# Law on General Administrative Procedure:

## Contemporary Tendencies and Challenges

## Thematic Collection

Belgrade 2024

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# Закон о општем управном поступку: Савремене тенденције и изазови

*Тематски зборник*

Београд, 2024

**Закон о општем управном поступку:**
**Савремене тенденције и изазови**
*Тематски зборник*

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# A WORD FROM THE SCIENTIFIC COMMITTEE, EDITORS AND PUBLISHERS

## ADMINISTRATIVE LEGISLATION UNDER THE MICROSCOPE

Imagine that the Law on General Administrative Procedure (LGAP) is a car. It is reliable, sturdy, and well-constructed, but as time passes, new challenges appear on the road. The roads are now more modern, the passengers' demands more specific, and sometimes it is necessary to adjust a part or even do a "general service." This is exactly the topic of this collection: how to improve the LGAP so that it remains in its best form for all passengers, whether they are citizens or businesses.

The analysis of administrative legislation is one of the levers of modernization of Balkan societies, particularly their public sectors, on the path to building a more effective public administration based on the rule of law and good governance. These activities, in both a formal and substantive sense, are part of the Europeanization process. Around this current idea, in a time of great challenges facing the future not only of Serbia but also of Europe, after more than thirty years, distinguished experts from all countries of the region and several European states gathered at a conference held in Belgrade, at the Serbian Chamber of Commerce and Industry, on October 13, 2023.

The regional conference, on the topic "Analysis of the Law on General Administrative Procedure in the Service of the Economy and Citizens," organized by the consulting firm "Eurosfera," which was held with the support of the National Assembly of the Republic of Serbia, enabled a professional, collegial, and well-argued discussion of all current aspects of the Law on General Administrative Procedure, particularly on the effects of its implementation. The conference also served as an immediate inspiration for the creation of this collection of papers on this ever-relevant topic.

Regarding the implementation of the Law currently in force in Serbia, which was adopted seven years ago, it can be discussed not only from the aspect of its integral text but also from other aspects: whether and to what extent related laws are harmonized with it, whether the officials applying the Law on General Administrative Procedure are sufficiently trained, and whether it is necessary to adopt by-laws for the implementation of this important law. Finally, every law, including this one, is open to potential amendments and supplements.

We hope that the publication of this collection of papers on this important topic can serve as an additional guide in re-examining certain provisions of the all-present applicable Law on General Administrative Procedure in Serbia, but also that it can contribute to identifying and overcoming challenges in the current regulations of other countries. For these reasons, the conference and the collection are an authentic contribution to illuminating the further direction of modernization of the LGAP's provisions and its normative environment. In this sense, regarding the question of whether the necessary interventions in the text will be called "fine-tuning" or even "general service" – perhaps the most important thing is that they are realized. The collection is a contribution to the idea that through the joint action of experts and the appropriate state bodies, amendments will continue that will further optimize the legal text, and thus the success of its application in practice.

# РЕЧ НАУЧНОГ ОДБОРА, УРЕДНИКА И ИЗДАВАЧА

## УПРАВНО ПРАВО ПОД ЛУПОМ

Замислите да је Закон о општем управном поступку аутомобил. Он је поуздан, чврст и добро конструисан, али, како време пролази, појављују се нови изазови на путу. Путеви су сада модернији, захтеви путника све специфичнији и некада је потребно подесити неки део или чак урадити „генерални сервис". Управо то је тема овог зборника: како унапредити ЗУП да би остао у најбољем издању за све путнике, било да су то грађани или предузећа.

Анализа управног законодавства једна је од полуга модернизације друштава Балкана а посебно њихових јавних сектора, на путу изградње делотворније државне управе засноване на правној држави и добром управљању. Ове активности и у формалном и суштинском смислу део су процеса европеизације. Око те актуелне идеје окупили су се, у времену великих изазова који стоје пред будућношћу не само Србије већ и Европе, након више од тридесет година, угледни стручњаци из свих земаља региона и неколико европских држава на конференцији која је одржана у Београду, у Привредној комори Србије, 13. октобра 2023. године.

Регионална конференција, на тему "Анализа Закона о општем управном поступку у функцији привреде и грађана", у организацији Консултантске куће "Еуросфера", која је одржана уз подршку Народне скупштине Републике Србије, омогућила је стручну, колегијалну и аргументовану расправу о свим актуелним аспектима Закона о општем управном поступку, а посебно о ефектима његове примене. Конференција је послужила и као непосредна инспирација за израду зборника радова на ову, увек актуелну, тематику.

О примени Закона који је на снази у Србији и који је усвојен пре 7 година може се говорити не само са аспекта његовог интегралног текста, већ и са других аспеката: да ли су и у којој мери сродни закони усклађени са њим, да ли су службеници који примењују Закон о општем управном поступку довољно обучени и да ли је потребно донети подзаконске акте? Напослетку, сваки закон, па и овај, отворен је за евентуалне измене и допуне.

Надамо се да објављивање зборника радова на ову важну тему може послужити као додатни путоказ у преиспитивању појединих одредаба свеприсутног важећег Закона о општем управном поступку у Србији, али и да може допринети уочавању и превазилажењу изазова у актуелним прописима других земаља. Из наведених разлога, конференција и зборник су аутен-

тичан допринос расветљавању даљег правца модернизације одредаба ЗУП-а и његовог нормативног окружења. У том смислу, у погледу питања да ли ће се неопходне интервенције у тексту назвати „фино подешавање“ или чак и „генерални сервис“ – можда је најважније да се оне остваре. Зборник је допринос идеји да се заједничким деловањем стручњака и одговарајућих органа државе настави са изменама које ће даље оптимизовати законски текст, а тиме и успех његове примене у пракси.

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# LAW ON GENERAL ADMINISTRATIVE PROCEDURE: CONTEMPORARY TENDENCIES AND CHALLENGES

## *Thematic Collection*

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# PART ONE
# Administrative Procedure on the European Road and Some Regional Experiences

Polonca Kovač*

# SLOVENIAN EXPERIENCES IN CHANGING AND IMPLEMENTING THE GENERAL ADMINISTRATIVE PROCEDURE ACT (GAPA) FROM THE EU AND NATIONAL PERSPECTIVES**

*Abstract*

*This paper aims to analyze the basic characteristics of the development of procedural administrative law in the Republic of Slovenia. In the first part, the author identifies three main characteristics of the public administration reform with the conclusion that there is still a need and opportunity for the development of good administration and good governance in the conditions of the modern European system. The author points out the basic characteristics of the Slovenian Law on General Administrative Procedure (GAPA), indicating its historical development, the reasons for which it has changed in recent years, as well as the type and content of the changes. The main forces that supported the changes in the Slovenian GAPA over time were quite different, from the need to develop an independent country and public administration to EU integration, striving for more efficient procedures, consensus-oriented public affairs, as well as the COVID-19 pandemic, with increased digitization. The paper also points to the measures taken in the past period with the aim of creating a flexible Slovenian Administrative Procedure Act comparable to modern foreign laws, possible positive changes to GAPA, and the effects that would be caused by those changes. The author concludes that Administrative Procedural Law represents a key business process for effective public policies and therefore a part of public administration reform and significant implementation of constitutional guarantees of democratic governance.*

**Keywords:** Administrative Procedural Law, General Administrative Procedure Act, Public Administration, Reforms, Slovenia.

## 1. Basics on Slovenia, its Public Administration and the GAPA

Slovenia is a nation state, a parliamentary democratic republic, independent since 1991 with a population of approx. two million. Its neighboring countries

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are Austria, Hungary, Croatia and Italy. As an independent state, Slovenia aimed at building a democratic society founded on market mechanisms. Slovenia has been a full member of the EU since 2004, applying the euro as a currency since 2007, and a member of the United Nations (1992-). Council of Europe (1994-), NATO (2004-) and the OECD (2010-).

Slovenia has most often been, especially before the economic crisis in the late 2000s, considered one of the most successful post-socialist or Central or Eastern European states that introduced reforms in its society, economy and public administration as well. Slovenia had until World War II developed predominantly under German and Austrian, i.e. continental or Central European societal, political and administrative and legal culture. This legacy was upgraded by the socialist system in Yugoslavia, in which society was under the control of the state authorities. Slovenia underwent major development very fast in the course of a few years after its independence.[1] However, such a legacy had and still has an impact on public administration (PA) functioning and its reforms (PAR) since its starting point anticipates a state that dominates a society, with PA being understood primarily through government policies and public law. The main characteristics of this system are: rule of law and Rechtsstaat, division of powers, division of public and private law and judiciary, and (lately neo-) liberalism. In this respect, the European Administrative Space and its principles have played a significant role in Slovenian PAR as well. The public administration reform was a more or less systematic set of strategies and activities, distinguishing Slovenia from the majority of CEE countries with the overproduction or vagueness of different measures.

In Slovenia, three main processes can thus be identified throughout the reform: (1) modernization in terms of political interests and in substantive and technical terms, i.e. digitalization and (2) Europeanization.[2] Slovenian administrative reforms, including administrative procedures, can be categorized under several targets: the prevailing rationalization on the one hand, and confirmation of the existing regulations (maintenance) on the other, which we can bundle together as omnipresent modernization processes. Nevertheless, there is still a need for and possibility of developing good governance and good administration in terms of a modern European system, simultaneously enabling efficiency and democratization of political and administrative structures.

Like in the EU in general, also through PAR in Slovenia, a concept of good administration has been developed,[3] albeit rather unsystematically and, again,

[1] More in Polonca Kovač, Gregor Virant, *Development of Slovenian PA 1991–2011, Official Gazette of the RS*, Ljubljana, 2011; Polonca Kovač, Mantas Bileišis, *Public Administration Reforms in Eastern EU MS*, Faculty of Public Administration: Mykolas Romeris University, Ljubljana: Vilnius, 2017; Janez Stare, Mirko Pečarič, M, *The Science of Public Administration*, Faculty of Public Administration, Ljubljana, 2021.

[2] P. Kovač, M. Bileišis, *Public Administration Reforms in Eastern EU MS*, Faculty of Public Administration: Mykolas Romeris University, Ljubljana: Vilnius, 2017; Giacinto della Cananea, „Administrative Procedure in Europe: National and Supranational Legislation", *Penn Program on Regulation Research Paper Series*, No. 22-02, 2022.

[3] Venice Commission, *Stocktaking on the Notion of "Good Governance" and "Good Administration"*, Study 470/2008¸ CDL-AD(2001)009, Strasbourg, 2011; Diania-Urania Galetta, *et al., The general principles of EU*

more regulatory-oriented. The Slovenian General Administrative Procedure Act (GAPA) as an umbrella field law for efficient and democratic procedures was adopted in 1999[4] and was subsequently subjected to several further amendments. The latter were mainly devoted to the removal of administrative barriers under the EU recommendations, but major reform was not introduced insofar as in most other countries, as in Western so in Eastern and Southern Europe. The GAPA has been recognized as a rather modern law although strongly based on the Austrian legacy, in compliance with the European principles and requirements. However, its scope is still limited to classical unilateral administrative decision-making. Additionally, the administrative judiciary has been operating as well, based on a long tradition ever since the creation of the independent state, initially under the general Supreme Court and since 1998 as a specialized Administrative Court of the Republic of Slovenia, enabling better accessibility for the parties and a greater focus on administrative matters. After an individual administrative act is complete, usually in the second instance, it can be challenged before the court in two instances to reach finality.

The GAPA and related laws in Slovenia were, however, always integrated into or at least mentioned in the strategic documents concerning public administration reform issued between 1996 and 2015, yet almost always declaratory only and have never featured as a pillar of development.[5] Subsequently, the reforms mostly involved the debureaucratization of regulations, and some partially increased the level of rights of parties, such as the guarantees of the participation of interested parties.

The structure of PA in Slovenia reflects its small size, duality between the state and local self-government and the slow process of delegation of powers from central PA. PA is defined mainly functionally by performing public tasks, both regulative ones and public services through:

– state administration with ministries (currently 19) and government offices (approx. 10), agencies within ministries (approx. 40) and local administrative units (58), together totaling slightly more than 30,000 employees,

– local self-government within 212 municipalities with nearly 5,000 employees,

– several hundred legally autonomous entities, in the form of public institutes, agencies, and funds, such as institutes for social insurance, regulators of energy, telecommunication, market security, schools and hospitals, etc., employing approx. 120,000 employees,

*administrative procedural law,* European Parliament, Brussels, 2015; Paolo Duret, Giovanna Ligugnana, *New challenges for administrative procedure in Europe: A comparative perspective*, Edizioni Scientifiche Italiane, Napoli, 2021.

[4] *Official Gazette of the RS*, No. 80/99. In force since 2000 and later amended several times, the most recently in 2022 by the Debureacratization Act.

[5] P. Kovač, G. Virant, *Development of Slovenian PA 1991–2011*, Official Gazette of the RS, Ljubljana, 2011; Polonca Kovač, „Codification of administrative procedure in Slovenia and the EU", *Teorija in praksa*, Vol. 57, No. 3, 2020; P. Duret, G. Ligugnana, *New challenges for administrative procedure in Europe: A comparative perspective*, Edizioni Scientifiche Italiane, Napoli, 2021.

– private holders of public office or providers of public services (via concessions) that have been delegated certain powers by the state or municipal authorities.[6]

Since almost all of these bodies (also) conduct administrative procedures, annually issuing roughly 10 million acts in the first instance and 300,000 in the second instance, the GAPA therefore functions as an antifragmentary mechanism in terms of minimal joint – in particular constitutional – standards. That applies not just to any administrative area but also to any type or level of administrative bodies. However, there are leges speciales which (can) define individual procedural issues primarily in relation to the GAPA, yet only if a substantial reason for different regulation is established (based on Article 22 of the Constitution on equal protection of rights).[7]

## 2. The Main Developmental Steps of the Slovenian GAPA

Administrative procedure codification has been typical of the current Slovenian territory since 1923, with the Austrian and old Yugoslav laws of 1925 and 1930, and the Yugoslav GAPA of 1956. However, no radical improvement was introduced comparing the Slovenian 1999 GAPA to these, except some minor simplifications. One of the reasons for this is also the successful realization of several organizational measures over the last several decades with no re-regulation required to comply with EU standards, such as data exchange within public databases, a one-stop shop in some fields or developed e-government.[8] The degree of protection of the rights of parties has been traditionally high in Slovenia – with some gaps in practice such as often excessively long proceedings.[9] Conversely, the need for (more) efficiency in the administrative procedure and work of public administration in general has been stimulated in Slovenia over the past few years mainly by the economy, either in the pursuit of greater national competitiveness or in order to overcome the impacts of the economic crisis. However, many effective and innovative approaches have already been regulated since 1999, such as the *mutatis mutandis* application of GAPA in the delivery of public services and

[6] For more on PA in Slovenia: P. Kovač, G. Virant, *Development of Slovenian PA 1991–2011*, Official Gazette of the RS, Ljubljana, 2011; J. Stare, M. Pečarič, *The Science of Public Administration*, Faculty of Public Administration, Ljubljana, 2021.

[7] Matej Avbelj, *Commentary to the Constitution of the RS*, New University; European Faculty of Law, Nova Gorica, 2019. However, the tendency of sector-specific (subsidiary) regulations that interfere with the status of the parties in individual administrative cases as above needs to be therefore critically evaluated, mainly because of their inconsistency with GAPA when a different regulation is neither necessary nor justified. Over the last few years, such attempts have been quite frequent in Slovenia, triggered by political pressures to shrink administration and by the need for easier implementation of the rights of e.g. providers of economic activities. Hence: when reregulating through debureaucratization, one has to bridge the dilemma between efficiency (in economic terms) and lawfulness in order to realize good administration.

[8] P. Kovač, M. Bileišis, *Public Administration Reforms in Eastern EU MS*, Faculty of Public Administration: Mykolas Romeris University, Ljubljana: Vilnius, 2017.

[9] For normative and empirical analyses of various contries on the subject, see Dragos Dacian, Polonca Kovač, Hanna Tolsma, *The sound of silence in European administrative law*, Palgrave Macmillan, Basingstoke, 2020.

special administrative enforcement, which, inter alia, reduces the need to re-codify the general law and enact special rules. On the other hand, present regulation in place overprotects the rights of parties and considerably neglects the efficiency of administrative procedures as a whole.[10] For a start, the law consists of approximately 350 articles, which seems to often reduce awareness of more important provisions even of fundamental principles, which is among others 10 times more than there are (30) articles in the EU draft Regulation for an open, efficient and independent EU administration.[11]

The main forces to support changes of the Slovenian GAPA over time were pretty diverse, from the need to develop an independent country and PA to EU integration, strive for more efficient procedures, consensus-oriented public affairs and also the COVID-19 pandemic with increased digitalization.[12] So, the frameworks of modifications are diverse and multifaceted, but the effects are limited. Under the basic text of the GAPA in 1999, relatively few changes occurred in Slovenia's "first" codification, as shown by a general review.

**Table:** An analysis of the main novelties in codifying the Slovenian GAPA 1999–2024

| | Preparation – Adoption / Validity – Application | Type and Content of Changes | Direction and Extent of Amendments (positive marked in bold) |
|---|---|---|---|
| Basic Act = GAPA[13] | September 1999 / April 2000 | 325 articles of GAPA/99, a break from the previous GAPA/86 mainly editorial | Despite an entirely new act, relatively little change for an eight-year-old independent state |
| GAPA-A | August 2000 | Deletion of just one article due to presumed unenforceability on enforcement effectiveness | Very partial and shows lack of foresight with amendment immediately after the act's implementation |

[10] P. Duret, G. Ligugnana, *New challenges for administrative procedure in Europe: A comparative perspective*, Edizioni Scientifiche Italiane, Napoli, 2021.

[11] See The 2013 and especially 2016 European Parliament resolutions, *https://www.europarl.europa.eu/doceo/document/TA-8-2016-0279_EN.html*,
H.C.H. Hofmann, J.P. Schneider, J. Ziller, The ReNEUAL Model Rules, *www.reneual.eu/*, 5. 5. 2024.

[12] More in P. Kovač, "Codification of administrative procedure in Slovenia and the EU", *Teorija in praksa*, Vol. 57, No. 3, 2020; P. Duret, G. Ligugnana, *New challenges for administrative procedure in Europe: A comparative perspective*, Edizioni Scientifiche Italiane, Napoli, 2021.

[13] *Official Gazette of the Republic of Slovenia* (OGRS), No. 80/99. And GAPA-A (OGRS 70/00), GAPA-B (OGRS 2/02), GAPA-C (OGRS 73/04), GAPA-D (OGRS 119/05), Administrative Dispute Act (ADA, OGRS 105/06), GAPA-E (OGRS 126/07), GAPA-F (OGRS 65/08), GAPA-G (OGRS 8/10), GAPA-H (OGRS 82/13), and Debureacratization Act (OGRS 3/22).

| | Preparation – Adoption / Validity – Application | Type and Content of Changes | Direction and Extent of Amendments (positive marked in bold) |
|---|---|---|---|
| GAPA-B | June 2002 | Amendments on data exchange from official records among authorities | Very minor, but **positive orientation towards parties with data exchange among authorities** |
| GAPA-C | June 2004 / January 2005 | Amendment of 140 articles, mostly e-communication, though only with a qualified signature or introduction of administrative certification | Significant, but mainly editorial. **Positive administrative certification** as a substitute for less accessible notarial certification |
| GAPA-D | December 2005 | Editorial amendment to one art. to promote one-stop shops | Minor and partial, **but positive, partly only a positive option for service via proxy** |
| Administrative Dispute Act (ADA) | September 2006 / January 2007 | Comprehensive regulation of administrative disputes with limited challenging of acts | Relatively partial, otherwise a desirable joint overhaul of GAPA and ADA |
| GAPA-E | December 2007 / January 2008 | 40 articles amended, but mainly editorial, e.g., conversion of former currency to euros for fines, more interventions for clearer service effects or municipal competencies, introduction of appeal waiver | Medium, mainly editorial interventions regarding municipal authorities, personal data, provisions on procedural efficiency with **less legal protection than under Administrative Dispute Act, and appeal waiver a double-edged sword, but positively oriented** |

| | Preparation – Adoption / Validity – Application | Type and Content of Changes | Direction and Extent of Amendments (positive marked in bold) |
|---|---|---|---|
| GAPA-F | June / July 2008 | Only procedural simplification of the examination requirement in Article 31 for easier (!) employment in administration | Very minor and partial, in practice even a negative promotional effect |
| GAPA-G | January / February 2010 | Redefinition of administrative inspection measures as more advisory | Partial, practical effect pretty negative due to less power |
| GAPA-H | September / October 2013 | Only three articles, mainly regarding applications with the assistance of an official, merely editorial | Partial and promotional only, unnecessary |
| GAPA-I (not adopted) | Autumn 2015; partly same in 2024? | Planned procedural simplification of communication and less formality of acts | Government withdrew the proposal due to postal lobbying over projected loss of millions of euros due to the decline in physical service |
| ZZUSUDJZ | March – July 2020 | Temporary suspension of deadlines and other actions during the coronavirus crisis | Some solutions, such as **simplified e-communication**, possible as permanent solutions |
| Debureacratization Act | January / June 2022 | Some simplifications such as increased e-notification, reduction of formalities (e.g. no seal) | Mainly positive in individual institutes, yet only partial and insufficient |

| | Preparation – Adoption / Validity – Application | Type and Content of Changes | Direction and Extent of Amendments (positive marked in bold) |
|---|---|---|---|
| GAPA-I on several acceleration institutes (planned) | Planned for 2024/25 | Major simplifications, such as reduction of deadlines and further deformalization (even of reasoning unless legal remedy is announced) | **Expected to bring positive, although still gradual improvements** |

As shown in the table above, the successful amendments that passed the legislative process were often merely cosmetic (especially the amendments GAPA-A, GAPA-D, GAPA-F, and GAPA-G, and predominantly GAPA-C and GAPA-E), adopted mainly for political appeal. At the same time, proposals in line with European trends, such as the procedural simplification of communication methods and the formality of decision acts, were not implemented, being withdrawn from the legislative process in 2015, although they became relevant again following the coalition agreement of the government that took office in 2018. For the period 1991–2019, it can be noted that the majority of GAPA amendments and other procedural provisions and legislation on judicial oversight of administration in Slovenia were likely primarily aimed at enhancing the efficiency of administrative decision-making, specifically the so-called technical rationality according to Weber, rather than protecting the constitutional guarantees of individuals. This trend is understandable in context, as the level of protection of parties' rights has traditionally been high at least at the normative level, while in recent years the need for greater efficiency in the administrative procedure and the functioning of public administration has been primarily driven by economic factors, whether due to the pursuit of greater competitiveness in the global environment or overcoming recessionary challenges. The amendment of the Slovenian GAPA thus generally follows European trends,[14] as the protection of parties' rights is consolidated, and the notion that the administration need not be efficient is no longer prevalent.

Regarding the type, content, and scope of the GAPA amendments, we find that only four amendments were positive, one of which was not adopted (GAPA-I), four implemented only partially due to alignment with the old concept and where more editorial corrections opened new dilemmas (GAPA-C and GAPA-E and Debureacratization Act) or where the anticipated breakthrough was mitigated by specific sectoral laws (GAPA-B). Besides the already mentioned tra-

[14] H.C.H. Hofmann, J.P. Schneider, J. Ziller, The ReNEUAL Model Rules, *www.reneual.eu/*, 5. 5. 2024; G. Della Cananea, „Administrative Procedure in Europe: National and Supranational Legislation", *Penn Program on Regulation Research Paper Series*, No. 22-02, 2022.

dition of codified administrative procedure in Slovenian territory for almost 100 years and the sensible use of GAPA, reasons for this can also be attributed to a number of developed institutes that foreign acts do not include in their corpus.[15] For example, since its basic codification in 1999, the Slovenian GAPA has had an entire chapter on the enforcement of administrative decisions and orders (Articles 282–305). However, practice shows that this is a nomotechnical approach that can create more problems than it solves redundancy in GAPA norming, as it raises issues of the questionable scope of using other laws depending on the nature of the relationship or procedure involved.[16]

The current Slovenian government set out a new plan upon taking office in 2002 to develop a more flexible Slovenian Administrative Procedure Act (APA) comparable to modern foreign laws. Several steps have been taken over the past two years for this purpose. First, one of the three working groups of the Expert Council for Sustainable Development of Public Administration, which was very active in 2023 and 2024, focused on analyzing and proposing significant amendments to the APA. Second, the Ministry of Public Administration initiated a three-year target research project in 2023 on the theoretical and practical foundations for the APA's overhaul. Third, various stakeholders are implementing and preparing the groundwork for the revision of the law based on evidence-supported issues in practice (e.g. in Administrative Consultation[17]). Fourth, the current administration recognizes critical points in administrative practice, such as the excessive duration of procedures, and is preparing further amendments to the existing law for 2024 or as soon as possible, considering several breakthrough concepts.

Among the possible positive changes to GAPA, more guiding principles on balancing opposing positions could be included, such as striving for alternative dispute resolution, involving more affected persons but only within their legal interest, and less challenging of already issued acts, where – although the first-instance procedure may take longer – legal values and interests are realized more quickly. GAPA could therefore be simplified towards a more participatory relationship between the authority and the parties while also ensuring more efficient processing, as indicated by the relevant judicial practice in our country. Also, there is still a great gap to cover automated administrative decision-making[18] despite its emergence in administrative practice, e.g. in the areas of taxes, social affairs and agriculture.

[15] See G. Della Cananea, „Administrative Procedure in Europe: National and Supranational Legislation", *Penn Program on Regulation Research Paper Series*, No. 22-02, 2022; In the EU, the national Administrative Procedure Act (APA) has been adopted by 25 out of 27 countries (only Ireland and Belgium have not adopted it), with recent adoptions including France or Romania, and also Japan in 2006. Most countries have recently updated their (G)APAs, such as Germany, the Netherlands, Croatia, and Hungary.

[16] P. Kovač, „Codification of administrative procedure in Slovenia and the EU", *Teorija in praksa*, Vol. 57, No. 3, 2020.

[17] See Upravna-svetovalnica, *https://upravna-svetovalnica.fu.uni-lj.si/index.php/Glavna_stran,* 19. 08. 2024.

[18] Diana-Urania Galetta, Herwig C.H Hofmann, „Evolving AI-based automation – the continuing relevance of good administration", *European Law Review*, Vol. 48, No. 6, 2023.

The above was also a significant factor in the establishment of the Expert Council for Sustainable Development of Public Administration in Slovenia in December 2022, operating at the level of the Ministry of Public Administration and serving as a central coordinating body of the Government. Within this framework, three working groups were established to lay the groundwork for the overhaul of the regulation adoption system, the reorganization of local administrative units, and the revision of the national GAPA to align with sustainable guidelines, principles, and practices. It is important to ensure cohesion among all three groups, linking the processes of adoption of administrative regulations and single-case administrative decisions with the shared principles of sustainable development. The relevance of science-for-policy and sustainable development is reflected in the involvement of academic experts in the governance of the Council and its working groups. This involvement is characterized by a dual approach, engaging both academia and government representatives. Particularly noteworthy is their active participation within individual groups, where their research in selected areas serves as expert input for policy decisions in the governance process. Those of us who engage deeply with administrative procedural law, whether academically or through managing daily administrative procedures, have taken a keen interest in the ideas proposed by the current government in 2023 and 2024 regarding a more flexible and modern Slovenian GAPA. Over the past two years, several steps towards this have been undertaken, yet the final outlook of the potential changes remains unclear. Looking to the future legal regulation under the GAPA in Slovenia, we anticipate a law that serves more as a facilitator than a barrier to effective and expedient administrative decision-making. It should reflect the societal changes and international solutions. However, the law alone cannot foster a modern mindset; hence, training and awareness-raising activities will be required alongside the new law. Any changes should be thoughtful, drawing on positive experience of implementing administrative procedures and judicial oversight, both domestically and internationally, as suggested by professional literature. Given that alterations to the GAPA could impact millions of cases, the need for significant, yet carefully standardized and prudently implemented changes is pressing.

## 3. Conclusion

Modern regulation of administrative procedures has several characteristics. It is distinguished primarily by focused regulation, which, among other things, separates the wheat from the chaff. If a law has more than 350 articles, it is already difficult for a judge to understand or discern what and why certain provisions are (more) important. It is even more challenging under the pressure of workload and expectations of parties for officials of various educational backgrounds (economists, social workers, veterinarians, forestry technicians, etc.) to

thoroughly examine a multitude of rules. Moreover, fewer provisions generally grant the law clarity and transparency, rather than having an individual institution being broken down into approximately 10 different provisions scattered throughout the regulation (for instance, in the Slovenian GAPA, this applies to the rules on impartiality, notification, or decision deadlines). How is an average party or even a legally untrained official supposed to understand that the most crucial rules are not necessarily those with lower article numbers, but those provisions that define fundamental principles and reasons for the use of legal remedies? It must also be added that the legal framework should be tailored to the average recipient and should not contain an excessive number of rules just in case an individual party might not comply with the law.

Furthermore, the scope of the law is crucial; it should not only address classic individual and concrete administrative matters, which was sufficient in the past. After one hundred years, life is certainly much more diverse and complex, requiring tools that suffice today. Just think about how we communicate or travel today compared to the beginning of the 20$^{th}$ century. Similarly, in communication and transportation, we need new mechanisms in regulating administrative procedures, not those from a few decades ago. Administrative activity over time becomes increasingly intensive and influential, as there is a need for a swift and operational response to changes in business operations. According to some estimates, only about four percent of the current regulation consists of laws adopted by parliament, while the rest is a matter of general and individual as well as mixed administrative acts. If the GAPA is to be a true general law (lex generalis), which defines the minimum standards of the relationship between authorities and addressees of legal norms in an antifragmentary manner, regardless of the field, type of authority, or level of decision-making, it must also regulate newly emerging – despite under-regulation in practice already existing – types of administrative acts. These include, for example, at least guarantee (individual but abstract) and real acts, administrative contracts, and acts issued in competitive procedures.

In conclusion, it is important to emphasize the role of administrative procedures as a potential driver of a better and more modern public administration if the GAPA is recognized as a strategic tool. Administrative procedural law represents a key business process for effective public policies and thus part of public administration reform and significantly the implementation of constitutional guarantees of democratic governance and good administration. The GAPA thus exceeds a merely instrumental role in the procedure. In the case of the Slovenian GAPA, it can be observed that the lack of systemic integration of this codification or perceiving the development of the GAPA as a dead letter in various strategies results in a loss of opportunities and comparative regression, although due to the widespread and traditional nature of administrative procedures in the region, the situation is not alarming. Various analyses show that in Slovenia the functioning of the public administration, especially in administrative procedures, is traditionally at a relatively high level in terms of implementation of the principles and

institutions of the GAPA. This implies that changing the codification of the general administrative procedure is not urgently necessary, while at the same time one can identify the high potential of more modern approaches to the role of the GAPA in strategic administrative development and comparability with the EU.

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Vedran Đulabić*

# MODERN ADMINISTRATIVE PROCEDURE AS A MIXTURE OF TYPES IN A SEARCH OF A WIDER COMMON PROCEDURAL DENOMINATOR

*Abstract*

*The aim of the paper is to explore of administrative procedure in Croatia and the successor countries of the former Yugoslavia from the perspective of three generations, that is, three models of administrative procedure as they have been developed by Barnes. After introductory part, the second part deals with the elaboration of the three types of modern administrative procedure. The first one is traditional model, also referred to as 'quasi-judicial model' of administrative procedure. The second is labelled as 'quasi-legislative model' since it regulates the procedure of consulting of interested public in legislative process. And the third is entitled 'collaborative model of administrative procedure' since it contains the rules regarding the involvement of various actors across administrative domains in decision making. It also analyses administrative procedure in the South-Eastern Europe, namely on the territory of former Yugoslavia. The third part is devoted to specific Croatian experience with three generations of administrative procedure. General discussion and analysis are done in the fourth part of the chapter. The analysis shows that in Croatia, as well as in the other successor states of the former Yugoslavia, there is no genetic connection between the three generations of the administrative procedure The final part is conclusion in which some general thoughts have been elaborated and assembled together. The author concludes all three types of administrative procedure should be classified under the common procedural denominator, given that in this way it is ensured that the entire public administration and its activities are subject to legal norms, which is a fundamental feature of a modern, democratic state.*

**Keywords:** Administrative Procedure, Administration, Three Models of Administrative Procedure, Quasi-judicial Model' of Administrative Procedure, Quasi-legislative Model' Administrative Procedure, Collaborative Model of Administrative Procedure'.

## 1. Introduction

Modern public administration requires different tools to respond to complexity challenges inside the administrative system as well as outside, i.e. in the

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wider social environment.[1] New modes of governance such as network governance as well as new or rediscovered standards (i.e., accountability, transparency, protection of legitimate expectations, participation, collaboration, etc.) and expectations from public administration have to be respected in everyday functioning of public administration. Along with legal principles such as respecting and promoting the rule of law[2], protection of human rights and limiting the arbitrariness of administrative bodies, there is also another group of values such as efficiency, expediency, focus on outcomes instead of insistence on often cumbersome formal procedure, etc., which are expected to be upheld by modern public administration.[3] Modern public administration makes numerous decisions and acts which fall into different formal categories[4] and all of them need a proper procedural framework and legal foundation not only to respect and uphold the rule of law but also in order to legitimise these decisions.[5] Due to exceptional differentiation of material rules, the statement according to which procedures "...become the main basis of legal security by building procedural principles that are considered a result of the development of the rule of law in general, and are, therefore, relatively stable over time and in principle independent of state borders."[6] This chapter deals with various types of administrative procedures having in mind first and foremost Croatian public administration. The analysis is undertaken from the perspective of distinguishing between three generations of administrative procedure,[7] which exist in parallel in

[1] For the concept of complexity and its influence on contemporary public administration, see: Vedran Đulabić, „Public Administration Complexity and its Implications on Theory, Research and Practice", *paper presented at the conference Researching, Theorizing, and Teaching Administrative Science and Public Administration: Croatia, South East Europe, and Beyond*, Dubrovnik, 10.-15. 7. 2017, *https://www.researchgate.net/publication/346787302_Public_Administration_Complexity_and_its_Implications_on_Theory_Research_and_Practice#:~:text=Public%20Administration%20Complexity%20and%20its%20Implications%20on%20Theory,%20Research%20and,* 3. 9. 2024.

[2] For development of the '*rule of law*', '*Rechtsstaat*', in British, German and French legal systems: Elisabeth Zoller, *Introduction to Public Law: A Comparative Study*, Martinus Nijhoff Publishers, Leiden, 2008; Venice Commission, *Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session,* Venice Commission, Strasbourg, 2011.

[3] Procedure or standardization in public administration as an essential component of administrative action represents an extremely important part of administrative technology. See: Ivan Koprić, „Administrative Technology and General Administrative Procedure: Challenges and Changes in South-Eastern Europe", *Hrvatska i komparativna javna uprava: časopis za teoriju i javnu upravu,* Vol. 11, No. 1 , 2011, pp. 435-454; It achieves two fundamental groups of goals, namely the protection of the rights of certain groups (equal treatment of equals), on the one hand, and the goal of efficiency in reaching an administrative decision, on the other. See: Eugen Pusić, *Nauka o upravi – XII izmijenjeno i dopunjeno izdanje,* Školska knjiga, Zagreb, 2002.

[4] "Today's administration makes individual decisions, adjudicates, makes rules and regulations, and develops innovative and far-reaching public policies in complex situations, such as those of the public-private and inter-agency collaborations within and beyond national-state boundaries." Javier Barnes, .,Three Generations of Administrative Procedures", *Comparative Administrative Law* (eds. Susan Rose-Ackerman, Peter Lindseth, Blake Emerson), Second edition, Cheltenham, 2017, p. 306.

[5] In order to realize a concept of 'legitimation through procedure' (Niklas Luhmann, *Legitimation Durch Verfahren,* Naprijed, Zagreb, 1975), there have to be a proper procedural rules which need to be followed in decision-making process in public administration.

[6] Eugen Pusić, "Teorija sistema i sistematizirano iskustvo prava", *Legitimation Durch Verfahren (*ed. Niklas Luhmann), Zagreb, 1992, p. 16.

[7] Javier Barnes, „Towards a Third Generation of Administrative Procedure", *Comparative Administrative Law (*eds. Susan Rose-Ackerman, Peter Lindseth), Cheltenham, 2010, pp. 336-356; J. Barnes, pp. 302-318; Javier

modern public administration. The main research goal is to elaborate the need to establish a common (procedural) denominator of all these types of administrative procedures and to assess the overall administrative functioning in this context.

After this introductory part, the second part deals with the elaboration of the three types of modern administrative procedure. It also analyses administrative procedure in the South-Eastern Europe, namely on the territory of former Yugoslavia. The third part is devoted to specific Croatian experience with three generations of administrative procedure. General discussion and analysis are done in the fourth part of the chapter. The final part is conclusion in which some general thoughts have been elaborated and assembled together.

## 2. Three Generations of Administrative Procedure and Comprehension of Administrative Procedure in South Eastern Europe

According to Barnes: "…*administrative procedure* is understood to be a *system of rules* that govern the administrative *decision-making process*… 'Administrative procedure' ultimately refers to how governmental organizations actually conduct business and manage responsibilities. Today there are a bewilderingly large and diverse number of administrative procedures. Whilst the first general administrative procedure acts (APAs) focused on the so-called 'administrative act' (typically a unilateral decision made by public bodies), their reach progressively broadened as the responsibilities of the executive branch and public administrations grew. APAs branched out to deal with other legal acts, such as rules and regulations, agreements under public law, guidelines and administrative guidance, as well as setting general principles to which administrative activities would be subject."[8]

There are at least three models or generations or types of administrative procedure.[9] The first one is traditional model, also referred to as 'quasi-judicial model' of administrative procedure. The second is labelled as 'quasi-legislative model' since it regulates the procedure of consulting of interested public in legislative process. And the third is entitled 'collaborative model of administrative procedure' since it contains the rules regarding the involvement of various actors across administrative domains in decision making.

*a) Traditional administrative procedure (Quasi-judicial model)*. The traditional administrative procedure develops in parallel with stabilization of the executive branch of government, which, due to intensive social development especially during the second half of the 19th century, takes on significant prerogatives

Barnes, „Administrative procedure", *The Oxford Handbook of Comparative Administrative Law (*eds. Peter Cane, Herwig C. H. Hofmann, Eric C. Ip, Peter L. Lindseth), Oxford, 2020, pp. 831-856.

[8] J. Barnes (2020), pp. 831-856.

[9] J. Barnes (2010), p. 336.

inherent in the judicial branch. Namely, the public administration authoritatively decides in individual cases (adjudicates), imposes sanctions and/or obligations, etc. All this creates the need for the existence of procedural rules that will regulate such proceedings, especially from the point of protection of citizens from the administrative misbehaviour. Since this type of administrative decision-making is, in a way, a reflection of court proceedings, that is why the classic administrative procedure is largely a copy of the court procedure.

The traditional model of administrative procedure is enshrined in general administrative procedure act (GAPA) and many special acts dealing with administrative matters where decision making on individual rights and obligations of natural and legal persons takes place. It could be labelled as administrative procedure in the strict or narrow sense of the meaning and usually labelled just as 'administrative procedure'. This type of administrative procedure is the only one that is usually first codified in separate, often general and subsidiary, administrative procedural act backed by numerous special procedural rules regulating different aspects of administrative procedure in various administrative fields and policy areas (e.g. building, tax, customs, procurement, etc.). The fundamental legal institution of this classic administrative procedure is an 'administrative act',[10] a unilateral authoritative decision based on a legal regulation that decides on the right, obligation or legal interest of natural or legal persons who submit a request or against whom the procedure is initiated *ex officio*. An administrative act appears as a kind of counterpart to a court verdict in civil procedure. Other elements of this highly formalized procedure are similar to other legal procedures and deal with questions such as jurisdiction, official persons conducting a procedure and necessary steps in the procedure, legal aid, party and its participation in the procedure, conduction of a procedure, presenting evidences (e.g. through documents, witnesses or experts, etc.), deadlines, communication, legal remedies, enforcement of administrative acts, costs and similar questions.

[10] In this concept, an administrative act is defined as "...an authoritative decision... in order to cause an immediate legal effect in the rights and duties of natural and collective persons for a specific case in the field of administrative activity." See: Ivo Krbek, „Upravni akt i njegova pogrešnost", *Hrestomatija upravnog prava, (*ed. Ivan Koprić), Zagreb, 2003, p. 15; It is characterized by several elements, namely: concreteness, authoritativeness, legal effect, and a public legal body as the adopter of such an act. Similar definitions could be found in newer literature. See: Ivo Borković, *Upravno pravo,* 6. izmijenjeno i dopunjeno izdanje, Informator, Zagreb, 1997, p. 326; He defines administrative act as: "…legal act by which, in the cases provided for in the legal norm, state bodies or legal entities that have public powers decide in an authoritative and unilateral manner on the obligations of individual subjects in a specific administrative matter." In the comparative literature, there are somewhat different, that is, broader definitions of an administrative act. Thus, an administrative act is defined as follows: "Diverse in scope and nature (general acts, individual acts, authorizations, concessions, sanctions, etc.), an administrative act refers to an action or inaction by an entitled administrative authority required by legislative policy to carry out the intent of statutes. An administrative act is an act of volition by which an administrative authority empowered by law recognizes new rights, liberties, legal interests, and obligations, or asserts existing ones, for the benefit of an indefinite number of citizens or for an individual person or organization." See. Frédéric Rolland, *Administrative Law*, Max Planck Encyclopedia of Comparative Constitutional Law, Max Planck Institute: Oxford University Press, 2019, p. 3; In Croatia and in the other former Yugoslav countries there is distinction between an 'administrative act' which has previously described formal elements and 'acts of administration' which is considered to be "…any type of act that administrative bodies pass in the exercise of their function." See: I. Borković, p. 330.

*b) Procedure of consulting interested public in the general acts' adoption process (Quasi-Legislative model of Administrative Procedure).* However, since its very beginnings, the administration also makes a large number of other decisions that are also authoritative in nature, but which, admittedly, are not – as in the previous case – an expression of decision-making that to a large extent resembles court proceedings. These procedures could be labelled as 'standard operating procedures'[11] in public administration. Nevertheless, these procedures must also be legally regulated in a public administration system based on the principle of legality and the rule of law. For this reason, such rules should also be considered as rules of administrative procedure, but in a broader sense of the term. This is why the understanding of different generations or types of administrative procedure have found its place even in the biggest European traditional administrative systems.[12]

The administrative procedure of the second generation concerns the adoption of different types of general regulations, according to more or less the same procedural assumptions and guarantees as the 'classic' administrative procedure in which individual acts are issued. That is why it is also called a quasi-legislative administrative procedure. In modern administrative development, this type of administrative procedure mostly concerns the consultation and participation of general public and other interested actors in the process of preparing laws, various by-laws, as well as general acts of territorial self-government units and legal entities that perform public services.[13] That's why the "… second-generation procedures are

[11] "Standard operating procedure (SOP), set of written guidelines or instructions for completion of a routine task, designed to increase performance, improve efficiency, and ensure quality through systemic homogenization. The term was first recorded in the mid-20th century. SOPs are utilized in various contexts by a vast array of entities, including those in the areas of business, education, government, health care, industry, and the military." Jeannette L. Nolen, Standard operating procedure, *https://www.britannica.com/topic/standard-operating-procedure,* 27. 06. 2024.

[12] Commenting on changes in German administrative law, Voßkuhle and Wischmeyer conclude: "The latest debate, which is usually framed as a dispute between the traditional 'juristic method' (*Juristische Methode*) and the new paradigm of regulation or 'steering' (*Steuerung*), originated in the early 1990s and lasted well into the 2000s." See: Andreas Voßkuhle, Thomas Wischmeyer, „The 'Neue Verwaltungsrechtswissenschaft' against the backdrop of tradítional administrative law scholarship in Germany", *Comparative Administrative Law* (eds. Susan Rose-Ackerman, Peter Lindseth, Blake Emerson), Second edition, Cheltenham, 2017, p. 86; Also, analyzing the content of the French law governing relations between the public and the administration from 2015 (*Code des Relations entre le Public et l'Administration*), it can be concluded that it also contains rules not only of the first, but also of the second and third generation of administrative procedure. The first part of that law "...entitled 'Exchanges with the administration,' deals with the public's requests, adversary procedure in individualized decisions, and participation in rulemaking." See: Dominique Custos, „The 2015 French code of administrative procedure: an assessment", *Comparative Administrative Law* (eds. Susan Rose-Ackerman, Peter Lindseth, Blake Emerson), Second edition, Cheltenham, 2017, p. 287; Furthermore, "Contrary to a strict subjective approach to administrative procedure, this codification is not limited to individualized acts. … the CRPA also concerns itself with making the regulations and mixed-nature acts such as declarations of public utility prior to takings. Yet recent availability of public consultation denotes a subjectivization mainly through public consultation of the making of general and impersonal determinations. As far as the degrees of normativity of administrative action, the code is rather encompassing. The codification is not confined to hard law but rather also applies to soft law such a circulars, policy statements and guidance documents." See: Dominique Custos, p. 288.

[13] "Participation rights in rule-making procedures thus often follow the same values and principles present in judicial review: the right to be heard, due process, and the rule of law. In other words, participation in

based on norm-generating mechanisms in a context where gathering and processing of information is largely carried out by the administration itself. They follow a centralized, top-down regulatory process, and in a broader sense, implement legislation."[14]

*c) Collaborative model of administrative procedure*. Finally, there is a third generation of administrative procedure which corresponds to changes in public administration, and which changes are best summed up in the phrase 'from government to governance'. The third generation of administrative procedure refers to the modern model of public administration, which is more democratic, includes more public and private actors in the adoption of various acts of public administration. Not only individual, authoritative acts, but also general acts and acts based on the cooperation of various actors. It is stated that: "Third-generation procedures are becoming increasingly relevant. First and second generations of administrative procedures correspond to simple, traditional, top-down understandings of executive power. The third generation, on the contrary, corresponds with a contemporary environment of governance, a new broader policy model."[15] This model is usually not codified in a single legal act, which is sometimes the case with the procedures of the first, and to some extent also of the second generation of the administrative procedure. So, it is often more difficult to understand it as a single procedure with a clear set of legal rules that regulate it.[16] One of the challenges faced especially by the administrative procedures of the third generation is how to completely subject them to the principle of the rule of law, as a fundamental principle of the functioning of a democratic state.[17]

The aforementioned typology of administrative procedure is actually a kind of ideal-type division which can serve for a better understanding of contemporary administrative reality. Nevertheless, it could be criticized from several aspects. First of all, it is difficult to strictly separate each of the mentioned generations, considering that traditional administrative procedures are upgraded and modernized over time in order to include some of the characteristics of newer generations of administrative procedures. In this sense, some institutes that are incorporated into modern codifications of the first type administrative proce-

rule-making is here viewed as a defensive mechanism, not as a collaborative dialogue between citizen and agencies. "(J. Barnes (2007), p. 307).

[14] *Ibidem*.

[15] *Ibidem,* p. *310.*

[16] Barnes states: "A wide range of policy innovations seeks to create more effective forms of participation, coordinate multiple levels of government, allow for more diversity and decentralization, foster deliberative arenas, mutual learning and information gathering, and permit more flexibility, monitoring and revisability. Procedural rules are deeply involved in policy design and implementation: from simplification of procedures to ongoing information exchange between agencies at national, supranational, and global levels; from assessing public policy options to monitoring and reviewing decisions, programs, plans, or standards that are never definitive given the dynamic nature of some policy-making." See: *Ibidem*, p. 308.

[17] "A challenge for the future is how the achievements of the rule of law can be preserved and further developed under circumstances where individuals are increasingly influenced by and linked to new modes of governance." See: Venice Commission, *Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session,* Venice Commission, Strasbourg, 2011, p. 13.

dure – such as the administrative contract, one-stop shop, obligatory consultation of neighbours in building procedure, etc. – should be understood as tools which ensure the cooperation of various actors of administrative action. In this context, they can be considered as elements of the third generation of administrative procedure (collaborative procedure), which are incorporated into the classic administrative procedures (quasi-judicial procedure). Sometimes even the administrative procedure of the first generation is analysed according to some standards of 'good administrative behaviour'.[18] Also, different parts of the world have a greater or lesser tradition of codification the classic administrative procedure, which is why it is actually harder for countries with a long tradition of codifying the first type of administrative procedure to clearly distinguish, and even accept, the existence of several other types of administrative procedure and to consider them as an administrative procedure *stricto sensu*. Therefore, in such administrative and legal traditions, it is more appropriate to talk about administrative procedure in the narrow sense (quasi-judicial administrative procedure), and administrative procedure or procedures in a broader sense (quasi-legislative and collaborative administrative procedure). Finally, the rules and standards that regulate each of the mentioned generations of administrative procedure have been developed, codified and upheld by administrative courts to varying degrees. The first generation certainly experienced the greatest degree of institutionalization and stabilization both in the legal system and in the consciousness of various actors, while with subsequent generations of administrative procedure this is much less pronounced.

A significant contribution to the development of a somewhat more modern understanding of administrative procedure at the EU level was made within the framework of the ReNEUAL initiative, within which the Model Rules on EU Administrative Procedure were formed in 2015.[19] According to these Model Rules, administrative procedure "... means the process by which a public authority prepares and formulates administrative action...", which is defined as: a) a legally binding non-legislative act of general application, b) a decision , and c) a public contract (Model Rules, art. I-4/1, 2).

*Administrative Procedure in the South-Eastern Europe.* After the dissolution of former SFRY, all succeeding countries had chance to departure from the common administrative culture and procedural tradition. This separation took place at different pace and intensity resulting in many national specificities. With the upcoming reforms, the succeeding countries were gradually departing from previous administrative culture due to several reasons which were connected with domestic administrative development of each country, their reform and political dynamics, as well as with the various stage of the EU accession process.

[18] To confirm this statement, see a relatively recent analysis of the law on general administrative procedure in five countries of the Western Balkans. See: Timo Ligi, Andrej Kmecl, *Implementation of laws on general administrative procedure in the Western Balkans,* OECD/Sigma, Paris, 2021.

[19] More details about ReNEUAL which stands for Research Network on EU Administrative Law can be find at: *https://www.reneual.eu/,* 3. 9. 2024.

The wave of reform of the general administrative procedure acts (GAPA) passed over the area of South-Eastern Europe in the second half of the 2010s, when most of the countries in that area adopted a new legal regulation of general administrative procedure. Most of the new administrative procedure acts in the five countries of the Western Balkans were adopted in period 2014-2016. Firstly, in 2014 Montenegro adopted its administrative procedural law, followed by Albania and North Macedonia in 2015, and finally Serbia and Kosovo in 2016.[20] Before that, Slovenia, Bosnia and Herzegovina and Croatia adopted the same laws a little earlier. Slovenia in 1999, B&H in 2002 and Croatia in 2009. However, it has to be noted that Slovenia did not significantly reform its LGAP, but more or less stuck to the regulation it inherited from the former state. The new Slovenian LGAP was "… drafted to be a continuation of the former administrative procedure regulation with certain updates and further developments in the content. GAPA was amended eight times until today, while the concept of the Act remained unchanged."[21] Bosnia and Herzegovina is an exception in this sense, considering that there are four laws governing the administrative procedure in its territory. Croatia adopted new GAPA in 2009 as a result of an EU funded reform project. Although the aforementioned laws were adopted at the beginning of the 2000s, they were not reformed in the reform wave that affected the other countries of the Western Balkans under the SIGMA initiative.

In almost all of the countries in SEE the concept of administrative procedure is still quite narrow, reflecting predominantly the understanding of administrative procedure as authoritative decision-making process with the effect on the concrete administrative case. It reflects the first generation of administrative procedure with introduction of some novelty elements such as e.g., administrative contracts. Thus, situation in the region is every much in line with the 'reductionist view about the concept of administrative procedure'.[22]

Unlike other European countries with a rich tradition of administrative law (e.g. France, Germany) which, despite this, significantly expanded the understanding of their administrative procedure, the successor countries from the former SFRY did not do so to a sufficient extent. They still reduce the understanding of administrative procedure to the first generation of administrative procedure (quasi-judicial procedure), with no indication that this approach will be abandoned. Reasons for this have to be found partly in the influence of Austrian regulation from 1925 which was an umbrella law that inspired all of the countries in the Habsburg empire for eight decades,[23] legal inertia and conservativism and a

[20] T. Ligi, A. Kmecl, p.9.

[21] Bruna Žuber, „Slovenia", *Administrative proceedings in the Habsburg succession countries* (ed. Zbigniew Kmieciak), Lodz-Warszawa, 2021, p. 217.

[22] J. Barnes (2020), pp. 831-856.

[23] See*: Administrative proceedings in the Habsburg succession countries* (ed. Zbigniew Kmieciak) Lodz-Warszawa, 2021, *https://dspace.uni.lodz.pl/xmlui/bitstream/handle/11089/32970/Kmieciak_Administrative.pdf, 3*. 9. 2024.

significant degree of institutionalization of the traditional understanding of administrative procedure.[24]

### 3. Three Types of Administrative Procedures in Croatia

Croatian public administration is comprised of three main components, namely central administration, local and regional self-government and more or less autonomous legal entities performing services of general interest (public services) at all existing levels of public governance – local, regional and national. All public law bodies in Croatia make decisions and adopt acts regarding very different subjects. They do so by implementing various sets of administrative procedural rules, which are sometimes not aligned or not even harmonised.

Starting from three types of administrative procedure further sections analyse the Croatian experience with various administrative procedural rules which exist in Croatian legal order.

*a) Traditional Model of Administrative Procedure* (*Quasi-Judicial Model*). Most of academic literature dealing with administrative procedure in Croatia, as well as in other South-Eastern European countries as well as other countries inspired by the Austrian Law on General Administrative Procedure from 1925[25], has been devoted to traditional model of administrative procedure.

The application of the classic administrative procedure, as regulated by the provisions of the GAPA during almost the entire 20th century, with its major reform, i.e. the adoption of the new law from 2009, has now been slightly modified and expanded. Thus, the provisions of GAPA are applied not just on the issuing of the classic administrative acts, but also on the conclusion of administrative contracts, as well as on to the cases of legal protection in the situation of the adoption of the so-called 'real acts of administration', as well as protection in the actions of bodies that provide public services.

Since its adoption in 2009, the Croatian GAPA has been amended only once, in 2021, in order to incorporate information technology tools into its provisions. Structurally and content-wise, the law resembles the traditional understanding of administrative procedure.[26]

Problem of this model is the existence of one general and numerous special administrative procedural laws, which are often not harmonised to a satisfactory

[24] For study of implementation of the GAPA in the Western Balkans see: T. Ligi, A. Kmecl, *Implementation of laws on general administrative procedure in the Western Balkans*, OECD/Sigma, Paris, 2021; For general assessment of the administrative reforms in countries of the South Eastern Europe see: I. Koprić, pp. 435-454.

[25] For the review of administrative procedure laws in so-called Habsburg Succession countries see *Administrative proceedings in the Habsburg succession countries* (ed. Zbigniew Kmieciak) Lodz-Warszawa, 2021, *https://dspace.uni.lodz.pl/xmlui/bitstream/handle/11089/32970/Kmieciak_Administrative.pdf,* 3. 9. 2024; The book covers the following country cases: Croatia, Czech Republic, Hungary, Italy, Poland, Serbia, Slovakia and Slovenia.

[26] For the review of these amendments see: Frano Staničić, "Što nam donosi prva promjena Zakona o općem upravnom postupku?", *Informator*, No. 6699, 2021, pp. 1-5.

level. The question is whether many of these special procedural rules should exist in the first place. These procedural rules are mostly the pure copy of existing administrative procedural rules regulated in the general administrative procedure legislation, but with some departures from it. These departures regulate sometimes practically irrelevant issues (e.g. extending deadlines, naming administrative acts or procedural tolls differently from the general law, etc.), but create confusion and reduce general administrative procedural transparency. Despite the efforts to harmonise special administrative procedure with the general one, the existence of these special procedural laws still remains a challenge in Croatian legal order.

Also, some bodies avoid implementation of GAPA by stating that particular acts do not have characteristics of administrative acts and therefore, the provisions of the administrative procedure do not apply to their adoption. Fortunately, the courts (High Administrative Court and Constitutional Court) in the process of judicial review of the administration have long since taken the position according to which to give an act the character of an administrative act, its content is important, not its name and form.[27]

This model is not very far from experiences of other countries in the Western Balkans region despite the fact that Croatia entered the EU in July 2013. Several similar challenges characterise GAPA's in these countries despite the fact that they relatively recently adopted new legislation (SIGMA 2021).

b) *Procedure of consulting interested public in the general acts' adoption process (Quasi-Legislative model of Administrative Procedure)* exists in Croatian legal order, and could be found in several pieces of legislation. However, it has to be noted that this type of procedure is not fully procedurally developed nor recognised as a separate administrative procedure. Nevertheless, some elements of the procedures of this second-generation can be recognized and have been partially codified in various pieces of legislation.

First of all, there are several different types of legal acts enacted by different categories of public law bodies. General provisions on these acts, their form, content and legal authorizations for adoption are found in several basic laws that regulate the organization and functioning of the Cabinet and the organization and functioning of the state administration, as well as of territorial self-government. These are the Government of the Republic of Croatia Act – GRCA[28] and the State Administration System Act – SASA[29]. However, as in the case of the legal regulation of the general administrative procedure, there are also numerous special laws that regulate some of these issues in a different way, that is, they extend the powers of the Cabinet and state administration bodies to pass various acts. Territorial self-government bodies also issue various legal acts, mainly gen-

[27] For an overview of court practice in this regard, see: Dario Đerđa, *Opći upravni postupak u Republici Hrvatskoj,* Inženjerski biro, Zagreb, 2010, p. 41.

[28] Law on the Government, *Official Gazette*, No. 150/11, 119/14, 93/16, 116/18, 80/22, 78/24.

[29] Act on the State Administration System, *Official Gazette*, No. 66/19, 155/23.

eral, which are decisions adopted by their representative bodies and individual administrative acts deciding on individual cases, as well as other types of acts (local strategies, announcements, policy statements, etc.). Among the acts that are regulated in these legal acts, the nature of general acts have decrees and rules of procedure adopted by the Cabinet and the rulebook adopted by the minister based on express legal authority and within the limits of given authority. Also, decisions adopted by local and regional councils have the characteristics of general acts. Depending on the content, other acts authorized to be enacted by public law bodies may have the characteristics of general acts, to which the provisions on transparency, consultation with interested public and provisions on the assessment of the effects of regulations should also be applied.

Furthermore, several other regulations contain procedural provisions that can be classified under the definition of second-generation administrative procedure. They refer to the right to access public sector information, but also the procedure for preparing and adopting various regulations and their monitoring and evaluation, as well as the procedure for consulting the interested public in the process of drafting and adopting these regulations.

The Right to Access Information Act (RAIA) was – in comparison with the GAPA that has roots back in 1930's – adopted only recently, in 2013 and amended twice since (in 2015 and 2022).[30] It lays foundation for public consultation in the process of adoption of regulations (laws, Cabinet decrees, bylaws adopted by ministers, etc.). That law establishes the obligation of transparency in the form of the duty of public law bodies to publish various categories of acts on their own websites in an easily searchable manner and in a machine-readable form (Art. 10).[31] Furthermore, the RAIA sets the basic rules for consultation of general public in the process of preparation of regulations before the adoption by relevant public law body. The obligation to consult is carried out through the central internet portal and always exists when laws and by-laws are adopted, and when adopting general acts or other strategic and planning documents when they affect the interests of citizens and legal entities (Art. 11).

Some form of obligatory consulting the interested public is sometimes an integral part of classic administrative procedure in which an authoritative decision is made in an individual administrative matter. The procedure of issuing a building permit is a typical example of a traditional administrative act in which mandatory consultation with interested parties is prescribed.[32] It is similarly regulated by the

[30] Law on the Right to Access Information, *Official Gazette*, No. 25/13, 85/15, 69/22.

[31] There are 14 categories of different information – including laws and other regulations – that should be published and this obligation covers all public law bodies if they pass the act that has influence on the interests of citizens.

[32] Such mandatory consultation of the interested public is foreseen by the Construction Act (*Official Gazette*, No. 153/13, 20/17, 39/19, 125/19), which distinguishes between several situations. Firstly, the public and interested public have the right to be informed about the construction process of buildings for which special construction conditions are determined and the process of assessing the impact of construction on the environment or on the ecological network is carried out (Art. 4 and 107.a). Secondly, the owner and holder of rights on

Environmental Protection Act[33], which provides for public participation in the process of assessing the impact of interventions on the environment.[34]

*c) Involvement of various actors across administrative domains in decision making (Collaborative Model of Administrative Procedure)*. This type of administrative procedure is formally and informally present in everyday work of various public administration bodies. However, it is rarely prescribed in detail in the single piece of legislation nor it is perceived as a separate administrative procedure. However, it is possible to identify several legal provisions scattered in different pieces of legislation that can be classified under the common denominator of the 'collaborative administrative procedure'.

Firstly, it should be pointed out that the cooperation of public law bodies is prescribed as one of the basic organizational principles of public administration (Article 8 SASA).[35] In this sense, the legislator has foreseen the cooperation of administrative bodies as a fundamental feature of the public administration system in Croatia.

Collaborative administrative procedure is also recognized even in older Croatian administrative law theory when considering the various types of administrative acts. Krbek defines 'compound (complex) administrative act' as act "… in the adoption of which two or more organs cooperate ..."[36] Such understanding found its echo in legal regulation as well. Along these lines, the regulation of the traditional administrative procedure foresees the cooperation of several public law bodies in the adoption of a 'joint administrative act'.[37] Also, GAPA from 2009 provided an organizational structure for the collaboration of administrative bodies. Namely, Art. 22 regulates the 'Single administrative place' and stipulates that if several administrative or other procedures are necessary to realize a party's right, the party will be allowed to submit all requests at the single administrative place in the public law body. That public law body is *ex officio* to submit these requests to other competent public law bodies without delay.

In addition, Croatia has adopted two generations of legal acts that regulate the assessment of the effects of regulations and the procedure for drafting regu-

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the real estate immediately adjacent to the real estate for which the building permit is issued *ex lege* becomes a party to the building permit issuance procedure and thus acquires the right to inspect the case file for a possible statement on the construction of the building (Art. 115).

[33] Environmental Protection Act, *Official Gazette*, NN. 80/13, 153/13, 78/15, 12/18, 118/18.

[34] This is mainly a consequence of the acceptance of the Aarhus Convention, which established the procedural rules that the signatory parties are obliged to apply in interventions that have an impact on the environment. For details see: Rui Lanceiro, „The Review of Compliance with the Aarhus Convention of the European Union", *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (eds. Edoardo Chiti, Bernardo Giorgio Mattarella), Berlin-Heidelberg, 2011, pp. 359-382.

[35] It prescribes the following: "(1) State administration bodies are obliged to cooperate with each other within the limits of their scope and to provide legal and professional assistance to local and regional self-government units and legal entities with public powers in the performance of entrusted tasks of state administration …".

[36] I. Krbek, p. 32.

[37] Article 26 of GAPA is entitled 'Joint decision in an administrative matter' and regulates the obligation of two or more public law bodies to participate in the resolution of an administrative matter if this is prescribed by law. They must reach a mutual agreement on which body will pass the final act, which must also include the decisions of other public law bodies.

lations and consulting the public in that process. These are the Assessment of the Effects of Regulations Act (AERA)[38], which was firstly adopted in 2017 and was in force until the end of 2023, when the new Policy Instruments of Better Regulations Act – PIBRA[39] was adopted, which is in force from the beginning of 2024.[40] Today, the PIBRA regulates three main policy instruments of better regulations. These are planning of legislative activity, impact assessment and evaluation of regulations and consulting with public, and also regulates the procedure for their application. PIBRA is applied in the process of preparing and drafting laws and other regulations and monitoring their implementation (Art. 2). It can be concluded that PIBRA to some extent anticipated the participatory model of consultation with the public, given that this consultation is defined as "... a two-way process in which public law bodies seek and receive feedback from citizens or the public in the process of drafting laws and other regulations." (Art. 26). Given that it is a matter of consultation in the process of preparing laws on other regulations, it can be concluded that the legislator has foreseen the participation of the public in making decisions about the content of the regulations, so this procedure could be considered a third generation, i.e. a collaborative model of administrative procedure.

In addition to the above, there are other examples in the legislation where the collaboration of public law bodies is prescribed and which can be recognized as a collaborative model of administrative decision-making.[41]

## 4. Discussion and Analysis

Bearing in mind contemporary administrative development, there is a need to develop such a regulation of administrative procedure that will regulate the activity of the administration in changed social circumstances and in new forms of governance under the principle of the rule of law. At the same time, it should ensure sufficient flexibility for different forms of administrative activity. In this sense, distinguishing between three types or generations of administrative procedure seems to be an acceptable and desirable development path.

[38] Assessment of the Effects of Regulations Act, *Official Gazette*, No. 44/17.

[39] Policy Instruments of Better Regulations Act, *Official Gazette*, No. 155/23.

[40] Before the adoption of the AERA the main document setting procedural rules for consultation the interested public in legislative procedure was Code of Consultation with the Interested Public in Procedures for Passing Laws, Other Regulations and Acts (*Official Gazette*, 140/2009). This was a soft law mechanism which was applied by public law bodies when drafting laws and other regulations.

[41] Thus, the aforementioned Environmental Protection Act regulates that local self-government units in whose territory the intervention is located or it could have an impact on their territory are allowed to participate in the procedure for assessing the impact of the intervention on the environment, which procedure is conducted by the regional or state level of government (Art. 89/4). The Regional Development Act (*Official Gazette*, 147/14, 123/17, 118/18) establishes as one of its fundamental principles 'Partnership and cooperation', which means the cooperation of the public, private and civil sectors in the formulation of regional development policy. This principle is later implemented through various provisions of the law, such as partnership councils, drafting strategic documents of regional development, etc.

The analysis shows that in Croatia, as well as in the other successor states of the former SFRY, there is no genetic connection between the three generations of the administrative procedure. The greatest social and professional attention, and even the very understanding of administrative procedure, is devoted to the first generation of administrative procedure (quasi-judicial model). The rules governing the other two types develop sporadically, one might even say accidentally and under influence of various factors, mostly transposition of EU legislation and standards of the European administrative pace. These types are not even perceived as administrative procedures *stricto sensu*, but as 'procedures in the administration', and consequently to a large extent they should not even be subject to the rules of the first-generation regulation of administrative procedure. These types are certainly less formal than the classic procedure, they are regulated by a smaller number of procedural rules that are scattered among different regulations. The rules of these procedures derive from a different understanding of administrative action than that which characterizes the traditional administrative procedure. The other two generations of administrative procedure are not codified, as shown to be the case in some other administrative systems (e.g. France) or the Model Rules at the EU level (see *supra* analysis).

What is interesting to note is that some modern institutes find their place in the regulation of the traditional administrative procedure. Nevertheless, this regulation is usually not satisfactory and detailed, but only rudimentary, which is why problems are encountered with the implementation of these innovations. This is certainly the case with the administrative contracts or one stop shop in Croatian GAPA.

The traditional administrative procedure is still a copy of the court procedure, which is why it is quite unsuitable for application to other types of administrative action, except for authoritative administrative decision-making. It is an open question to what extent its rules can be simplified and made flexible so that they can be applied to other forms of administrative procedure, and to what extent national codifications should contain rules governing other generations of administrative procedure? This should certainly be the case with at least a minimum of provisions regulating public participation in the adoption of general acts (laws, by-laws and strategic documents affecting the interests of natural and legal persons). It is the same with the regulation of basic settings of collaborative action in the administration, which should include not only public law bodies, but also private sector subjects (businesses and civil society).

Ongoing challenge is also how to ensure the efficient judicial control over the acts adopted in all three generations of administrative procedure. It has to be noted that in parallel with the development of the rules of different types of administrative procedure, it should not be forgotten that they must be accompanied by effective mechanisms of judicial control of these rules. These mechanisms must ensure the achievement of the purpose of each of the three types of

administrative procedure, taking care to respect and promote the fundamental elements of the rule of law[42], good administrative behaviour and the European Administrative Space.[43]

Although it is possible to find and recognize provisions belonging to all three generations of administrative procedure in the Croatian legal system, the traditional understanding of administrative procedure (quasi-judicial model) prevails in legal and administrative practice. The same is the case with scientific and professional literature. It is practically impossible to find scientific and professional literature that will consider the other two generations of administrative procedure as administrative procedure at all.

The third generation of the administrative procedure is only rudimentary developed, although the cooperation of public law bodies has long been prescribed as one of their fundamental obligations. What still does not find enough space in the regulation is cooperation with actors outside the system of state and public administration. Some of this exists in regulations that were created as a result of adaptation to EU law or are a direct consequence of the implementation of international conventions.

## 5. Conclusion

This paper analysed the understanding of administrative procedure in Croatia and the successor countries of the former Yugoslavia from the perspective of three generations, that is, three models of administrative procedure as they have been developed by Barnes.

It has been shown that provisions regulating all three types of procedure exist in the Croatian legal system. However, there are significant differences between them, both in terms of the very understanding of their nature, as well as in terms of the detail of regulation and the degree of their codification. The clearest and regulated in most detail is certainly the traditional administrative procedure, which has been the subject of codification since the beginning of the 20th century and which receives the greatest attention in the scientific and professional public. The other two types are not even perceived as 'real' administrative procedures, but are treated as procedures in administration which are only sporadically and partially regulated in various pieces of legislation. Modern public administration, more than ever before, needs to strive to achieve different set of values. That is why the recognition and acknowledgment of the status of administrative proceedings and

[42] The fundamental principles of the rule of law include: (1) Legality, including a transparent, accountable and democratic process for enacting law, (2) Legal certainty, (3) Prohibition of arbitrariness, (4) Access to justice before independent and impartial courts, including judicial review of administrative acts, (5) Respect for human rights and (6) Non-discrimination and equality before the law (Venice Commission, *Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session,* Venice Commission, Strasbourg, 2011, pp. 10-13).
[43] However, given that judicial control of the administration is not the subject of this chapter that issue was not dealt with in detail.

other types of administrative proceedings is a step that will further strengthen the realization of the idea of the rule of law in a modern state.

In future, a scientific and professional effort should certainly be made so that other two types of administrative procedure are not only recognized as such, but also developed and codified in more detail. This can be done, as some European countries have already done (e.g. France and Germany, and the Model Rules at the EU level), in a general law regulating the administrative procedure. In this way, the general rules would be applied to all types of administrative procedure, without the emergence of special regulation that would regulate each type of administrative procedure separately. All in all, all three types of administrative procedure should be classified under the common procedural denominator, given that in this way it is ensured that the entire public administration and its activities are subject to legal norms, which is a fundamental feature of a modern, democratic state.

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# PART TWO
# Dimensions of the Intervention ("Fine tuning", "General Service" or Just Better Implementation of LGAP?)

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# METHODS OF CONSISTENT APPLICATION OF THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE IN CONDITIONS OF INCONFORMITY OF SUBSTANTIVE LAWS

*Abstract*

*The legal framework for the actions of public authorities in the Republic of North Macedonia is made up of the Law on General Administrative Procedures (LGAP) and a large number of special (substantive) laws regulating procedural issues in special administrative procedures. With the adoption of the LGAP of 2015, the rules of general administrative procedures were significantly remodeled so that they provide a better basis for protection of the rights of citizens and business entities in the administrative procedures. According to the findings in SIGMA's 2021 Monitoring Report on the Republic of North Macedonia, the general legal framework (LGAP) is well aligned with the principles of good administration, but the alignment of specific (substantive) laws is slow and incomplete. The LGAP was adopted in 2015, and its application started in 2016. The legislator prescribed a delayed effect on the application of the LGAP for a whole year, in order to harmonize the special (substantive) laws with this general code of rules for the administrative procedure. Yet, this has not been done up to date. The application of the new provisions of the LGAP, especially those that provide for broader protection of citizens and legal entities and increased efficiency of the public authorities, is jeopardized. Thus, this article shall focus on the problem of non-application of the new provisions of the LGAP, especially due to the inconsistency of substantive laws with the LGAP, but also for other reasons. Suggestions on how to strengthen the implementation of the LGAP shall be offered. A vital role will be played by the administrative judiciary, which is corrective to the administration, but also the process of digitalization of the administration.*

**Keywords:** General Administrative Procedure, Administrative Dispute, Digitization, Public Services.

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## 1. Introduction

In the traditional sense of the word, we understand the administrative procedure as a procedure for adopting an administrative act.[1] Today, the rules of the administrative procedure also apply to the implementation of legal administrative actions (real acts) as well as the adoption of administrative agreements. The idea behind the administrative procedure rules is an equilibrium:

- on one hand the procedural rules should enable the protection of rights and interests of the parties (individuals or legal entities) when the public authorities issue administrative acts/real acts or when an administrative contract is to be concluded;
- on the other hand the procedural rules should enable the protection of the public interest.

At the same time, what is required from the authorities that are authorized to act in an administrative procedure is to carry it out not only in a legal way, but to enable the procedure to be carried out in the simplest possible way (easy and transparent communication with the parties), in the most efficient way possible (action in the shortest possible period of time, without delay), and in a way that will be economical (with as few costs as possible that would arise for the parties in the procedure). On the other hand, the public authority should be careful that all this does not affect the quality of the procedure and the decision that will be made.

Bearing in mind these general goals of the administrative procedure, and with the motive to modernize the conduct of the administration and ensure a more consistent implementation of the principle of constitutionality and legality, transparency, efficiency and reduction of costs when public authorities decide on the rights, obligations and legal interests of citizens and business entities, in 2015 the Republic of Macedonia[2] adopted a new Law on General Administrative Procedure (LGAP).[3] This law replaced the LGAP from 2005, which was amended and supplemented in 2009 and 2011.[4]

However, today, almost a decade after its adoption, the LGAP is still inconsistently implemented in certain aspects. In particular, the new provisions on the delegation of decision-making powers, electronic communication and official exchange of evidence and data between public authorities are not implemented. This is due to the inconsistency of special laws with the new LGAP and the established (outdated) practices. Therefore, in this paper we will discuss how to

[1] Stevan Lilić, *Upravno pravo – upravno procesno pravo*, osmo izdanje, Pravni fakultet Univerziteta u Beogradu, Beograd, 2014, p. 432.

[2] Before 2019, when Amendment XXXIII of the Constitution of the Republic of Macedonia entered into force, the name of the state was "Republic of Macedonia". Today the name has been changed to "Republic of North Macedonia". In this paper, both names will be used, depending on which period is being discussed.

[3] *Official Gazette of the Republic of Macedonia*, No. 124/2015.

[4] *Official Gazette of the Republic of Macedonia*, No. 38/2005, 110/2008 and 52/2011.

achieve a consistent application of the LGAP. In that context, we will firstly pay some attention to the novelties in the LGAP from 2015.

## 2. Novelties in the LGAP From 2015 and Their Application

### *2.1. Scope of the LGAP from 2015*

Speaking about the LGAP of 2015, it is firstly important to emphasize that it applies not only to the administrative authorities (i.e. state administrative bodies) but to every public authority when it, performing its legal competences, acts, decides (adopts individual administrative acts) and undertakes other administrative actions in administrative matters. This in itself does not mean much, if several terms are not defined: public authority, individual administrative act, administrative matter and administrative action. We will, of course, find the definitions in the LGAP's glossary (Art. 4).

At the beginning, an administrative act is an individual act of a public authority that was adopted on the basis of a law that decides on the rights, obligations and legal interests of the parties (Article 4, Paragraph 1, Paragraph 6). But the LGAP goes one step further, stating how the administrative acts can be titled: decision, order, license, permit, prohibition, approval or other. The reason why the names administrative acts can bear are listed, while leaving open space for other names as well (stating that the administrative act can bear "other" names), is to reduce the space for "creativity" of public authorities. In the past public authorities who wanted to avoid administrative-judicial control over their acts often used to send "notices" to the parties regarding their requests.[5] The argument of the public authorities was that they did not issue an administrative act at all, which the party can challenge before the administrative judiciary, but that they only informed the party that its request was rejected. So, the purpose of the LGAP of 2015 is to interpret whether an administrative act has been issued in a given situation or not according to its effect, and not according to the name. Yet, as an additional safety ground, guidelines are also given as to what name the administrative act can bear.

Administrative action, in addition to the adoption of administrative acts, is also the conclusion of administrative contracts, the undertaking of other administrative actions (real acts) and the protection of users of public services and services of general interest (Art. 4, paragraph 1, sub-para. 5).

Administrative matters, according to the glossary of LGAP, are all acts and actions through which the competences of public authorities are expressed or carried out, and with which the rights, obligations or legal interests of natural

[5] Ana Pavlovska-Daneva (ed.), Commentary on the Law on Administrative Disputes, OSCE Mission in Skopje, Skopje, 2021, p. 51.

persons, legal persons or other parties in the procedure are resolved or affected (Art. 4, paragraph 1, sub-para. 4).

In the end, public authorities are the ministries, bodies of state administration, organizations established by law, other state bodies, legal and natural persons entrusted by law with exercising public powers,[6] as well as the bodies of local self-government units (Art. 4 , paragraph 1, sub-para. 1).

Thus, one may conclude that the LGAP of the Republic of (North) Macedonia from 2015 has a wide scope.

### *2.2. Some of the Novelties in The LGAP From 2015 and Their Application*

#### 2.2.1. The Principle of Delegation of the Decision-Making Power

The first principle that we would single out, as a complete novelty in the LGAP of 2015, is the principle of delegation of the decision-making power (Art. 13), according to which, within the framework of the public authority, the power to resolve administrative matters is, as a rule, delegated to employees (administrative servants), in accordance to the complexity of the administrative matter. This means that according to the LGAP political appointees or elected persons who are the head of authorities,i.e., those who are responsible persons (sometimes also called managers or directors) should no longer adopt administrative acts. Instead, administrative acts should be adopted by the administrative servants who worked on the matter themselves. Simply put, in public authorities the head/the manager (the minister, director, mayor, etc.) no longer needs to sign the administrative acts. The act is adopted with the signature of the administrative servant who drafted the act. At the same time, according to the LGAP, the decision-making power should be delegated by the provisions of the Act on Internal Organization, which will then be transposed into the Act on Systematization on Working Positions (in the description of the work tasks of a given workplace, the adoption of administrative acts should be foreseen). According to Art. 24, para. 1, 2 and 3:

> "(1) In the administrative procedure, the public authority acts through the authorized official person appointed in accordance with the rules specified in this article.
>
> (2) If it is not determined by a separate law or by a by-law, the official who manages the public authority, that is, the managing person, is obliged to determine with the Act on Organization an organizational unit competent for each type of administrative matter under his authority.

[6] These are all chambers that have entrusted public powers (for example, the Medical Chamber, the Bar Chamber, etc.), public enterprises, joint-stock companies in dominant or full ownership of the state that exercise public powers, private trading companies that exercise public powers and others. It is rare for a natural person as such to be entrusted with public authority, but the LGAP did not exclude natural persons, in order not to create a legal vacuum in practice.

(3) The authorized official person leads and completes the procedure, unless otherwise determined by law."

The delegation of the decision-making power, in fact, is not completely unknown in the legal system of the country. Even before the obligation to delegate was inserted in the LGAP, the practice of delegating the decision-making powers by ministers, directors and mayors to administrative servants was known. Ministers, directors, and mayors would issue specific letters of authorizations, i.e. letters for delegation of the decision-making powers to administrative servants (usually ones of high rank) allowing them to adopt administrative acts and perform other administrative actions without the need for approval. Namely, ministers, directors, and mayors used to delegate the decision-making powers on the basis of the Law on Organization and Work of State Administration Bodies[7] (in relation to ministers and directors) and the Law on Local Self-Government (in relation to mayors).[8] Art. 52, para. 2 of the Law on the Organization and Work of State Administration Bodies provides that the minister can authorize a civil servant to make decisions in administrative matters, while Article 52, para. 3 provides that the director who manages an independent body, or an administrative organization, can authorize a civil servant to make decisions in administrative matters.[9] Similarly, Article 50, para. 2 of the Law on Local Self-Government provides that the mayor can authorize a senior civil servant of the municipality to decide on administrative matters.

The principle of delegation of the decision-making power was foreseen in the LGAP of 2015 with the expectancy for multiple positive outcomes: depoliticization of administrative procedures; clear distinction between the responsibilities of the manager, i.e. the politician and the administrative servant, that is, the professional;[10] greater efficiency, considering the fact that numerous draft decisions prepared by several administrative servants will not be collected and waiting for signature by the manager and so on. Practically, the principle was introduced to overcome the "dominance of verticalism" [11] typical for Central and Eastern European countries.

Although the principle of delegation has long been incorporated into the LGAP (ever since 2015), today not many managers have really complied with it. According to SIGMA's Monitoring report for the Republic of North Macedonia in 2021, the delegation of decision-making powers in the ministries was only an exception,[12] not a rule. We can confirm the fact that the principle of delegation

[7] *Official Gazette of the Republic of Macedonia*, No. 58/2000.

[8] *Official Gazette of the Republic of Macedonia*, No. 5/2002.

[9] It is interesting to ask why in Art. 52, para. 3 stipulates that only the director of independent body of the state administration and the director of an administrative organization can authorize a civil servant to make decisions in administrative procedures, and not the directors of the bodies within the ministries?

[10] The manager, that is, the politician, should deal with building policies and managing the authority. The administrative servant who is an expert in the relevant matter is the one who should solve the administrative cases.

[11] *Ibidem*.

[12] SIGMA, OECD, *Monitoring Report: Republic of North Macedonia – The Principles of Public Administration*, 2021, p. 92.

was insufficiently implemented if we take into account the fact that the Government on several occasions, with its conclusions, bound the bodies that answer to it (first of all, the ministries, the bodies in their composition and the independent bodies of the state) to implement the principle of delegation.[13] The principle of delegation is not implemented due to two reasons: some of the substantive laws are not aligned with LGAP in terms of delegation (which is allowed per Art. 24, para. 2 of LGAP) and outdated practices.

### 2.2.2. The Principle of Economy and Efficiency and Obligation for *Ex Officio* Acquisition of Data and Evidence

Another important principle foreseen in the LGAP, which is additionally operationalized in its further provisions, is the principle of economy and efficiency (Art. 7): "[t]he procedure should be carried out in the simplest possible way, without delay and with as little as possible costs for the parties, while ensuring full respect for the rights and legal interests of the parties and a complete determination of the factual situation". An emanation of this principle is, among others, Art. 56 titled acquisition of evidence *ex officio*. Art. 56 (para. 1 and para. 2) practically provides that:

- it shall be considered that the party submitted the necessary evidence along with the request, if the respective documents/data are being kept in the official records of public authorities
- the authority which carries out the administrative procedure shall *ex officio* obtain all evidence and data necessary to complete the administrative procedure, if those evidence and data are recorded in its official records or the records of other public authorities.

Unfortunately this obligation is rarely respected by public authorities, for few reasons. First, some of the substantive laws and the by-laws adopted on their basis still provide that the party is the one who should obtain all the evidence from other public authorities and attach it to the request. These laws are not only contrary to the LGAP, but they are also contrary to the Law on Electronic Management and Electronic Services,[14] where it is stipulated that public authorities should obtain evidence from the official records *ex officio*. Secondly, the infrastructure of the institutions does not allow them to really implement this obligation, considering that they have outdated software and devices they work on, lack of trained staff, etc.

[13] One such conclusion was adopted at the 120th session of the Government of the Republic of North Macedonia in February 2019: *https://vlada.mk/sednica/120,* 17. 2. 2024.
[14] *Official Gazette of the Republic of North Macedonia*, No. 98/2019, 244/2019.

### 2.2.3. The Principle of Active Assistance to the Party and the Obligation to Enable Electronic Communication Between the Public Authority and the Party

One interesting principle in the Macedonian LGAP from 2015 is the principle of active assistance to the party, according to which the public authority is obliged to enable all parties in the procedure to exercise and protect their rights and legal interests in the most effective and easy way possible, but also to inform the parties about legal provisions that are important for solving the administrative matter, about their rights and obligations, and about all the information related to the procedure (Art. 17, paragraphs 1 and 2). In para. 3 of Art. 17 it is also provided that the public authority provides the party with the possibility for electronic communication.

### 2.2.4. The Application of the LGAP to Real Acts and Administrative Contracts

In the previous text, we already talked about the fact that the LGAP of 2015 regulates not only the procedure for administrative acts, but also the procedure for issuing real acts. In addition, the LGAP regulates the legal protection against real acts, that is, it introduces the objection as a legal remedy. In this part, the LGAP is properly implemented by t numerous public authorities that issue real acts, regardless of their name: confirmation, statement, certificate, etc.

As another administrative action, administrative contracts were also foreseen: contracts the public authority concludes with parties for the purpose of performing public tasks which usually fall under the jurisdiction of the public authority. When such contracts are concluded, but also when they are canceled or unilaterally terminated, the provisions of the LGAP should be respected. This is regulated in Art. 98 – 101 of LGAP. What is especially important is that Art. 99 of the LGAP provided that the administrative judiciary shall decide, in an administrative dispute, on the lawsuits for annulment of administrative contracts. Also, the LGAP specified the occasions when the public authorities may terminate the administrative contracts unilaterally. An administrative contract may be unilaterally terminated by the public authority if that is necessary to neutralize immediate danger to the life and health of people or property, if there is no other way to neutralize the danger. In order to unilaterally terminate an administrative contract the public authority must issue a specific administrative act, against which the other contracting party may initiate an administrative dispute.

So, to put it briefly, all disputes regarding annulment of administrative contracts and unilateral termination of administrative contracts should be resolved, per the LGAP, in administrative disputes. Yet, this is where there is a collision between the provisions of the LGAP and the provisions of the Law on Administra-

tive Disputes. In Article 3, para 1, sub-para. 8 of the Law on Administrative Disputes it is stated that the (Administrative) Court decides on disputes arising from the procedure for concluding administrative contracts. Disputes arising from the procedures for annulment or unilateral termination of administrative contracts are not mentioned in the Law on Administrative Disputes.

Thus, if the provision from the Law on Administrative Disputes is interpreted in a strict and literal manner, a wrong conclusion might be reached that the Administrative Judiciary resolves only disputes related to the conclusion of administrative contracts, while the disputes related to the annulment/unilateral termination of administrative contracts are supposed to be resolved by the civil courts. Of course, such conclusion is irrational.

### *2.3. How to Implement the LGAP Consistently and Properly*

#### 2.3.1. Consistent Implementation of the Principle of Delegation of Decision-Making Power

First of all for the consistent implementation of this principle a process of changing the substantive laws should be initiated. This means that all substantive laws which contain provisions that explicitly stipulate that the administrative act is adopted by the head of the authority (minister, director, mayor, etc.) should be amended. This is necessary considering that Art. 24, para. 3 of the LGAP reads "[t]he authorized official person conducts and completes the procedure, unless otherwise determined by law." So, if it is determined otherwise by the special law, the delegation will not be implemented.

In cases where the substantive laws do not contain provisions that explicitly stipulate that the head of the authority/the manager adopts the administrative act, the delegation must be carried out in accordance with the LGAP. If in such cases the principle of delegation of the decision-making power is not implemented, the Administrative Court and the Higher Administrative Court should have a corrective role. The Administrative Court should annul all administrative acts which are adopted by an unauthorized person, i.e. by the head of the authority/manager (minister, director, mayor) and not by an administrative servant in accordance with the LGAP.

An interpretation that supports this claim can be found in the judgments of the Administrative Court. Thus, according to the explanation of the Judgment U-4. no. 113/2019, which refers to a case in the field of social protection, the Administrative Court states the following: "according to the concept of the new Law on General Administrative Procedure, the Minister of ... authorizes the head of the department to draw up a decision and decide on the appeal of the claimants for social protection rights […] the lawsuit allegations about the illegality of the

decision because it was not signed by the Minister of ... are unsubstantiated". So, in the case, the Administrative Court rejects the allegations of the party that the minister must sign the administrative act and confirms that the administrative act should have been signed by an administrative servant (in the case at hand, a head of a department within the Ministry), as it was done, in accordance with the principle of delegation of decision-making power and Art. 24 of the LGAP. The mere fact that the law provided that the act is adopted by the ministry (and not the minister as a person) means that the act is, in fact, adopted by an administrative servant employed at the ministry, not the minister himself/herself.

### 2.3.2. Consistent Application of the Principle of Economy and Efficiency and the Obligation to *Ex Officio* Acquisition of Data and Evidence

For the consistent application of the principle of economy and efficiency, public authorities must necessarily fulfill their obligation to obtain data and evidence necessary for decision-making *ex officio*. At the same time, the public authorities have an obligation not only *ex officio* to obtain the documents and data that they have at their disposal (they have them in their official records) but also those that other public authorities have at their disposal.

For the consistent implementation of this obligation, in addition to the provisions of the LGAP, other laws have been adopted, such as the Law on Electronic Management and Electronic Services[15] and the Law on the Central Population Register.[16] According to these regulations, a Central Population Register is established – an integrated database of personal data of the population, created on the basis of automatic integration of the data maintained by the competent authorities, from which the public authorities can obtain data on the individual who submits a request. In addition, the Interoperability Platform was established, conceived as a platform for the exchange of data and documents between public authorities, among others, those necessary for the adoption of a decision in an administrative procedure.

Although these efforts have been undertaken, the acquisition of evidence and data *ex officio* in administrative proceedings does not happen often. We see the first obstacle in some of the special laws and by-laws that are outdated and still stipulate that the parties attach evidence to the requests/applications they submit. In truth, however, the number of such laws is decreasing, so this obstacle is becoming less and less relevant. The second obstacle, which is more serious, is the lack of infrastructure within the public authorities to implement such an electronic exchange of data and evidence. The mentioned Interoperability Platform is, unfortunately, used by an extremely small number of authorities. According

[15] *Official Gazette of the Republic of North Macedonia*, No. 98/2019.
[16] *Official Gazette of the Republic of North Macedonia*, No. 98/2019.

to the State Audit Office "the number of institutions connected to the platform is only 2.93% of the total number of public institutions that, according to Article 9 and Article 30 of the Law on Electronic Management and Electronic Services, are obliged to use the IOP platform for the exchange of data and information in electronic form".[17]

### 2.3.3. Consistent Application of the Obligation to Enable Electronic Communication Between the Public Authority and the Party

The provision of the LGAP according to which every party should be given electronic access to the public authority, which in itself means electronic submission of a request for initiation of an administrative procedure and issuance of electronic administrative and real acts, is still not being properly applied.[18]Although the Law on Electronic Management and Electronic Services contains provisions that further operationalize this obligation from the LGAP, i.e. it was foreseen that every public authority must offer electronic administrative services,[19] a large part of the authorities still do not receive electronic requests nor issue electronic acts. There are two basic reasons: first, in some of the substantive laws and by-laws there are still provisions according to which requests in administrative procedure are submitted in written form;[20] secondly, institutions do not have the appropriate infrastructure to receive electronic requests, and even more so to issue electronic documents. Regarding the first problem, it must be taken into account that outdated legal provisions (or provisions in by-laws) that provide for a mandatory written request or a mandatory issuance of a written decision are in conflict with the Law on Electronic Documents, Electronic Identification and Confidential Services[21] where in Art. 6, para. 1 provides that "[t]he electronic document has the same legal and evidential force as the written form of the document, in accordance with the law", and in Art. 6, para. 3 is provided "[w]hen the written form of documents or acts is determined by law, the electronic document is considered a document or act in written form". Hence, the legal obstacles should be considered irrelevant, although this is not the case in practice. Speaking about the second

[17] State Audit Office, *Final Report on an IT Audit Performed as a Performance Audit: Platform Functionality for Interoperability Between Public Sector Institutions*, Skopje, 2022, p. 23.

[18] The national portal for electronic services is set up as a platform for electronic submission of requests to public authorities, but also for issuing electronic decisions and other acts. In other words, this Portal exists for public authorities (but only those that are central, not local) to provide electronic administrative services. But the situation in the month of February 2024 is such that only 107 services out of a total of 1288 institutions are offered on the National Portal for electronic services. This number is small, taking into account that thousands of decisions are issued every day, as well as real acts, in written form.

[19] By administrative services we mean the issuance of acts in administrative proceedings.

[20] Acts in which there are such provisions are enlisted in the paper: Konstantin Bitrakov, "Digitalization of the Macedonian public administration: a pathway to prevent maladministration and illegal activities", *Conference Proceedings "Law in the Digital Age"* (ed. Zoltan Vig), 2023, pp. 20-21.

[21] *Official Gazette of the Republic of North Macedonia*, No. 101/2019, 275/2019.

problem, i.e. the lack of infrastructure, the Government of the Republic of North Macedonia should be focused on building the necessary infrastructure for public authorities to connect to the appropriate platforms for data exchange and the appropriate platforms for issuing electronic services, but also serious training of officials so that they can deal with new technologies.

### 2.3.4. Consistent Application of the LGAP in Terms of Administrative Contracts

In the previous text we already spoke of the collision between the LGAP's and the Law on Administrative Disputes' provisions. According to the LGAP disputes arising from unilateral termination of administrative contracts are the subject matter of administrative disputes, therefore should be resolved by the Administrative Court and the High Administrative Court. According to the Law on Administrative Disputes, on the other hand, only disputes arising from the procedure for concluding an administrative contract are the subject matter of administrative disputes (implying that disputes related to unilateral termination of administrative contracts should not be resolved by the Administrative Court and High Administrative Court but by the civil judiciary).

Yet, in the previous case-law of the Administrative Court and the High Administrative Court these dilemmas are resolved. The administrative judiciary accepted that it is neither logical nor prudent to accept a narrow interpretation according to which disputes related to the conclusion of administrative contracts are resolved by the administrative judiciary but disputes related to the annulment or unilateral termination of administrative contracts are resolved by the civil courts.

After all, even if the provision of Art. 3, paragraph 1, sub-para 8 of the Law on Administrative Disputes is interpreted as narrowly as possible, the provision of the LGAP stipulates that unilateral termination of administrative contracts is carried out by an administrative act, and each administrative act is, of course, subject to administrative-judicial control in an administrative dispute.[22]

## 4. Conclusion

The LGAP of the Republic of Macedonia from 2015 was inspired by the idea of reforming the public administration with the aim of bringing it closer to the European standards. But even today, almost ten years after the LGAP was

[22] See: Verdict UZ-2. No. 495/2021 in the explanation of which it is stated that the Government (concessionaire) argued that the dispute related to the decision to terminate the contract (termination) is a civil-law dispute, i.e., it does not have the character of an administrative dispute, and the Administrative Court accepted this in the first instance and refused the lawsuit. The Higher Administrative Court states that such an interpretation of the Administrative Court was wrong and clearly points out that administrative disputes may be initiated against decisions to unilaterally terminate an administrative contract (in the present case concession contracts).

adopted, some of its (new) provisions are not consistently applied. We argued above that the principle of delegation of decision-making power, the principle of economy and efficiency, the principle of active assistance to the party and the provisions for administrative contracts are not properly and consistently applied. We also elaborated upon the reasons for not applying referred principles and provisions from the LGAP consistently. Several efforts are needed to overcome the existing situation, and to consistently apply all principles and provisions of the LGAP: amendments to the substantive laws to harmonize their provisions with the principle of delegation of the decision-making power from the LGAP, proactive and corrective role of the administrative judiciary when reviewing the legality of administrative acts and actions, and holistic approach in the digitalization of the public sector.

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Verdict UZ-2. No. 495/2021.

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# DOES THE NEW LGAP NEED "GENERAL SERVICE"

*Abstract*

*Seven years after the adoption of the new Law on General Administrative Procedure (LGAP), we have the opportunity to conduct an objective analysis and evaluate the real scope of this boldly announced law. A number of innovations (e.g. legal definition, concept of administrative matter, guarantee act, administrative contract, single administrative point, etc.) are analyzed, including the harmonization of sectoral laws with LGAP which was considered one of the key goals of the new LGAP in the service of the economy and citizens in the context of SIGMA standards and European Commission reports. The general conclusion is that LGAP is due for a "general service."*

**Keywords:** Innovations in the Law on General Administrative Procedure, Harmonization of Sectoral Laws With the Law on General Administrative Procedure, Law on General Administrative Procedure in the Service of the Economy and Citizens, SIGMA Standards and European Commission Reports, "General Service" of the Law on General Administrative Procedure.

## 1. Small Jubilee - Seven Years Since the Adoption of the New LGAP

Seven years have passed since the adoption of the new Law on General Administrative Procedure (LGAP) and six years since its full implementation.[1] A small anniversary, but at the same time a good opportunity to analyze and evaluate from the point of view of its application in practice. Based on the numerous "innovations" introduced by LGAP, but also from the numerous "open issues" that accompany the application of this procedural law, it can be immediately concluded that the moment is ripe for the "general service" of the current LGAP, both from the point of view of content reconstruction of a number of material and process contradictions, as well as with regard to a larger number of conceptual and nomotechnical inconsistencies.[2]

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[1] Law on General Administrative Procedure, *Official Gazette of RS*, No. 18/2016, 95/2018.

[2] Stevan Lilić, *Zakon o opštem upravnom postupku: anatomija zakonskog projekta sa modelom za generalnu rekonstrukciju ZUP-a,* Centar za unapređenje zakonodavstva, Komitet pravnika za ljudska prava: Dosije studio, Beograd, 2019.

The Law on General Administrative Procedure from the point of view of "functions for the economy and citizens" can be viewed from two aspects: (a) review of the success of some of the most significant innovations[3] (e.g. legal definition of administrative procedure; concept of administrative matter; guarantee act; administrative contract; single administrative point and others), as well as (b) analysis of the process of harmonizing sectoral laws with LGAP, with special reference to the European standards of "democracy and rule of law in the service of the economy and citizens" in the documents of the European Commission on Serbia's progress and the reports of the SIGMA agency.

## 2. Overview of the Most Significant Innovations in the New LGAP

On this occasion, we will present a general overview of the success (failure) of some of the most significant praised innovations[4] in relation to which a "general service" should be done today.

***Theoretical definition***. In LGAP, the administrative procedure is defined as "...a set of rules..." However, this legal definition of administrative procedure is theoretically wrong because the law is a "set of rules," while the administrative procedure is a "set of procedural actions" that are performed according to the rules prescribed by law.[5]

***Different legal definitions of the same legal matter.*** LGAP introduces a legal definition of administrative matter that is significantly different from the already existing legal definition of administrative matter in another law.[6] While according to LGAP, the concept of an administrative matter is radically expanded (and includes the adoption of administrative acts, the adoption of guarantee acts, the conclusion of administrative contracts, the undertaking of administrative actions and the provision of public services), according to the Law on Administrative Disputes (LAD),[7] an administrative matter is an "individual undisputed situation," in which there is a "need to legally and authoritatively determine a party's future conduct." Although it is obvious that there are significant differences between the definition of an administrative matter according to LGAP and LAD, some authors claim that the existence of different legal definitions of the same thing does not pose a problem.[8]

[3] Stevan Lilić, "Uspon i pad novog Zakona o opštem upravnom postupku", *26. Budvanski pravnički dani* (ed. Miodrag Orlić), UPS, Beograd, 2023, pp. 415-440.

[4] Dobrosav Milovanović, Vuk Cucić, "Nova rešenja nacrta Zakona o opštem upravnom postupku u kontekstu reforme javne uprave u Srbiji", *Pravni život*, Vol. 2, No. 10, 2015, pp. 95-110.

[5] Dragan Milkov, Radovan S. Radošević, "Neke novine u Zakonu o opštem upravnom postupku – upravno postupanje", *Zbornik radova Pravnog fakulteta u Novom Sadu,* Vol. 50, No. 3, 2016, p. 736.

[6] Radomir Radošević, "Pojam upravne stvari i novi Zakon o opštem upravnom postupku Republike Srbije", *Pravna riječ*, Vol. 13, No. 46, 2016, pp. 717-728.

[7] Law on Administrative Disputes, *Official Gazette of RS*, No. 111/2009.

[8] Zoran Tomić, Dobrosav Milovanović, Vuk Cucić, *Praktikum za primenu Zakona o opštem upravnom postupku,* Ministarstvo za državnu upravu i lokalnu samoupravu, Beograd, 2017, pp. 23-24.

***Disputed legal nature.*** The problem with the newly introduced guarantee act is that according to LGAP, its legal nature is not clear. The guarantee act does not decide on the rights and obligations of the party, which leads to the conclusion that the guarantee act is not an administrative act by its legal nature. However, according to LGAP (Art. 21), "the provisions of this law on administrative acts shall be applied accordingly to the guarantee act," which leads to the conclusion that a guarantee act is an administrative act by its legal nature.[9] On the other hand, the wording of the provision of paragraph 3 indicates that the guarantee act is just an administrative act "which may have another name."

As one of the authors of LGAP states: "There is room for 'fine-tuning' in the provisions of LGAP concerning the guarantee act [and concludes that] the author's criticism should not be understood exclusively as correcting one's own mistakes, although there is that."[10]

After six years of application of LGAP, not a single case of adoption of a guarantee act according to the provisions of the new LGAP has been recorded.

***Authentic interpretation.*** Of all the "innovations," the innovation titled "administrative contract" fared the worst, for the simple but absurd reason that our current legislation does not mention administrative contracts.[11] Namely, LGAP prescribes that administrative contracts be concluded according to the provisions of LGAP, thus in practice creating confusion, especially with public procurement contracts (but also communal public contracts, public-private partnership contracts, concessions, etc.) in terms of whether to apply the existing (special) laws or the new LGAP. The source of the problem is that the professional public "believes" that certain contracts in special laws are "administrative contracts," even though they are not designated as such in the laws. Due to this confusion, the National Assembly had to make an extraordinary intervention by passing a so-called Authentic Interpretation Act in 2018 in which it specifically states that these provisions of LGAP "should be understood that contracts concluded in accordance with special laws are not administrative contracts in the sense of the Law on General Administrative Procedure, and the legal regime of the Law on General Administrative Procedure cannot be applied to them."

As with the guarantee act, after six years of application of LGAP, not a single case of concluding an administrative contract according to the provisions of LGAP has been recorded.

***Single administrative point.*** Of the innovations introduced by LGAP, the one related to the "single administrative point" is significant. However, as it is pointed out: "In fact, the meaning is that every request, submitted at a single administrative point, is considered submitted to the authority that is competent to

[9] Stevan Lilić, *Komentar i kritička analiza Zakona o opštem upravnom postupku,* Službeni glasnik, Beograd, 2022, pp. 109-121.

[10] Vuk Cucić, "Fino podešavanje Zakona o opštem upravnom postupku", *Anali Pravnog fakulteta u Beogradu*, Vol. 66, No. 2, 2018, pp. 143-145.

[11] S. Lilić (2022), pp. 122-137.

act on it. This has the effect that for the competent authority, the legal deadlines for action begin on the day the request is submitted to the single administrative point, regardless of when the request actually arrived at the authority from the single administrative point. It is this in-between time that can be a problem. (...) We can conclude that there is a real danger that the authority will fall into arrears in many cases because it will not be able to act within the deadline."[12]

Apart from the above, LGAP also introduces other "innovations" that cause controversies in practical application and which, according to our belief, should be on the list for a "general service," especially: if the conclusion according to LGAP is an administrative act, why is the special appeal abolished; why was the response of the first-instance authority to the appeal introduced; how the (formal) procedural action of delivery appears as a "type" of (factual) action of notification; why was the "announcement of the solution null and void" abolished; why no deadline was set for the interventions of the ombudsman, etc.[13]

## 3. Administrative Acts - Decision and Conclusion

### *3.1. Administrative Acts*

According to the definition in LGAP, administrative acts are decisions and conclusions, but they can also have other names (e.g. permits, orders). For example, instead of legal definitions, LGAP contains the so-called theoretical definition of an administrative act, as the rubrum (title) above Article 16 which reads: "Administrative act - concept and types," can serve as an illustrative example. Such headings should not be used in legal texts, primarily because the goal of legal texts is to be instructive, not descriptive and educational. An official who applies LGAP in practice does not need to expand their knowledge and education on the topic of "concept and types of administrative acts" (there is plenty of professional literature available for this), but needs precise instructions for when and how to make a decision. The use of a theoretical formulation such as "administrative act - concept and types" in LGAP indicates the circumstance that when determining the definition, subjective theoretical criteria were used, instead of objective nomotechnical standards in the drafting of the legal text (e.g. according to the standards in the official methodologies for drafting laws).[14]

In relation to the "concept and types of administrative acts," according to the new LGAP, very detailed analytical remarks were made in professional papers:

[12] S. Kulić, "Single administrative point - ambiguities and doubts", *Savremena uprava i pravosuđe*, Vol. 2023, No. 2, 2023, pp. 30–35.

[13] Stevan Lilić, Katarina Andrić-Manojlović, Katarina Golubović, *Priručnik: Praktična primena novog Zup-a, sporna pitanja i odgovori: analiza i komentar najznačajnijih otvorenih pitanja praktične primene novog Zakona o opštem upravnom postupku,* Službeni glasnik, Beograd, 2018.

[14] Legislative Committee of the National Assembly of the Republic of Serbia, *Uniform Methodological Rules for Drafting Regulations,* March 2010, *http://www.parlament.gov.rs*, 25. 8. 2024.

"In our legal system, there are two different legal definitions of an administrative act. One is specified in the new Law on General Administrative Procedure and obligates all those entities that pass administrative acts. The other is specified in the Law on Administrative Disputes and obligates the Administrative Court, when checking the legality of an administrative act. Bearing in mind the different criteria for definition, it could happen that one and the same act is considered an administrative act in the sense of the Law on General Administrative Procedure, but this is not the case in the sense of the Law on Administrative Disputes. Such a difference is unacceptable and can cause negative consequences in practice."[15]

### *3.2. The Administrative Decision*

According to LGAP, there are two types of decisions: a) administrative decision (on the merits) that decides on an administrative matter (i.e. on the right, obligation or legal interest of a party) and b) the procedural administrative decision. A decision on an administrative matter under LGAP is an individual legal act whereby the authority, directly applying regulations from the appropriate administrative area, decides on the right, obligation or legal interest of a party, or on procedural issues (Art. 136, para. 1). A procedural decision under LGAP is made "in other cases determined by this law" (Art. 136, para. 2), for example, when rejecting a party's request to initiate the procedure, when interrupting or suspending procedure, when rejecting objections or appeals, etc.

The meritorious decision can be of first instance and of second instance. The first-instance decision is an administrative act that decided on the main (administrative) matter, i.e. on the recognition of a specific right or determination of a specific obligation of a person in an individual case. The decision on the administrative matter ends the administrative procedure at the same time. The second-instance decision is an administrative act that decided on the appeal, i.e. on the appellate request to annul the first-instance decision. The decision on the appeal request ends the appeal procedure at the same time.

Procedural decisions are made in cases of non-fulfillment of formal procedural reasons (e.g. inadmissibility, untimely submission, unauthorized subjects). Among others, procedural decisions include: the decision to reject the request, the decision to reject the appeal, the decision to end proceedings, the decision to impose a fine on the witness, etc.

### *3.3. Administrative Matter*

The current Law on General Administrative Procedure expanded the concept of an administrative matter so that, in addition to the previous legal situation

[15] D. Milkov, R. S. Radošević, pp. 739–740.

(i.e. passing a decision), it also includes other legal situations (passing a guarantee act, concluding administrative contracts) and new "factual" situations (taking administrative actions, provision of public services). According to the current LGAP, the administrative matter now includes individual situations in which the administrative body in the administrative procedure: (a) passes administrative acts; (b) passes guarantee acts; (c) concludes administrative contracts; (d) undertakes administrative actions and (e) provides public services.

However, the definitions of administrative matters in LGAP and Law on Administrative Disputes do not match. Different legal definitions of "administrative matter" create practical difficulties when conducting an administrative dispute and put the plaintiff (party) in an uncertain position because, from a legal point of view, an administrative dispute could not be conducted against an administrative matter that was not decided by an administrative act, even though according to Law on Administrative Disputes, the Administrative Court is authorized to decide on the merits "on an administrative matter" in a dispute with full jurisdiction (e.g. in case of "silence of the administration").

In some professional papers, views are expressed that "the expanded concept of administrative matters does not create problems from the aspect of the mentioned definition of LAD, given that lawsuits will still be submitted to the Administrative Court on the basis of administrative matters from administrative proceedings, exclusively against administrative acts."[16] This understanding, however, is not based on legal arguments because, on the one hand, it stems from the fact that the concept of administrative matter according to LAD automatically excludes the concept of administrative matter according to LGAP, and, on the other hand, from the premise that LAD is the *lex specialis* in relation to LGAP. Since LAD is clearly not that, the position that the provision of LAD in an administrative matter automatically excludes the provision of LGAP on the same issue is also wrong.

### *3.4. Conclusion*

According to the definition in LGAP (Art. 146): a conclusion is an administrative act whereby the authority manages the procedure and which is adopted when this law does not specify that an (administrative) decision is to be adopted.

"It is also debatable how the conclusion can be considered an administrative act at all (as it is written in Article 16 of LGAP) when, according to the new Law on General Administrative Procedure, 'no appeal is allowed against it, nor can an administrative dispute be initiated.' It follows that the conclusion never has an independent legal existence, and therefore can only represent an accessory act, an individual act without direct legal effect, and not an administrative act. The provisions of this law on the types of administrative acts are, therefore,

[16] Z, Tomić, D. Milovanović, V. Cucić, p. 21.

contradictory. The legislator first divides administrative acts into decisions and conclusions, and then negates that division by subsuming all conclusions under accessory acts."[17]

## 4. Harmonization of Sectoral Laws with LGAP

### *4.1. Deadlines fot Harmonizing Sectoral Laws*

Innovations introduced by LGAP have a special place in the provision (Art. 214) according to which "Special laws regulating certain issues of administrative procedure in certain administrative areas shall be harmonized with the provisions of this law by June 1, 2018." However, this provision prescribed an "unrealistic" deadline for harmonizing special laws with LGAP. This circumstance, especially in the context of the function of LGAP in relation to the economy and citizens, was pointed out by SIGMA experts who participated in the drafting of the Draft LGAP: "The question of special administrative procedures remains significant, bearing in mind the number of special laws that are in force. One can express doubts that the 24-month period will be possible to realize. Considering the number of special laws, the actual effect (e.g. protection of individual rights and realization of public interest) of this provision in the Draft will be very limited".[18]

The government was significantly late with the order on the formation of the Coordinating Body[19] whose task is to assess the compliance of the provisions of special laws, and to, among other things, "determine the criteria for determining the special laws whose harmonization is needed as a priority." However, those criteria were not always clearly articulated, as can be seen from the text of one of the points of the Coordinating Body (and the Working Group for drafting LGAP): "We are of the opinion that, bearing in mind that the new LGAP foresees that in the process of harmonization with its decisions until June 1, 2018, priority should be given to the provisions of special laws that are not harmonized, which should also apply to the provisions of special laws that relied on the model of LGAP from 1997."[20]

### *4.2. Two Documents of the Coordination Body*

However, shortly after the expiration of the legal deadline for harmonizing special laws with LGAP, the Coordination Body published two of its acts. In the

[17] D. Milkov, R. S. Radošević, pp. 739–740.
[18] SIGMA, *Challenges for Public Administrative Reform (PA) in Serbia,* Key Findings of the 2017 SIGMA Report, *www.sigmaweb.org* , 25. 8. 2024.
[19] Decision on the formation of the Coordinating Body for harmonization of special laws with the Law on General Administrative Procedure, *Official Gazette of RS*, no. 119/17 of December 29, 2017.
[20] Dobrosav Milovanović, "The process of harmonizing special laws with the Law on General Administrative Procedure", *Zbornik radova,* Skopje, 2017, p. 65-76.

first ("Conclusions"),[21] it states that sectoral laws should, instead of several provisions referring to LGAP, contain only one provision, which will generally refer to the subsidiary application of LGAP and which reads: "Regarding procedural issues that are not otherwise regulated by this law, the provisions of the law governing the general administrative procedure shall apply." In addition, they expressly state that: "Compliant application is out of the question, because it implies the application of the provisions of LGAP to something that, by its legal nature, is not an administrative procedure. As special laws regulate special administrative procedures, only subsidiary application comes into consideration." However, with these conclusions, the Coordinating Body left its legally prescribed framework because the stated positions do not refer to "determining the criteria for determining special laws whose harmonization is necessary."

In the second act ("Notice"),[22] the Coordinating Body, among other things, takes the following positions: "(1) The process of harmonizing special laws with the Law on General Administrative Procedure continues after June 1, 2018, and (2) Until the end of the process harmonizing special laws with the Law on General Administrative Procedure, special laws will be applied." However, on this occasion too, the Coordinating Body went beyond the scope of its statutory powers, because without a valid legal basis, it assumed the authority of the legislator to make a decision on changing the provision on deadlines in the current law. It is particularly interesting that this unusual "intrusion" into the jurisdiction of the parliament was carried out by the adoption of an informal individual act in the form of a "notification."

### *4.3. SIGMA and EC Reports on Harmonization of the Sectoral Laws with LGAPSIGMA*

As SIGMA points out in its analysis: "This document was created with the aim of analyzing the implementation of the Law on Administrative Procedure (LAP) in the countries of the Western Balkans (WB) that have recently reformed their laws - Albania, Kosovo, Montenegro, the Republic of North Macedonia, and Serbia. In these administrations, new LGAPs entered into force in 2016 and 2017, with the aim of reforming the way administrative procedures are carried out. However, the reports of the European Commission (EC) and national civil society organizations point to problems with regard to the implementation of these laws, which implies slow progress in harmonizing special laws governing administrative procedures with the general provisions of LGAP. (...) All LGAPs

[21] *Conclusions,* Coordinating Body for Harmonization of Special Laws with the Law on General Administrative Procedure, *http://www.mduls.gov.rs/latinica/uskladjivanje-sa-LGAPom.php*, 27. 6. 2018.

[22] *Regarding the application of Article 214 of the Law on General Administrative Procedure,* the Coordination Body for Harmonization of Special Laws with the Law on General Administrative Procedure, Ministry of Public Administration and Local Self-Government, *http://www.mduls.gov.rs/latinica/uskladjivanje -sa-LGAPom.php*, 25. 8. 2024.

in the territory of the Western Balkans foresee a period of one to two years for the harmonization process, but in no country has the process been completed on time, and in most of them limited progress has been achieved so far."[23]

And the European Commission progress reports on Serbia,[24] which were made after the adoption of the new LGAP in connection with the harmonization of sectoral laws, point out, among other things: "The legal framework for the simplification of administrative procedures was established by the LGAP. (...) Serbia still needs to harmonize a significant number of sectoral laws that include special administrative procedures with the LGAP." (2018, p. 14-15); "The legal framework for the simplification of administrative procedures was established by the LGAP in 2016. However, there is still regulatory uncertainty for citizens and the economy due to significant delays in aligning sectoral legislation with this law." (2019, p. 14); "There is still regulatory uncertainty for citizens and the economy due to the continuous delay in aligning sectoral legislation with this law." (2020, p. 20); "Regulatory uncertainty for individuals and companies remains due to constant delays in harmonizing sectoral legislation with the LGAP. (...) The Secretariat for Public Policies has started implementing a program to simplify administrative procedures." (2021, p. 20).

And in the recent European Commission Report for 2022, the same conclusion is repeated: "The legal framework for simplifying administrative procedures has been established. However, regulatory uncertainty remains for individuals and businesses due to constant delays in aligning sectoral legislation with the Law on General Administrative Procedure. The capacities of the Ministry of Public Administration and Local Self-Government to effectively supervise the implementation of this law are still limited. In implementing the 'e-paper' program for the period 2019-2021, the Secretariat for Public Policies simplified 311 administrative procedures and digitized 64. However, this program is still not clearly connected with the process of harmonizing sectoral legislation, i.e. special procedures, with the Law on General Administrative Procedure." (p. 21).

### *4.4. Register of Administrative Procedures*

The Register of Administrative Procedures (RAP) was established by a special law[25] which "regulates the establishment, management, content, manner of use and other issues of importance for the management of the Register of Administrative Procedures." According to the RAP portal (www.rap.euprava.gov.rs), the Republic Secretariat for Public Policy (RSJP) is responsible for the part

[23] *Implementation of the Law on General Administrative Procedure in the Western Balkans,* SIGMA Program Document no. 62, Paris, 2021, pp. 5-6, *https://www.sigmaweb.org/publications,* 25. 8. 2024.

[24] Reports of the European Commission on Serbia's progress, Ministry of European Integration, *www.mei.gov.rs* , 25. 8. 2024.

[25] Law on the Register of Administrative Procedures, *Official Gazette of RS*, No. 44/2021.

of public administration reform that refers to the modernization and transformation of public administration services, which implies simplification, optimization and abolition of unnecessary administrative procedures in order to create better business conditions and administration in the service of citizens. The role of the Register is to ensure, together with the public administration bodies, that all information about the procedures through which citizens and the economy address the public administration is displayed in one place, in a simple and transparent manner.

The RAP portal registered 2,381 administrative procedures for the economy, 379 administrative procedures for citizens and 177 administrative procedures for public administration bodies: a total of 2,937 administrative procedures. When this number is compared with the data from the European Commission Report that a total of 311 procedures in sectoral laws are aligned with LGAP, it is more than obvious that the Law on General Administrative Procedure needs a "general service" in this matter.

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# EXPERIENCES RELATED TO IMPLEMENTATION OF THE GENERAL ADMINISTRATIVE PROCEDURE ACT**

*Abstract*

*In accordance with changed environment and needs, the current Act on General Administrative Procedure (GAPA) has introduced a number of improvements regarding the regulation of proceedings in administrative matters. It is harmonized with the Constitution of the Republic of Serbia and the principles of the European Administrative Space, and legal certainty has been greatly increased. In accordance with European trends, the concept of administrative matters has been significantly expanded. GAPA regulates the conduct or provides legal protection in connection with all administrative activities. The efficiency and cost-effectiveness of the procedure have been significantly increased, by introducing the obligation of administrative bodies to acquire and process data from official records, by foreseeing the institute of a single administrative place and by improving certain already existing solutions. Key prerequisites for successful implementation of the GAPA are the process of harmonizing special laws with the GAPA, functional analysis to ensure effective and economical handling and a uniform workload of officials, strengthening the autonomy and professionalization of officials and completing the interoperability of electronic administration. In order to fully understand positive and negative consequences of GAPA, it is necessary to adopt the methodology for monitoring implementation of GAPA, which was created a few years ago as part of the project of the German Organization for International Cooperation (GIZ) in cooperation with the Ministry of Public Administration and Local Government (MPALG). In addition, this methodology facilitates the analysis of professional training needs, and thus the planning of individual trainings for authorized officials. The priority in the coming period is harmonization of the Administrative Disputes Act (ADA) with GAPA, so that these inextricably linked laws are based on the same model and solutions and that the ADA provides the same level of protection to the parties. This would achieve the realization of one of the principles of the Resolution on Legislative Policy of the National Assembly, according to which interconnected laws are drafted and adopted at the same time, regardless of the fact that two ministries are responsible for them. In this way, terminology would be harmonized, problems arising in practice would be overcome, legal certainty, efficiency*

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*and cost-effectiveness would be increased, and thus the potential for non-compliance with the principle of trial within a reasonable time would be reduced.*

**Keywords:** Administrative Procedure, Administrative Matter, Legal Certainty, Silence of Administration, Efficiency and Cost-Effectiveness.

## 1. Initial Remarks

Previous General Administrative Procedure Act (GAPA)[1] was an example of quality regulation in the legal system of Serbia (before that, Yugoslavia). GAPA did not change often, so authorized officials and subjects to whom it applied had the opportunity to study it well.

However, changes on the economic, social and technical-technological level required the improvement of this important law. The immediate reasons were harmonization with the Constitution from 2006 and the legal *acquis* of the European Union, increasing legal certainty, creating assumptions for the use of new technologies and electronic communication of public administration bodies with each other and with parties, introducing new and improving outdated solutions, as well as increasing efficiency and cost-effectiveness of the procedure.[2]

In order to apply the new law and produce desired consequences, it is necessary to undertake timely measures and activities in all stages of the legislative process.[3] Before formulating new or amended solutions, reviewing the results generated by monitoring the application of the previous law, i.e. the situation in the area, has a key role. Namely, it is necessary to collect data and indicators on existing problems,[4] discover their causes and propose a model of regulation based on positive comparative and historical experiences, with adaptation to the national environment, needs, opportunities and level of society development. In addition to the professional dimension, the involvement of the widest range of interested parties and general public from the very beginning of the process enables all participants to understand the goals of the law and the instruments for their implementation, as well as to gain a sense of co-ownership over the legal project, which greatly facilitates the application of norms and reduces costs.

Regulatory impact analysis and consultations contribute to correct definition of regulations and measures for their implementation. Serbia is one of the

[1] *Official Gazette of the Federal Republic of Yugoslavia*, No. 33/1997-1, 31/2001-1 and *Official Gazette of Republic of Serbia*, No. 30/2010-140.

[2] Dobrosav Milovanović, Vuk Cucić, "Nova rešenja Nacrta zakona o opštem upravnom postupku u kontekstu reforme javne uprave u Srbiji", *Pravni život*, Vol. 64, No. 10, Tom II, 2015, p. 95.

[3] Dobrosav Milovanović, "Pretpostavke za primenu Zakona o opštem upravnom postupku", *Pravni život*, Vol. 67, No. 10, Tom II, 2018, p. 149.

[4] These are records, information and analyses available to state and other public administration bodies and organizations, business entities, citizens' associations, the media and the public, as well as various objections or praises from citizens that are collected in the most widely established ways.

first countries that produced a regulatory impact analysis of the GAPA, which the Regional School for Public Administration highlighted as an example of good practice. Also, the preparation of the analysis started from formation of the working group (which ensured its greatest use value) and not only when the draft law was drawn up - which is more an explanation of already adopted solutions, than it helps the law makers in deciding between different options.

The analysis showed that relevant data and indicators often do not exist, are not up-to-date or do not match in different records. That is why drafting of the GAPA was more difficult and analysis indicated that it is necessary to review the existence and content of the records and ensure their up-to-datedness, which is one of the key assumptions for conducting evidence based public policy.

The analysis helped to consider the characteristics of national context, and the multi-decade tradition of the model of regulation of administrative activities in Serbia, by taking also into account the principles of the European Administrative Space, the model law for the Western Balkans Region and comparative experiences. Furthermore, it provided strong arguments for retaining or introducing certain solutions that were not fully in accordance with the views of foreign experts.[5]

The quality of the law is largely ameliorated by early initiation of consultations on the broadest basis, which is of particular importance for GAPA, which applies a large number of officials in public administration, and to all citizens, legal entities and other participants in the procedure.[6]

The effective and economical application of quality laws and related regulations requires continuous harmonization of special laws with the GAPA. It also requires a coordinated set of measures and activities that establish an optimal organization of work based on functional analyses, ensuring professional application of regulations based on the possession of relevant competencies, knowledge and skills and a merit system in connection with evaluation and promotion. It is also necessary to ensure the use of modern information and communication technologies (ICT), providing citizens and other persons to whom the law applies, as well as officials who apply it, with information and clarifications about new rights and obligations or ways of their realization, etc.[7]

[5] An example of negative influence of foreign experts and the European Commission is the removal of the authority of the public prosecutor to file an appeal and extraordinary legal remedies when the law is violated to the detriment of public interest due to insufficient knowledge or illegal motivation of the authorities. Therefore, when amending the GAPA, these powers should be returned to the public prosecutor or his former role should be left to another body.

[6] Numerous discussions, round tables were held with participation of representatives of state authorities, independent bodies and experts, as well as consultative meetings with representatives of civil society, business, regulatory bodies, local self-government and the bar association. A regional conference was held with the Regional School for Public Administration. Several hundred representatives of state bodies, local self-government units, public services, the non-governmental sector and other interested parties participated during the public discussion.

[7] D. Milovanović (2018), pp. 149-151.

## 2. Increasing Legal Certainty and Equal Treatment in Administrative Matters

In connection with implementation of the GAPA and laws governing special administrative procedures,[8] it is necessary to harmonize administrative and administrative- judicial practice, with respect for autonomy of the administration and independence of the courts that act in administrative disputes.[9] Therefore, in the new GAPA,[10] the principle of legality is supplemented by the principle of predictability or legitimate expectations, which is one of the principles of the European Administrative Space. In fact, it is an expression of the constitutional principle of equality of citizens before the law and the constitutional provision guaranteeing equal protection of rights before the authorities. The provision of paragraph 3 of Article 5 of the GAPA stipulates that, when acting in an administrative matter, the authority also takes into account earlier decisions made in the same or similar administrative matters. The principle of predictability does not lead to introduction of a precedent system, because it does not rely on a single decision, but on uniform legal practice of a certain authority on a certain issue.[11] Also, the administrative practice does not become a formal source of law, because the authority can deviate from it, but according to the provisions of paragraph 4 of Article 141 of the GAPA, the explanation of the decision must also contain the reasons for which the authority deviated from the decision it previously made in the same or similar administrative matters.[12] In connection with the guarantee act, it is also necessary to ensure a unified decision of the first-instance, second-instance authorities, as well as the Administrative Court.[13]

Increasing legal certainty requires solving strategic dilemmas regarding the application of the GAPA[14] or the relationship and harmonization of special procedural laws with the GAPA.[15] Then, it is necessary to give well-founded opinions in a timely manner.[16] In order to ensure the quality and uniformity of opinions,

[8] The same mechanism could, analogously, be used to standardize administrative and administrative-judicial case law in connection with the application of substantive laws, whereby the Administrative Court and relevant ministries would play a key role.

[9] D. Milovanović (2018), p. 153.

[10] *Official Gazette of RS*, No. 18/2016-10, 95/2018-441 (Authentic Interpretation), 2/2023-44 (Constitutional Court).

[11] D. Milovanović, V. Cucić, p. 100.

[12] Namely, reasons why it is necessary in particular case, what is the difference compared to similar cases in which it was handled in a different way and that this will not lead to inequality of citizens before the law. The same approach was used in Montenegro during the adoption of a new law regulating the administrative procedure.

[13] D. Milovanović (2018), pp. 154-155.

[14] For example, it was the question of time validity of the new GAPA with regard to extraordinary legal remedies. See: Dobrosav Milovanović, "Vremensko važenje Zakona o opštem upravnom postupku", *Pravni život*, Vol. 66, No. 10, Tom II, 2017, pp. 267-281.

[15] Such as harmonization of terminology – for example decisions and conclusions, guarantee act, administrative contract or objection according to the meaning of the new GAPA.

[16] Currently, according to the Act on State Administration, they are not binding, although the new institutes of the guarantee act, that is, the act for implementation of the law from the Act on Inspection Supervision, introduce an element of obligation in connection with the application of the law to a specific factual situation.

the inclusion of all relevant authorities, officials and experts, as well as general public, impartiality and the protection of public and individual interests, a procedure for determining and publishing draft opinions should be foreseen, leaving an appropriate deadline for comments and suggestions from all interested parties. The final text of the opinion of the ministry[17] should be published in order to increase legal certainty, equality of interested persons and to facilitate the application of regulations.

In addition, it is necessary to ensure continuous monitoring of non-compliant administrative actions, to establish mechanisms for overcoming them and to publish harmonized practices. The source of information on non-harmonized application of the GAPA and/or special administrative-procedural laws could be public administration bodies and organizations, the Administrative Court, the Supreme Court, but also parties and other participants in administrative proceedings, professional associations and non-governmental organizations.

The GAPA significantly improved legal certainty regarding determination of the moment of initiation of the procedure. In the case of procedures initiated ex officio, but not in the interest of a party (which is the rule), it is necessary for the party to be informed, which is considered the moment of initiation of the procedure. Notifying the party is a key prerequisite for implementation of the principle of the party's right to make a statement, that is, the protection of procedural rights and active participation of the party, but also an expression of the principle of economy, as it avoids the annulment of the decision and re-conduct of the procedure. Also, the party expects that documents related to that procedure can be delivered to it. This legal solution does not create additional work or costs for administrative bodies. An invitation that they should send to a party, e.g. for an oral hearing or for its statement on decisive facts, according to the GAPA, can be part of the conclusion on the initiation of the procedure.[18] On the other hand, the new GAPA provides for the initiation of the procedure by the request of the party, which means that this moment no longer depends on when the authority made a conclusion or undertook some other action. This clearly determines which regulation was in force at the time of submission of the request and from that moment the administration's silence period begins to run.[19]

[17] MPALG (for GAPA), and relevant ministries (for special administrative-procedural laws).

[18] D. Milovanović, V. Cucić, pp. 101-102.

[19] A similar requirement for notifying the party of the formal initiation of the procedure is set forth in the Italian General Administrative Procedure Act (Act No. 241 of August 2, 1990, last amended in 2022). If there is no need to conduct a procedure with particular urgency, the commencement of a procedure is communicated through the delivery of a formal notice to the parties who will be directly affected by the final decision and to subjects who are legally obliged to intervene, as well as to the persons who may be indirectly affected by the act (if the authority can easily identify them). The notice shall indicate the object of the procedure, the competent authority, the office and the name of the person authorized for the procedure, the deadline within which the procedure shall be concluded and the remedies available against silence, the date of submission of the request (in case of procedures initiated by a party) and the office in which is possible to access the files. This notice represents the formal initiation of the procedure ex officio, while in case of proceedings initiated upon request of a party, the procedures starts in the date in which the request has been presented. The lack of compliance with

Legal security of the parties was also improved by introduction of the guarantee act institute,[20] as a written act by which the authority guarantees the party that it will issue an administrative act of a certain content if the factual situation and regulations[21] are not changed in the period between the adoption of the guarantee act and the submission of the request for issuance of the administrative act. True, in the GAPA it is a requirement that the guarantee act be stipulated by a special law.

### 3. Extension of the GAPA Subject-Matter

The previous GAPA only regulated the procedure for issuing administrative acts and public documents. The current GAPA expands the concept of administrative matter as to include other types of administrative action - guarantee acts, administrative contracts, administrative actions (all, not only the issuance of public documents) and the provision of public services. The GAPA regulates in detail the issuance of a guarantee act, while in the case of other types – especially administrative actions and the provision of public services – it primarily regulates legal protection against their illegal, inexpedient or inappropriate (non) undertaking. In order to avoid problems with interpretation and inconsistencies in practice, this broader concept of administrative matter is limited to administrative proceedings ("within the meaning of this law").

Administrative Disputes Act (ADA)[22] still contains a narrower concept of administrative matter, so that only administrative acts that are final in the administrative procedure can be challenged in an administrative dispute. Against other types of administrative action an objection may be filed in an administrative procedure, which is decided by an administrative act, which may then, depending on the position of the authority that issued that act, be challenged through an appeal in the administrative procedure and/or a lawsuit in an administrative dispute. Thus, both concepts of administrative matter, broader and narrower, can exist unhindered in the legal system.

The definition of an administrative matter is determined in two ways. First of all, in terms of content – "a single undisputed situation in which an authority, di-

such a requirement makes the final decision unlawful, and hence it has to be annulled by the Administrative Court, unless the public authority proves that the content of the decision would not have been different with the participation of the party. See: Marcello Clarich, *Manuale di diritto amministrativo*, 3rd edition, Bologna, 2013, pp. 243-246 and Domenico Sorace, *Diritto delle Amministrazioni pubbliche*, Bologna, 2007, pp. 308–311.

[20] A similar act is regulated by the German Administrative Procedure Act of May 25, 1976 (last amended in 2021), defining Zusicherung as the binding commitment of a public authority to later issue or to refrain to issue a specific administrative act. The nature of such kind of acts, which play an important role in practice (e.g. the commitment to issue a building permit) is controversial as they have, as the administrative act, binding nature, but they do not entail yet a rule for the case. According to the German APA, the provisions applicable to administrative acts apply mutatis mutandis to the guarantee act, but only on the condition that the legal and factual conditions remain unchanged. See: Hartmut Maurer, *Allgemeines Vervaltungsrecht*, 15. Auflage, München, 2004.

[21] Only if new regulations would change, cancel or annul administrative acts already issued.

[22] *Official Gazette RS,* No. 111/2009-39.

rectly applying laws, other regulations and general acts, legally or factually affects the position of the party by passing administrative acts, concluding administrative contracts, undertaking administrative actions and providing public services". Then, there is the possibility to prescribe by law that some other legal matters (e.g. deciding on compensation for damages in the event of an objection) will be decided in the administrative procedure, by providing that the administrative matter is as well "any other situation determined by law as an administrative matter". This brings the GAPA into line with the existing legislation and practice, which provides examples of decision-making on, for example, disputed, criminal matters in administrative proceedings (an example is the determination of administrative measures, as criminal sanctions, in competition protection proceedings).[23]

## 4. Increasing Efficiency and Cost-Effectiveness of Administrative Procedure

GAPA elevates the provision according to which the authorities acting in the administrative procedure are obliged to obtain all data on decisive facts that are kept in the official records *ex officio*, and that they may not require the party to provide them, to the level of principle. This solution saves time, money and significantly improves the party's position. This was especially evident during Covid-19 pandemic, when it enabled or facilitated determination of rights or obligations, while reducing the possibility of infection. Becoming a principle, this provision is binding in all administrative areas, regardless of the provisions of special regulations. The principle is elaborated in the part of the law that regulates the evidentiary procedure. The novelty is the prescription of misdemeanor liability for the head of an authority who requires the party to submit data that is kept in official records, as well as for the head of an authority who keeps official records and does not submit the requested data to the authority that conducts the administrative procedure in a timely manner. Giving citizens effective means of legal protection, through the introduction of misdemeanor liability, resulted from the lack of capacity of the Administrative Inspection.

The working group did not accept that the administration's silence is considered as an acceptance of the party's request as a general rule. First of all, it took into account solutions from comparative law, where this is generally foreseen in special administrative areas.[24] Secondly, such a provision would significantly

[23] D. Milovanović, V. Cucić, pp. 103-104.

[24] The Italian GAPA stipulates that in proceedings initiated at the request of a party, after the deadline for a decision has expired, the silence of the administration is equated with consent. However, the exceptions to this rule provided by the same Act are numerous, because silence does not constitute a positive decision, among other things, in procedures related to cultural or landscape heritage, life safety, inter-ethnic struggle, mutual security, citizenship, health or public safety, as well as in cases where EU legislation requires the adoption of formal administrative acts. Therefore, numerous authors noted that those provisions had negative consequences for legal certainty. Due to large number of exceptions, necessary for protection of important public interests, it is very difficult for a party to know

increase corruption, because the authorized official would ignore "selected cases" and thereby tacitly adopt the illegal and illegitimate demands of the parties. Thirdly, such a model would not speed up the procedure, because in all those cases where the authority intentionally or accidentally failed to reject the illegal and/or unjustified request of the party, the procedure would have to be conducted later by extraordinary legal means, in order to remove such an act. This would require significantly greater involvement of the public prosecutor in the detection of illegal work and corruption, especially in one-party administrative proceedings, which are the most numerous, where there is no opposing party to react to corruption and illegal work.

The GAPA introduced a termination deadline for filing an appeal in the event of the administration's silence, after which it is considered that the procedure has ended and that an appeal cannot be filed. With that solution, two problems that may arise in practice are solved. First, that the party filed the appeal unreasonably late, and that in the meantime there were changes to the regulations governing the administrative matter. The regulation, as a rule, contains transitional provisions, which stipulate that the regulation that was in force at the time of the initiation of proceedings shall be applied to proceedings initiated before their adoption or amendment. This means that by filing an appeal against the administration's silence, the party would remain in the regime of the regulation that was valid before, which can create confusion in the legal system and make the work of the authorities much more difficult. Second, the administration's silence does not end the proceedings. This means that, as a rule, the regulation that was valid at the time of its initiation will apply to that procedure even in the event of a change in the regulations. In the event that the changes are more favorable to the party than the previous regulations, the party will be prevented from taking advantage of the new regulation of the administrative matter because the procedure has not yet been completed.

The valid GAPA prescribes two novelties regarding appeals against the administration's silence. First, that such an appeal should be submitted directly to the second-instance authority, which avoids the first-instance authority of keeping the appeal and the case files with itself. Also, in that situation, the GAPA prescribes the misdemeanor liability of the person responsible for the authority. Second, the GAPA stipulates the obligation of the second-instance authority to decide on the merits of the administrative matter itself, when the first-instance authority, in connection with an appeal due to its silence, does not act on the order of the second-instance authority to make a decision. This prevents the party from going from the first-instance to the second-instance authority and vice versa, without a meritorious decision being taken.[25]

whether the failure to make a decision after the deadline means a decision allowing the proposed activity or whether an authority must be submitted for legal assistance. Moreover, in the case of so-called of tacit consent, the party does not know whether the authority assessed its request and considered it legal or did not examine the request, with a high risk that, in the latter case, the authority later revokes the tacit consent. See: M. Clarich, pp. 253-256.

[25] This does not burden the second-level authorities too much, because such a situation is very rare in practice. Second, the Administrative Court, in the case of passive non-compliance with the judgment, must decide in full

The number of cases before second-instance authorities and the Administrative Court due to the "silence of the administration" represents one of the biggest current problems. With regard to cases of unjustified silence, it is necessary to combine several measures: a) individualization of responsibility, b) greater use of electronic administration potential, c) improvement of the quality concerning professional training of officials, d) changes in the law governing transferred jurisdictions and expanding the authority to take over them when they are not performed in a timely manner. However, a large number of these cases arose solely due to the efforts of an extremely small number of lawyers trying to obtain fees for representation. This not only unreasonably damages the budget, but it also prevents or makes it difficult for the applicants of legal remedies, who really need such protection, to access justice. It is necessary to introduce the principle of prohibition of abuse of rights into the GAPA and ADA, to redefine the fee that is approved for submitting representation costs (taking into account the scope and type of effort), and to foresee forms of appeals, i.e. lawsuits regarding the silence of the administration (in accordance with the principle of helping an ignorant party).

Introduction of the possibility of the party waiving the right to appeal, in order for the decision to acquire finality as soon as possible, is based on the effective implementation of the party's rights and the cost-effectiveness of the procedure. This enables the parties to exercise other rights more quickly, realization of which depends on the occurrence of finality, that is, the finality of the decision. However, bearing in mind that this may be to the detriment of other persons, in the case when the first-instance authority rejected the request of a certain person to be recognized as a party, the GAPA provided that (in addition to any existing other parties) that person must waive the right to appeal in order for the decision to become final and binding. This avoids subsequent repetition of the procedure on the same basis and increases legal certainty. That legal solution represents a compromise between conflicting principles of cost-effectiveness, on the one hand, and the principles of efficacy and the right to be heard by the party (a person who believes that he should be a party to the proceedings), on the other hand.[26]

The data collected in the ex-ante analysis of the Draft GAPA showed that the first-instance authorities almost never use the possibility to replace their decision in the case of a well-founded appeal. The purpose of that institute is to increase the efficiency of the procedure, faster realization of rights and interests of the party, and less burden on second-level authorities. Therefore, the GAPA envisages the obligation of the first-instance authority to send to the second-instance authority its response to the appeal, in which it is obliged to evaluate all the allegations of the appeal. Thus, the first-instance authority, will more often

jurisdiction (with fulfilment of the conditions for the merits of the court's decision), while the second-instance authority of the previous procedure, where the second-instance authority is the previous criminal procedure, has the authority to annul the contested administrative act only and returned the case to the decision of the first-instance body, which left the party's rights and interests unprotected. D. Milovanović, V. Cucić, p. 106.

[26] *Ibidem*.

replace its decision, or it will make the job of the second-instance authority easier, which, along with the explanation of the decision, also receives a legal analysis of the appeal allegations from the first-instance authority.[27]

The system of extraordinary legal remedies has been redefined and simplified, in order to eliminate inconsistencies. First of all, the violation of the substantive law is now, instead of repealing, more adequately sanctioned by annulment of the decision. Second, it is possible for the second-instance or supervisory authority to remove their illegal acts for the same reasons and under the same conditions under which they can remove the illegal acts of the first-instance body based on official supervision. Third, theoretical difference between declaring a decision null and void and cancelling a decision without a time limit has been removed, because the consequences are the same - the act is removed as if it never existed in the legal system.[28]

Legal protection in the previous GAPA also had certain gaps. First, in the case of failure to provide instructions on the legal remedy to the party or giving the wrong instructions - the party only had the right to act according to applicable regulations or according to the instructions. If an ignorant party was instructed that it had no legal recourse, by the time it realized that this possibility existed, the short deadlines for appeals and lawsuits could have expired, as well as the objective deadline for restoring the previous situation. As assistance to a party is one of the basic principles of the administrative procedure, it is prescribed that the failure to instruct or wrongly instruct the party about the right to a legal remedy constitutes grounds for annulment of the administrative act. Second, the lack of a system of extraordinary legal remedies was the impossibility of removing administrative acts passed at the request of a party, which subsequently become an obstacle for the party to exercise another right. The need for introduction of such an extraordinary legal remedy is recognized in Croatian and Montenegrin law. Thirdly, in practice there was a problem that the body does not always have the procedural possibility to act on the recommendation of the Protector of Citizens (Ombudsperson), despite having committed an irregularity and wanting to act on the recommendation. That problem was solved by introducing a special basis for cancelling, revoking or amending an administrative act at the proposal of the Protector of Citizens. Thus, the recommendations of the Protector of Citizens did not become binding, but the authority was enabled to act on them whenever it considers them to be justified.

Finally, the system of extraordinary legal remedies in the previous GAPA was unreviewable due to the differences that exist in the basis for their use, the

[27] D. Milovanović, V. Cucić, p. 105.

[28] According to which annulment has a constitutive character, and declaring it null and void has a declarative character because, allegedly, in the latter case, the administrative act was null and void from the beginning and could not produce any legal consequences. This attitude is not supported in practice. An example is the legal or factual impossibility of executing a certain act, as one of the reasons for declaring the decision null and void, where the reasons can appear only after the adoption of an administrative act, for example, banning the hunting of a certain type of animal for which a hunting license was previously issued.

competence of the authorities that act on them, the authorization and deadlines for their declaration or use on official duty, according to the consequences of their use (change, cancellation, and annulment of the act). Although all differences cannot be removed, the system has been simplified by merging certain legal instruments and harmonizing the authority for submission and use ex officio, as well as prescribing the competence of first and second instance or supervisory authorities to decide on them.[29]

## 5. Establishment, Organization and Functioning Method of a Single Administrative Office

The single administrative office is the institute, which was formally introduced by the GAPA for the first time. However, even before the adoption of the GAPA, there were examples of its establishment. For these reasons, as well as due to flexibility necessary to reflect the specificity of the distribution of responsibilities for different life events, the GAPA did not start from the concept of strictly applying one model of a single administrative office, nor from the obligation to assign all rights and obligations related to a certain life event, i.e. they must take place in one place. Therefore, it is left to the public administration bodies to find the most optimal way of organizing these affairs, while enabling the rights of the parties to use the provided path or, if it is more convenient for them, to use the old ways of communication with each body separately. Regulation on a single administrative office was adopted in order to provide guidance to the authorities in finding optimal models and obtaining strategic guidelines for the establishment and functioning of a single administrative office. After that, for each life event for which a single administrative office is organized, it is necessary to conduct analyses, simplify procedures and determine the way of its organization and functioning. At the same time, it should be kept in mind that Serbia has set itself the task of accelerated digitization of administrative procedures and electronic exchange of data from official records, which means that physical location of unified performance of related tasks loses its importance. Also, for persons who are unable to use modern technologies, it is necessary to provide locations where they can hand in or receive paper submissions, i.e. written ones, whereby existing infrastructure and places where citizens usually exercise their rights or obligations should be used (such as the buildings of local self-government units, post offices), with the provision of mobile teams that would visit persons who are unable to reach mentioned locations on their own through the institute of administrative days. In addition, it is necessary to carry out a needs analysis and ensure the acquisition of necessary competencies, knowledge and skills of an officer working in a single administrative position. The conclusion is that most of the time, funds should not be directed to new buildings in which, as single administrative offices,

[29] D. Milovanović, V. Cucić, pp. 106-108.

related tasks would be performed, because the authorities involved are from different territorial-political units, with different statuses and roles in administrative action. The most significant investments of time and resources should go into analyses focused on the unification and simplification of procedures, ICT and software solutions, as well as on the competences, knowledge and skills required to provide relevant information, help parties in connection with the provision of e-government services, by receiving the submission, forwarding it to the competent authorities and informing the parties about the decisions made and the actions taken.[30]

## 6. Monitoring the Situation in the Field of Administrative Action

Effective and efficient monitoring of the implementation of the GAPA enables an overview of its real effects in relation to the set goals, creates an analytical basis for discovering problems in implementation and their causes, as well as for proposing, i.e. taking measures aimed at increasing positive effects. Bearing in mind that this is a law that is applied by the widest range of authorities in a large number of diverse administrative matters, it is necessary to pay special attention to the organization of monitoring work. Therefore, it is necessary to develop quality mechanisms for monitoring the implementation and reporting on the implementation of the GAPA.

Fulfilment of this measure implies the undertaking of several interrelated activities:

1) development of a methodology for monitoring and reporting on the implementation of the GAPA[31] and instructions for implementation of the methodology;[32]
2) reviewing and/or establishing records, determining the type of required data and ensuring their completeness and up-to-datedness, in order to provide the analytical basis necessary for quality monitoring of the situation;
3) full cooperation of state authorities and (non)state entities;
4) establishment of a unit for monitoring the implementation of the GAPA within the MPALG, strengthening its capacities and ensuring its sustainability;
5) more complete realization of the role of the administrative inspectorate for monitoring the situation and preventive action in connection with the implementation of the GAPA;

[30] D. Milovanović (2018), pp. 158-159.

[31] The methodology would also include a mechanism for monitoring the process of harmonizing special laws with the GAPA.

[32] This Methodology and Instruction can be used analogously to monitor the application of special procedural laws.

6) proposing measures to improve the performance of GAPA and special administrative-procedural laws through: amendments and additions to laws, improvement of the organization of administrative proceedings, review of instruction deadlines and their adaptation to real needs and possibilities, simplification of procedures, proposing general and special professional training programs adapted to real needs, introduction or improvement of ICT solutions, consideration of criteria for approving procedure costs, etc.[33]

The text of the Methodology for monitoring action in administrative matters based on the GAPA was prepared several years ago as part of the project of the German Organization for International Cooperation (GIZ) in cooperation with the MPALG, but unfortunately it has not yet been adopted. As a result, valuable data resources were lost during almost the entire period of application of the current GAPA, which could contribute to the discovery of problems, the reasons for their occurrence, and therefore the type and scope of measures necessary to overcome them.[34]

The assumptions for determining and implementing the Methodology are: correct determination of data and parameters necessary for monitoring administrative procedures; establishment, review or cancellation of records (in electronic form), updating of data, optimization of condition monitoring using ICT, as well as development of analytical knowledge and skills for condition monitoring in this area. Namely, civil servants need easily accessible and electronically processed relevant data, as well as knowledge and skills in finding the main options for approaching the problem and its causes in connection with the implementation of the GAPA, while pointing out the (dis)advantages of these options. Also, they should enable and encourage other subjects to make their creative contribution. In conditions of uncertainty, complex problems and specificities of special areas of public administration, openness to information about the state of implementation of the GAPA, new ideas, solutions and methods of their implementation have a special value. Namely, the knowledge and experience of persons authorized to act in administrative matters are often insufficiently used. Dealing with application problems on a daily basis allows them a realistic insight into the type and degree of problems, causes and possible solutions. Also, a significant contribution can be made by the holders of administrative and judicial control of the administration, whose participation not only facilitates the resolution of the specific issue, but also represents a high-quality form of professional training for all participants. The same applies to the cooperation of officials from different departments. Finally, knowledge in the field of EU accession is necessary in order to gain insight into the obligations assumed by the Stabilization and Association Agreement. Also, they are important for the negotiation process and the expression of the country's specificity within the EU framework. After accession, quality specialized knowledge and skills will be

[33] D. Milovanović (2018), pp. 159-160.

[34] For example, are changes in regulations, training of authorized officials, education of parties, organizational measures, improvement or increase of ICT interoperability, etc. required?

necessary for participation in EU working groups regarding the general administrative procedure, as well as in specific areas.

On the other hand, it is necessary to enable different interest groups to point out problems in practice and express their views and efforts, regardless of the degree of their "honesty" in revealing the real background of certain proposals. The "art" of a public servant is to find the one from various proposals that can optimally satisfy public interest, while respecting justified private and group interests.

In a number of countries there are problems related to implementation of regulations. Mistakes can occur already at the stage of determining public policy and choosing implementation methods, if the characteristics of specific environment, existing knowledge and skills, capacities of the information and communication system,[35] available financial resources, etc. are not taken into account. Conducted trainings have shown that general and special professional training requires a greater degree of compliance of the program with specific needs of dealing with administrative matters and improvement of coordination in determining the person and time of conducting the training. In this regard, as well as in connection with motivating employees, a key role is played by direct managers, who should be given professional support by employees or organizational units for professional training. Similar comments can be made in connection with monitoring the situation in the area of GAPA application, as well as proposing corrective measures based on the observed results. One of the key factors for successful functioning of any system is knowledge and skills for early detection and warning of phenomena that can cause damage, or reduce the level of realization of set goals.[36]

When developing the Methodology, it is necessary to take into account the provision of Article 211 of the GAPA, which stipulates that the authority is obliged to keep official records of decisions in administrative matters. It contains data on: the number of submitted requests, the number of proceedings initiated ex officio, the method and deadlines for solving administrative matters in first and second instance proceedings, the number of decisions that were annulled or revoked, and the number of rejected party requests and suspended proceedings. The above data would be kept and reported per administrative areas. Official records would be registered in the Meta-register - a unique public electronic register ensures interoperability and efficient and up-to-date record keeping.

## 7. Conclusion

The previous GAPA was an example of quality regulation in the legal system of Serbia (before that, Yugoslavia). It did not change often, so the authorized officials and subjects to whom it applied had the opportunity to study it well.

[35] An example is the problem that once appeared when issuing new identity cards and passports.

[36] In this regard, the Coordinating Body made strategic decisions and took positions on key issues of the implementation of the GAPA (e.g. the primacy of the norms of special laws in relation to the provisions of the GAPA after June 1, 2018, (non)retroactivity of extraordinary legal remedies, etc.).

In accordance with changed environment and needs, the current GAPA introduced a number of improvements in the regulation of proceedings in administrative matters. First of all, it is harmonized with the Constitution of the Republic of Serbia and the principles of the European Administrative Space, and legal certainty has been greatly increased. In accordance with European trends, the concept of administrative matter has been significantly expanded, regulating the conduct or providing legal protection in connection with all administrative activities. The efficiency and cost-effectiveness of the procedure have been significantly increased, by introducing the obligation of administrative bodies to acquire and process data from official records, by foreseeing the institute of a single administrative place and by improving certain already existing solutions.

Quality implementation of the GAPA requires a permanent process of harmonizing special laws with the GAPA, functional analysis to ensure effective and economical handling of administrative matters and an even workload of officials, as well as further strengthening of the independence and professionalism of officials who act in administrative matters.

In order to fully understand the consequences of the GAPA, it is necessary to adopt the methodology for monitoring the implementation of the GAPA, which text was created a few years ago as part of the project of the German Organization for International Cooperation (GIZ) in cooperation with the Ministry of Public Administration and Local Government (MPALG). In addition, this methodology facilitates the analysis of professional training needs, and thus the planning of individual trainings for authorized officials.

The priority in the coming period is harmonization of the ADA with the GAPA, so that these inextricably linked laws would be based on the same model and solutions and that the ADA would provide the parties with the same level of protection. This would implement one of the principles of the Resolution on Legislative Policy of the National Assembly, according to which interconnected laws are drafted and adopted at the same time, regardless of the fact that two ministries are responsible for them. In this way, terminology would be harmonized, problems arising in practice would be overcome, legal certainty, efficiency and cost-effectiveness would be increased, and thus the potential for non-compliance with the principle of trial within a reasonable time would be reduced.

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# PART THREE
# Current Issues of the Application of the Expanded Concept of Administrative Matters and Newly Introduced Legal Institutions

Predrag Dimitrijevic*

# REFORM OF EXTRAORDINARY LEGAL REMEDIES IN ADMINISTRATIVE PROCEDURE**

*Abstract*

*Extraordinary legal remedies have a special place and function in administrative proceedings. Every emergency remedy has a reason for its existence and its own special purpose. The analysis of the current LGAP shows that the following remedies should be omitted in the new administrative procedure: changing and annulling the decision related to the administrative dispute (because it is an integral part of the Law on Administrative Disputes-LAD), and other remedies should be reformulated or eliminated. The basic and most important remedy would be the repetition of the administrative procedure. In addition to it, there should be a maximum of two remedies, including the one that can be effectively intervened even after the conciliation if it is in the public interest, i.e. in order to protect the legality. This would significantly relieve, speed up and simplify the administrative procedure, and make the protection of the rights of the parties and the public interest significantly more efficient.*

**Keywords:** Extraordinary Legal Remedies, Reform of Administrative Procedure, Law on General Administrative Procedure (LGAP), Administrative Procedure.

## 1. Introduction

The reform of administrative procedures is an integral part of the complex processes of public administration reform, the main goals of which are efficiency and rationalization, professionalism and depoliticization, transparency and personal accountability, participation and satisfaction of citizens. One particular segment in the reform of the administrative procedure is the package of extraordinary legal measures.

Extraordinary legal remedies have a special function in administrative proceedings. Each extraordinary remedy has a reason(s) for its existence and its specific purpose, which justifies and makes it necessary either for the purpose of

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protecting a party or the public interest and general legality. The complex of reasons why each extraordinary legal remedy exists creates a special legal and factual environment in which they are activated and act with a special goal, which is why they are introduced into positive administrative procedural law. This special physiognomy of an emergency remedy is recognized by a careful analysis of legal reasons, actively legitimized persons, conditions and expiration dates.

## 2. Terminological Questions

The LGAP in Serbia does not use the term extraordinary legal remedies, but refers to special cases of removal and modification of decisions and provides for five extraordinary legal remedies: modification and annulment of a decision related to an administrative dispute, repetition of the procedure, annulment of the final decision, annulment of the decision and annulment, cancellation or amendment of a final decision on the recommendation of the Protector of Citizens.[1]

This raises a few questions. Are these legal remedies extraordinary remedies or are they as the legislator calls them – special cases of removal and modification of the decision? It is interesting that the predecessor of this LGAP did not use the term "extraordinary legal remedies" either. If we bear in mind that the general common assumption of all remedies is the acquisition of validity, then these are not extraordinary remedies because (most) they can be used even before the finality (narrower understanding). If the general prerequisite for the use of an emergency remedy is understood in a broader sense, as an extraordinary legal intervention, i.e. the treatment of a solution after the inability to use a regular remedy, which is usually an appeal, because it has been used or has not been used (omission), then it is an emergency remedy. It is necessary to determine what we consider to be an emergency remedy, that is, whether we accept a narrower restrictive understanding or a broader understanding. The legislator did not use the term emergency remedy, but uses a derogatory name for these legal remedies, which is perhaps more correct.

In its terminological "creativity", the LGAP has introduced a non-legal term "removal" as an attempt to replace the two precise legal terms "annulment and repeal" with this term. Removal is not a legal term. Objects or things can be removed, but not made changes in normative reality. The terms annulment and revocation are precise legal technical terms and there is a clear legal awareness of their legal effect. It's important to keep this in mind so that everyone understands it. Terminological rationalization without consensus and convention in the legal sphere is a failed attempt, which is difficult to understand.

[1] Zoran Lončar, "Vanredna pravna sredstva u upravnom postupku u Republici Srbiji", *Pravna riječ*, No. 58, Banja Luka, 2019, pp. 169-192; Predrag Dimitrijević, *Upravno pravo*, Medivest, Niš, 2022, p. 389.

### 3. Modification and Annulment of the Resolution of the Administrative Dispute

The authority against whose decision an administrative dispute has been initiated in a timely manner may amend or annul its decision until the end of the dispute, for those reasons for which the court could annul such a decision, provided that: (1) it accepts all the requirements of the lawsuit and (2) it does not violate the right of a party to the administrative proceedings or the right of a third party (Art. 175. LGAP). The first condition is restrictive because the authority, as the defendant, must accept all claims of the plaintiff (party) in order for the court to be able to end the administrative dispute on that basis. The U.S. Attorney's Office does not admit a partial admission of the complaint. A more flexible solution would be a partial admission of the lawsuit, with which the defendant can subsequently agree, but the LGAP does not allow this. Secondly, it is difficult to conclude that this is an extraordinary legal remedy. The aim of this legal intervention is to avoid further administrative litigation. Therefore, the authority is hereby given the opportunity to annul or amend its decision for the reasons stated in the lawsuit, as a result of which further conduct of the dispute is irrelevant.

This is a kind of self-control of the administration that increases the efficiency of the administrative procedure. Legally, it is a matter of reversing an incorrect act,[2] which contributes to a more economical clarification and resolution of administrative matters, but it cannot be said that such a procedure of the authorities has the character of an extraordinary legal remedy.

Secondly, this action of the management stems from the principle of economy and can be assumed. The court sends the complaint to the defendant authority for a response and gives it the opportunity to get acquainted with the reasons for the lawsuit, to see its own mistake and to change its own decision until the end of the dispute.

Third, the possibility of "amending an administrative act in connection with an administrative dispute" is contained in the Law on Administrative Disputes (Art. 29).[3] Until the end of the dispute, the competent authority against whose administrative act an administrative dispute has been initiated may amend its own decision or issue a new decision if the dispute is initiated due to the "silence" of the administration. If, in the course of court proceedings, the competent authority adopts another act amending or repealing the administrative act challenged by the lawsuit, or if, in the case of "silence of the administration", it subsequently adopts an administrative act, in that case, the competent authority is obliged to inform the prosecutor and the court in writing in a timely manner and to submit a new administrative act to the court. After that, the court calls on the plaintiff to state in writing within 15 days whether he is satisfied with the subsequently adopted act or remains with the lawsuit

[2] Mihailo Ilić, *Pravni akti*, Administrativno pravo i drugi radovi, Beograd, 1998, p. 211.
[3] Law on Administrative Disputes, *Official Gazette of RS*, No. 111/2009-39.

and to what extent, i.e. whether he extends the lawsuit to a new administrative act. If the prosecutor declares that he is satisfied with the subsequently adopted act or if he does not give a statement within 15 days ("silence" regarding the new act), the court issues a decision to suspend the court proceedings. If the prosecutor declares that he is not satisfied with the new act, the court continues the proceedings.[4]

Finally, there is a possibility that (Article 30 of the LAD) the defendant authority in its response to the lawsuit may amend and annul its decisions because it accepts some or all of the grounds of action. In this way, even without the LGAP, the LAD contains this possibility and a much more flexible solution, and for these reasons we believe that this legal remedy has no place in the LGAP because this legal possibility is contained in the LAD (Articles 29 and 30).

## 4. Repetition of the Procedure

1. Repetition (renewal) of the procedure is a legal remedy that can be used against final decisions, i.e. against decisions that have not become final. The repetition of the procedure has the character of an extraordinary remedy, because it can be used against all final decisions, on the other hand, it has the characteristics of an ordinal remedy, because it can be used against a decision against which an appeal cannot be lodged because it replaces an appeal.[5]
2. The reasons for recurrence are:
    1) if new facts become known or it is possible to take new evidence which, alone or in connection with previously presented facts or evidence, could lead to a different conclusion;
    2) if the decision favourable to the party is based on untrue claims that mislead the official;
    3) if the decision was issued by an unauthorized person, or the procedure was conducted or decided in it by an unauthorized person or a person who had to be exempted;
    4) if the collegiate body did not decide in the prescribed composition or if the prescribed majority of members of the body did not vote for the decision;
    5) if the person who could have had the status of a party was not given the opportunity to participate in the proceedings;
    6) if the party was not represented in accordance with the law;

[4] This fifteen-day deadline in the ZUS of the Republic of Srpska has been shortened to 8 days (Art. 23). Law on Administrative Disputes of the Republika Srpska, *Official Gazette of the Republic of Srpska*, No. 109/2005.
[5] Zoran Lončar, "Ponavljanje upravnog postupka", *Zbornik radova Pravnog fakulteta u Novom Sadu,* Vol 54, No. 1, 2020, pp. 195-214.

7) if the party or other participant in the procedure is not allowed to follow the course of the procedure in accordance with Article 55 of the LGAP;
8) if the decision was made on the basis of a false document or false testimony of a witness or expert or as a consequence of another criminal offense;
9) if the decision is based on a court judgment or a decision of another authority that has subsequently been modified, repealed or annulled by a final decision;
10) if the competent authority has subsequently and in essential points made a different final decision on the preliminary issue on which the decision is based;
11) if the Constitutional Court has established a violation or denial of a human or minority right and freedom guaranteed by the Constitution in the same matter, and has not annulled the challenged decision;
12) if the European Court of Human Rights has subsequently found in the same case that the rights or freedoms of the applicant have been violated or denied (art. 176 -182 . LGAP).

Reasons from the point. 1), 3), 5) and 7) may be a reason for repeating the proceedings at the request of a party only if they could not have presented them in the earlier proceedings through no fault of his/her own. Reasons from the point. 3) – 7) cannot be grounds for repetition if the party has presented them without success in the previous proceedings.

3. A repetition may be requested by a party, who must make probable the reasons for requesting a repetition of the procedure. The authority that made the final decision may repeat the procedure ex officio. The application is always submitted to the first instance body.

   A request for retrial does not delay the execution of the final decision. Exceptionally, if the execution would cause damage to the party that would be difficult to compensate, and the delay of execution is not contrary to public interest, nor would it cause greater or irreparable damage to the opposing party or a third party, the authority deciding on the request may postpone the execution of the final decision by way of a decision.
4. The proposal for repetition shall be decided by the authority that made the final decision (first or second instance). When a repetition of the procedure is requested in connection with the second-instance decision, the first-instance authority that receives the proposal for repetition shall attach all case files to the proposal and submit them to the second-instance authority.
5. A party may request a repetition of the proceedings within 90 days of becoming aware of the reason for the repetition, i.e. within six months of the publication of the decision of the Constitutional Court or the European

Court of Human Rights in the Official Gazette of the Republic of Serbia. The same time limits apply if the procedure is repeated ex officio. When five years have elapsed since the party was notified of the final decision, no repetition of the procedure may be requested, nor may the authority repeat the procedure ex officio.

6. The request for repetition of the procedure shall be decided by the authority that issued the final decision. The same authority repeats the procedure ex officio.

The competent authority shall reject a request that is not timely, inadmissible or that has been made by an unauthorized person or if the reason for the repetition of the procedure has not been made probable. If he does not reject the request, he further examines whether the reason for the repetition of the procedure could have led to a different solution and, if he finds that he did not, rejects the request with a decision.

If the competent authority does not reject the request, the decision allows the repetition of the procedure and determines the extent of the repetition. A decision that allows a repetition of the procedure postpones the execution of the final decision.

7. The procedure is repeated (in whole or in part) by the authority that allowed the repetition of the procedure. The second-instance authority may order the first-instance authority to repeat the procedure in its place and set a deadline if the first-instance authority can undertake them more economically.

After repetition, the competent authority may leave the final decision in force or issue a new decision annulling or revoking the final decision.

On the basis of the data obtained in the previous and repeated proceedings, the authority issues a (new) decision on the administrative matter, and thereby ,it may leave the decision, which was the subject of a repetition of the procedure, in force or replace it (annul or abolish) it with a new one. In the event of a substitution of the decision, the authority may annul or revoke the earlier decision.

An appeal may be lodged against the decision issued on the basis of the motion for repetition of the procedure, as well as against the (new) decision issued in the repeated procedure, if the decision was issued by the first-instance authority. If they are brought by a second-instance authority, an administrative dispute may be initiated.

## 5. Reversing the Final Solution

With regard to the manner of initiating the procedure and the reasons, we distinguish two situations (Art. 183. LGAP).[6]

[6] This remedy has synthesized the reasons contained in the previous two remedies: the annulment (and repeal) of the right of supervision and the declaration of nullity of the decision. Law on General Administrative Pro-

1. The second-instance authority or supervisory authority shall, at the request of a party or ex officio, annul[7] (in whole or in part) the final decision:
    1) if it was brought in a matter of jurisdiction (absolute lack of substantive jurisdiction);
    2) if its execution could cause a criminal offence;
    3) if its execution is not possible at all;
    4) if it was made without the request of the party, and the party subsequently did not agree to the decision; 8
    5) if it was made as a result of coercion, extortion, blackmail, pressure or illegal acts;
    6) if it contains an irregularity that is provided for by law as a ground for nullity; 9
    7) if the decision was issued by an authority that is not really competent, other than the Government, and it is not a ground for annulment referred to in point 1) - (relative actual lack of competence);
    8) if a final decision was previously issued in the same administrative matter by which the administrative matter was resolved differently (ne bis in idem);
    9) if the procedure for granting prior or subsequent consent or opinion of another authority was not properly carried out when the decision was adopted (art. 138 . LGAP);

cedure, *Official Gazette of the FRY*, Nos. 33/97 and 31/2001 and *Official Gazette of the Federal Republic of Yugoslavia*, No. *RS Gazette*, no. 30 /2010. After all, the consequences of annulment under the right of supervision as well as declaring the decision null and void are ultimately the same. By annulling the decision and declaring the decision null and void, the legal consequences that the decision has produced are also nullified. There is retroactivity in both cases. Zoran Lončar, "Poništavanje i ukidanje rešenja u upravnom postupku", *Pravni život*, Vol. 68, No. 10, 2019, pp. 255-268.

[7] This was provided for by the LGAP of the Kingdom of Yugoslavia, so that the ministries could declare null and void their own final decisions. It is useful for decisions to be declared null and void for existing reasons through some form of supervision by a higher level authority. This is carried out ex officio, but also at the proposal of the party, i.e. the public prosecutor, bearing in mind that it is in the general interest that the solution, with such a violation of legality, be removed as soon as possible, and that the administration can first notice such acts and react most effectively.

[8] This is a legal remedy that is used only against decisions that contain the most serious forms of illegality, i.e. decisions that already at the time of adoption had such a defect that cannot be remedied even later. These solutions can never be validated, i.e. acquire legal force over time. An exception is the case where the decision was made without the request of the party, and the party subsequently, explicitly or tacitly, accepted such a decision. Zoran Tomić, *Pravno nepostojeći upravni akt*, Pravni fakultet u Beogradu, Beograd, 1999.

[9] The existing grounds for nullity generally have their justification, and are also contained in the regulations of other countries (Austria, Poland, Germany). Only the first reason could be debatable. The reason for the nullity of the solution is the so-called a serious form of violation of substantive jurisdiction that exists in the event that an administrative body resolves a matter from the jurisdiction of the court or on a matter that cannot be resolved at all in administrative proceedings. This had its justification, given that the current law also provides for a lighter form of violation of substantive jurisdiction, which is why the decision could be annulled under the right of supervision. We believe that the violation of substantive jurisdiction should be "broadly" placed, so that any violation of substantive jurisdiction can be a reason for declaring the decision null and void. In the laws of other countries, the infringement of substantive jurisdiction forms a single category and as a result of such infringement the act is deemed null and void.

10) if the decision was issued by a non-competent local authority;
11) if the decision does not contain at all or contains incorrect instructions on the legal remedy.

2. The second-instance authority or supervisory authority shall annul the final decision ex officio (in whole or in part): if it does not apply a substantive law, other regulation or general act at all or has not been properly applied.

The decision will be annulled within one year of the final decision. The decision will be cancelled for the reasons stated in the paragraph. 1 – 6. always (no deadline), within five years from the finality of the decision for the reasons stated in para. 7 – 9, and for the reasons stated in para. 10 and 11 within a year of the final decision.

No appeal is allowed against the decision on annulment, but a lawsuit in an administrative dispute.

## 6. Cancellation of the Decision

The revocation of the decision does not nullify the legal consequences produced by the decision, but prevents their further effects.[10] This remedy is the result of an internal hierarchical relationship in the administration. Although the "new" LGAP does not mention official supervision, it is the essence of this remedy. Unlike the previous one, this remedy can be used to cancel enforceable and final decisions. The second-instance or supervisory authority may, at the request of the party or ex officio, revoke the decision (and in part):

1) if it has become enforceable, for the purpose of eliminating a serious and imminent danger to human life and health, public safety, public peace and public order, or for the purpose of eliminating disturbances in the economy, if the purpose of the revocation cannot be successfully remedied by other means that less affect the acquired rights ("extraordinary revocation");11
2) if the decision is final, and it is requested by the party at whose request it was made, and the revocation is not contrary to the pub-

[10] This extraordinary remedy was created by synthesizing two remedies from the previous LGAP: extraordinary revocation of the decision and revocation (and modification) of the final decision with the consent or at the request of the party. The General Administrative Procedure Act, *Official Gazette of the Federal Republic of Yugoslavia*, No. 33 /97 and 31/2001 and *Official Gazette of RS*, No. 30/2010.

[11] Since this is a way to protect the public interest, it is sufficient that the decision is enforceable, and it is understandable that the abolition on this basis can also be applied to final, i.e. final decisions. This extraordinary remedy has its full justification, bearing in mind the primary objective of the administration's action, and therefore it has found its place in the legislation of other countries. Austrian General Administrative Procedure Act (AVG, para. 68) is familiar with such an institute, but since it is a question of repealing and modifying acts by which rights have been acquired, the "higher interest" is reduced to a minimum. According to that Law, the abolition of decisions on this basis is possible only "in order to eliminate conditions that endanger the health and life of people and in order to eliminate damage to the national economy". This should be borne in mind, given that it is a matter of repealing an act that constitutes a subjective right, which makes it impossible to enjoy a legally recognized right.

lic interest or the interest of third parties ("revocation of the final decision at the request of the party");

3) on the basis of a special law.

If there is no second-instance or supervisory authority, the authority that issued the first-instance decision shall revoke the decision, at the request of the party or ex officio (Article 184).

The abolition of executive decisions is carried out in order to protect important public interests, which the law exhaustively enumerates. This remedy is used against solutions that are not illegal, but are dangerous to public order due to changed circumstances (rebus sic stantibus). The extraordinary abolition is activated when the so-called extraordinary circumstances. This emergency remedy is declared ex officio (principle of officiality) and in principle without time limit. In practice, however, this time is limited because this remedy can be used from the moment of the execution of the solution, to the moment of its execution. Failure to do so would have serious social consequences. An administrative act that has become enforceable becomes dangerous and needs to be repealed. Repeal is the last available legal avenue to repeal such an administrative act. The consent of the party is not required for the cancellation of the decision of the authority, although the cancellation of the decision is, as a rule, to its detriment. A party has lawfully acquired a certain right, and in this case it loses it in whole or in part.

The authorisation authorization to apply this remedy is conditional on the absence, in the present case, of a more suitable way of achieving the envisaged objective, which would be less prejudicial to the acquired rights of the parties.[12]

Therefore, if the authority revokes the enforceable decision with its decision, and there was a more favourable way for the party, which would less interfere with its acquired rights, the decision on extraordinary revocation will be illegal. The decision on abolition specifically respects the principle of protection of the public interest in question, but indirectly takes into account the acquired rights.[13]

The revocation of the decision is realized at the request of the party and ex officio (official maxim) of the competent authority, without time limit. The authority is authorized to take such extraordinary administrative procedural measures (actions) in the case when, at its discretion, it is necessary to preserve the protected public interests. Here we can once again see the "natural connection" between the public interest and discretionary assessment.

[12] The abolition of the decision is the last available way to remove the administrative act in a specific case in order to protect the public interest. Zoran Tomić, Vera Bačić, *Komentar Zakona o opštem upravnom postupku,* Službeni list, Beograd, 1988, p. 409.

[13] In this regard, the question of the relationship between the public interest and acquired rights arises. It can be noted that the public interest is stronger than the principle of protection of acquired rights, because the public interest must ultimately be protected at the cost of violation or endangerment of acquired rights. If, by revoking the decision, the party is deprived of a legally acquired right (e.g., due to the spread of the epidemic, an object under construction for which the party has obtained a building permit must be burned), the party that suffers damage as a result of the cancellation of the decision is entitled to compensation for the actual damage and not for the lost profit.

The decision may also be revoked partially, to the extent necessary to eliminate the danger or to protect the stated public interests.

The LGAP did not provide a definition of public interest, but it defined the concept of public interest by exhaustively listing the goods that are protected.[14] The types of legal modalities of public interest are: [15] grave and immediate danger to human life and health, public safety, public peace, public order,[16] public morality (and not morality in general or private morality) and disturbances in the economy.[17]

## 7. Annulment, Cancellation or Modification of a Final Decision on the Recommendation of the Protector of Citizens

This is a new legal remedy. On the recommendation of the Protector of Citizens, an administrative authority may, in order to comply with the law, annul, revoke or amend its final decision, if the party (or several) agrees to it and if the interest of a third party is not offended.

The Protector of Citizens does not determine the illegality of an act, but only gives a recommendation for its removal (annulment or repeal) and amendment. The final judgment on this is made by the competent authority. The authority is obliged to take the recommendation into consideration, to act on the recommendation, but not to act on the recommendation, i.e. to annul, revoke or amend the final decision. Recommendations are not mandatory for the body. With this legal remedy, a legal path has been designed for the Protector to turn to the authority and propose a change in a legally valid legal situation if the parties agree with it and it does not harm third parties.[18]

The purpose of this legal intervention is to comply with the law. If the authority considers that it should not act on the recommendation of the Protector of Citizens, it is only obliged to inform him, which "puts an end" to the intervention of the Protector. [19] It is not necessary to make a formal decision rejecting the recommendation (art. 185. LGAP).

[14] Slavoljub Popović, Stevan Lilić, Jovanka Savinšek, *Komentar Zakona o opštem upravnom postupku*, Savremena administracija, Beograd, 1998, p. 609.

[15] Predrag Dimitrijević, *Javni interes i upravni postupak*, Aktuelna pitanja jugoslovenskog zakonodavstva, Budva, 1999, pp. 109-132.

[16] Public interest and public order are two different categories. However, public order appears as a type of public interest when public order is the object of administrative legal protection.

[17] These are general ex lege standards that should be covered in specific life situations. Secondly, but no less important, is the question of the possibility and procedure of control and verifiability of the existence of a real link between specific legally relevant factual situations with general legal standards of public interest in each individual administrative matter.

[18] Zoran Tomić, Dobrosav Milovanović, Vuk, Cucić, *Praktikum za primenu zakona o opštem upravnom postupku*, Beograd, 2017, pp. 240-268.

[19] Zoran Tomić, *Komentar Zakona o opštem upravnom postupku*, Službeni glasnik RS, Beograd, 2017, p. 691-692; Z. Lončar, pp. 169-192..

This legal remedy was created as an ideological cumulation of the previous two remedies: the request for the protection of legality[20] and the declaration of nullity of the decision (due to the lack of a deadline) because the remedy was placed in the hands of the Protector of Citizens and not the Public Prosecutor and is not limited by the deadline. The powers given to the Protector of Citizens by the LGAP are reminiscent of the previous powers that the public prosecutor had on the basis of a request for the protection of legality (which has since been deactivated in the administrative procedure due to possible destabilization of legal certainty).[21]

## 8. Conclusion

In the administrative procedure, there is an extremely large number of extraordinary legal remedies, unlike other legal procedures such as criminal and civil proceedings. Practice shows that many of legally prescribed emergency remedies are very rarely used because the conditions for their activation are such that they can hardly be met. The analysis of the current LGAP shows that the following remedies should be omitted in the new administrative procedure: changing and annulling the decision related to the administrative dispute, and other remedies should be reformulated or eliminated. This would significantly relieve, speed up and simplify the complicated administrative procedure, and make the protection of the rights of the parties and the public interest significantly more efficient. The basic and most important remedy would be the repetition of the administrative procedure. In addition to it, there should be a maximum of two remedies, including the one that can be effectively intervened even after the conciliation if it is in the public interest, i.e. in order to protect the legality. We believe that instead of the Annulment of the Final Decision and the Revocation of the Decision from the new LGAP, we should restore the Annulment and Revocation under the right of supervision, which in one place contains the reasons that were broken in the new LGAP, and also return the old name of Advertising the Decision null and void, the reasons for which are hidden and incorrectly placed in the Annulment of the Final Decision. So we would finally have three extraordinary remedies: Repetition of the procedure, Cancellation and revocation by right of supervision and Declaration of nullity of the decision. In addition, we consider it appropriate to restore the Protection of Legality as a fourth remedy in the event that legality in the public interest is to be established after the final decision, but with the consent of the

[20] This extraordinary remedy does not exist even under the Law on General Administrative Procedure, *Official Gazette of the Federal Republic of Yugoslavia*, Nos. 33/1997 and 31/2001 and *Official Gazette of the Republic of Croatia*. *RS Gazette*, No. 30/2010. However, some legislation still knows it (e.g. ZUP Republika Srpske, Law on General Administrative Procedure, *Official Gazette of RS*, No. 13/2002). Предраг Димитријевић, *Управно право*, Ниш, 2014, p. 453.

[21] Stevan Lilić, *Zakon o opštem upravnom postupku, Anatomija zakonskog projekta sa modelom za generalnu rekonstrukciju ZUP-a*, Beograd, 2019, p. 50.

party. This remedy should be placed in the hands of an administrative authority to act ex officio.

A modern administration and an efficient administrative procedure raises the question of practical and realistic purpose with the central requirement that citizens exercise their rights and protect themselves, but also the society itself (public interest), as quickly, simply and cheaply as possible. These are the postulates of administrative justice.

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# REDEFINISANJE VANREDNIH PRAVNIH SREDSTAVA U UPRAVNOM POSTUPKU

*Sažetak*

*Analiza važećeg ZUP-a pokazuje da u upravnom postupku treba izostaviti sledeće lekove: menjanje i poništavanje rešenja u vezi sa upravnim sporom, a ostale lekove preformulisati ili eliminisati. Osnovni pravni lek bi bio ponavljanje upravnog postupka jer je njegov smisao zaštita interesa stranke nakon konačnog rešenja zbog saznanja i nastanka nekih novih činjenica, kako bi se novo faktičko ili pravno stanje uvažilo i usaglasilo sa konačnom pravnom situacijom. Smisao ostala dva leka bi bio da nakon konačnog ili pravosnažnog rešenja budi zaštićeni primarno javni interes ili interes zakonitosti, a sekundarno i interes stranke. To bi značajno rasteretilo i ubrzalo upravnu proceduru. Rad želi da ukaže da su terminološka pitanja važna i da ona ukazuju na suštinska pitanja. Želimo da pokažemo da «novi» ZUP (2016) nije razrešio stara pitanja već ih je prikrio, terminološki pa i suštinski zamrsio i time otišao dva koraka unazad. On je promenio terminologiju vanrednih lekova na gore i sve razloge za njihovu upotrebu sačuvao (pretumbao), tako da se ni pravni stručnjaci ne mogu da snađu a kamoli građani.*

**Ključne reči:** vanredna pravna sredstva, reforma upravnog postupka, paravosnažnost, Zakon o opštem upravnom postupku, upravni postupak.

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# SINGLE ADMINISTRATIVE POINTS OR ONE-STOP SHOPS? - ANALYSIS OF LEGAL FRAMEWORK AND APPLICATION OF THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE'S NEW INSTITUTE***

*Abstract*

*This paper deals with the application of the concept of a Single Administrative Point (SAP) as one of the new legal institutes introduced by the 2016 Law on General Administrative Procedure (LGAP) of the Republic of Serbia. The SAP should represent a key contact point for providing public services to citizens and entrepreneurs, without changing the competencies and internal relations of organizational units within administrative bodies. Particular attention is paid to the SAPs established in Serbian local governments. The second half of the paper addresses the challenges and potentials that the SAP can offer for further improvement of administrative efficiency, as well as the specific conditions, criteria, and standards for the process of establishing a SAP as provided by the newly adopted Regulation of the Government of the Republic of Serbia.*

**Keywords:** SAP, LGAP, electronic administration, efficiency, public administration.

## 1. Introduction

The concept of "one-stop shop" in public administration has gained significant attention in academic literature and government practices in recent decades. This model aims to provide citizens with a single access point for obtaining diverse services in a convenient and user-friendly manner. This concept has been widely discussed and implemented in various national and local contexts, reflecting its global relevance.[1] The OSS approach is designed to integrate

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[1] Ariane Hegewisch, Henrik Holt Larsen, "Performance management, decentralization and management development: local government in Europe", *The Journal of Management Development*, Vol. 15, No. 2, 1996,

administrative services, customer interfaces, and web-based services to ensure transparency and cross-service integration. It is considered an effective model for enhancing service delivery and meeting the diverse needs of citizens in a holistic and person-centered manner. The successful implementation of one-stop government requires a deep understanding of user preferences and the development of integrated information management systems.[2] Moreover, the OSS model necessitates the reorganization of bureaucratic structures and the development of cross-cutting skills to ensure effective process management in the public sector.[3] The decentralization of service delivery and the establishment of one-stop shops have been key components of government reforms in various countries, including many European ones.[4]

OSS can be considered a centralized system for providing services to citizens and businesses by public administration. The goal is to ensure simpler, more efficient, and more transparent access to various administrative services at one location, eliminating the need to approach different institutions and bodies. It is an organizational, communicational, procedural, and legal innovation used globally by public administrations. The administration, and the entire public sector, can no longer be a complicated system of "counters and offices" which only true, experienced experts can and do manage to navigate. Instead, it should become a simple, "friendly" system where all businesses, rights, and legal interests are "completed" in one place.

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[2] E. Forkuo, S. Asiedu, pp. 1-14; P. Verdegem, L. Hauttekeete, p. 258; Jovana Anđelković, Ivan Nikčević, Milica Krulj Mladenović, "One-Stop Shop in Public Administration", *Управление и Образование*, Vol. 18, No. 4, 2022, Burgas, Bulgaria, pp. 19-31.

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[4] Ivan Koprić, "Jedinstveno upravno mjesto (one-stop shop) u europskom i hrvatskom javnom upravljanju", *Građani, javna uprava i lokalna samouprava: povjerenje, suradnja i potpora* (eds. Ivan Koprić, Anamarija Musa, Teo Giljević), Institut za javnu upravu, Zagreb, 2017, pp. 561-573.

## 2. Basic Concepts, Organizational Principles, and Purpose of SAP

One-stop shop (OSS) and Single Administrative Point (SAP) are both concepts aimed at streamlining public service delivery, but they differ in scope and approach. The OSS model involves co-located staff delivering multiple administrative services, integrating customer interface, and electronic cross-service integration. On the other hand, a SAP refers to a singular access point for information and service transactions. The OSS concept is a global initiative that accelerates public and private service delivery at citizens' doorsteps. It has been implemented in various countries, as a means to enhance service delivery. In our view, the SAP is focused on providing citizens with a centralized access point for information and services. It can be observed as a first OSS in its first phase of development.

On the other hand, OSS and SAP are different from a service center (SC). Many Serbian administrative bodies have already established exceptional service centers, but these are not SAPs. The essence of an OSS and a SAP lies in connecting various procedures from original jurisdiction, or from original and delegated jurisdiction. The unification of administrative procedures into a SAP should be preceded by their optimization, simplification, and standardization. A service center is just the first point of contact between citizens and the SAP.[5]

The OSS model is part of the New Public Management (NPM) approach, which emphasizes citizen-centric service delivery and efficiency in the public sector. It reflects a shift towards digital government. This concept originates from the doctrine of administrative simplification, legally expressed in Directive 2006/123/EC on services in the internal market.[6]

According to this Directive: "In order to further simplify administrative procedures, it is appropriate to ensure that each provider has a single point through which he can complete all procedures and formalities (hereinafter referred to as 'points of single contact'). The number of points of single contact per Member State may vary according to regional or local competencies or according to the activities concerned. The creation of SAP should not interfere with the allocation of functions among competent authorities within each national system. Where several authorities at regional or local level are competent, one of them may assume the role of point of SAP and coordinator. SAP may be set up not only by administrative authorities but also by chambers of commerce or crafts, or by the professional organizations or private bodies to which a Member State decides to entrust that function." Among the elements of administrative simplification required by the Directive are a) the establishment of SAP, b) the publication of all information about competent bodies and administrative procedures, c) the electronic means

[5] J. Jerinić, D. Vučetić, M. Stanković, p. 314.

[6] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006.

of participation in procedures and the possibility of conducting and completing procedures entirely electronically, d) the principle of implied approval if decision-making time limits in administrative procedures are exceeded, and other measures. As Koprić states, based on the Directive, every member country has been obligated since December 2009 to establish a SAP, which all countries have done. At first, the focus of established SAPs were businesses, not citizens (B2G prior to C2G).[7]

Organizational principles related to the SAP in the context of administrative organizations and procedures raise key questions regarding the implementation of SAP, focusing on the personal, legal, and procedural aspects. Other, more general principles of SAP, include cooperation and collaboration, centralization and integration, digitization, simplification and efficiency, and transparency.

## 3. Positive Legal Framework for the SAP and Discussion on Government Regulation on SAP

Basic legal framework for the SAP comprises the following legal references: Article 42 of the 2016 LGAP,[8] which establishes the basis for SAP, and Article 4 of the 2018 E-Government Law,[9] defining the electronic SAP as a portal or software solution for administrative procedures and Regulation on the specific conditions, criteria, and measures for determining a single administrative point, as well as the manner of cooperation of competent authorities in relation to the proceedings and performing tasks at a single administrative point. According to the provision of Article 42 of the LGAP, a party addresses a SAP if the realization of one or more rights requires the action of one or more bodies, and the establishment of a SAP, according to the provision of paragraph 2 of the mentioned article, does not affect the competence of the bodies nor the right of the party to address the competent body directly. The subsequent provisions of this article define the basic functions of the SAP. These are:

- instructing the applicant about what is necessary for the body to act upon the submission,
- receiving the submission and delivering it to the competent officer,
- informing the submitter about the actions taken and decisions made.

These functions can also be performed electronically, by mail, or in another convenient manner, and the deadlines for decision-making begin from the time a proper request is submitted.

On October 27, 2023, Government of the Republic of Serbia issued a Decree that outlines the procedures for establishing a "Single Administrative Point."

[7] I. Koprić, p. 566.

[8] Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, Nos. 18/2016, 95/2018 authentic interpretation, and 2/2023 Constitutional Court decision..

[9] Law on Electronic Government, *Official Gazette of the Republic of Serbia*, No. 27/2018..

Its full title is *Regulation on the specific conditions, criteria, and measures for determining a single administrative point, as well as the manner of cooperation of competent authorities in relation to the proceedings and performing tasks at a single administrative point*.[10] This regulation includes details on the conditions, criteria, and measures for setting up such points, focusing on streamlining administrative processes through coordinated actions and efficient information exchange among various governmental bodies and organizations.

The Regulation consists of nine Articles, which govern the following aspects: 1. subject of the Regulation; 2. concept of the SAP; 3. establishment of the SAP; 4. conditions for establishing the SAP; 5. criteria for Establishing the SAP; 6. measures for Establishing the SAP; 7. User Satisfaction Assessment; 8. method of Cooperation among Competent Authorities.

Article 1 of the regulation defines the conditions, criteria, and measures applicable in the process of establishing a single administrative point. This point acts as a unified contact for cooperation among competent authorities regarding the proceedings and execution of tasks at this single administrative location. The regulation applies to state bodies and organizations, bodies of provincial autonomy, local government units, institutions, public enterprises, special bodies for regulatory functions, and legal and physical entities entrusted with public powers. The tasks of the single administrative point are conducted both physically (in paper form) and electronically, through a web portal or other software solutions, enabling electronic proceedings in a consolidated manner as specified.

Article 2 of the Regulation defines the concept of a "single administrative point" as a location where various governmental bodies can process requests in either paper or electronic form. This facility is designed to facilitate the fulfillment of one or more rights or legal interests of users of public services, addressing their needs efficiently.

Article 3 of the Regulation allows for the establishment of a SAP by various bodies, regardless of whether their jurisdiction is original, delegated, or falls under local, provincial, or national authority. An entity can set up such a point for multiple related and interconnected tasks within its jurisdiction.

Article 4 of the Regulation stipulates the conditions for establishing a physical SAP. It mandates legal authority, suitable space ensuring easy access for submitting requests, obtaining information, or performing necessary actions, and adequate technical equipment with software for document exchange. Additionally, it requires a data exchange system and staff trained for direct public interaction. Notably, it emphasizes accessible facilities for persons with disabilities, children, and the elderly, aligning with regulations for unhindered movement and access.

According to Article 5, establishing a SAP requires procedures that enable the realization of appropriate rights for interested parties through competent

[10] Uredba o bližim uslovima, kriterijumima i merilima za određivanje jedinstvenog upravnog mesta, kao i načinu saradnje nadležnih organa u vezi sa postupanjem i obavljanjem poslova na jedinstvenom upravnom mestu, *Official Gazette of the Republic of Serbia*, No. 93/2023.

authorities. This article implies an obligation to ensure that the administrative processes at these points are not only efficient but also effective.

According to Article 6 of the regulation, the criteria for establishing a SAP are:

- establishing a SAP results in savings of budgetary and public funds;
- establishing a SAP results in time and cost savings for parties in procedures;
- procedures are resolved more efficiently and economically;
- parties are given easier access to information about the status of cases and similar matters;
- savings for parties as mentioned in point 1 of this article are measured based on the average time required to resolve procedures, before and after establishing the SAP, as well as the average costs (fees, reimbursements, travel expenses, and other expenditures) incurred by parties in these procedures.

The first, draft version of Article 6 was as follows:

"The criteria indicating the justification for establishing a SAP are that its establishment results in savings of budgetary and public funds, more efficient and economical resolution of procedures, and easier provision of information about case statuses and similar matters to parties at any time."

Upon reading the draft and consulting with one of the members of the commission that prepared the draft, one of the paper authors wrote a proposal to the competent Ministry and consequently Serbian Government for amending Article 6 of the Regulation. He suggested consideration of cost and time savings for the parties, in addition to the existing criteria for establishing a SAP. The amendment aimed to provide a more comprehensive evaluation of the effects of introducing such a point, considering not only the savings for government bodies but also the financial impact on the companies and citizens as service users. This proposition reflects an intention to focus on the users' interests, enhancing the conditions for their rights and interests, and ensuring a holistic analysis of the justification for establishing these administrative points. The author proposed a new version of Article 6 which was completely adopted by the Government of the Republic of Serbia.

Article 7 of the regulation mandates continuous user satisfaction surveys through questionnaires at the SAP, online surveys, or citizen interviews. The entity establishing this point must annually submit a report to the relevant ministry, detailing quantitative indicators and statistical data such as the number of applications received, decisions issued, certifications etc.

Article 8 of the regulation highlights the importance of cooperation among competent authorities at the SAP, focusing on establishing infrastructure for reliable and secure data exchange, particularly in electronic form. This approach underscores the move towards digitization and interconnectivity in public administration.

## 4. Single Administrative Points in Serbian Local Governments

Within Serbian local government units, nine types of services have been implemented within the SAP (OSS) framework with the help of Ministry of Public Administration and Local Self-Government and the Standing Conference of Towns and Municipalities (SCTM). These include: social assistance and support for energy-vulnerable consumers, child allowance and support for energy-vulnerable consumers, registration of death facts in the local tax administration registers, change of personal name and updating data in public enterprises' records, change of personal name and updating data in local tax administration records, consolidation of financial support (compensation) for newborn children provided by local self-government units within a SAP (e-Baby), child allowance and reimbursement of costs for a preschool institution, social assistance and subsidization of communal services' prices, and submission of property tax declaration and change of data for communal services users. One can see the diversity of administrative functions addressed by SAP, demonstrating its broad application in simplifying and centralizing various public services.

Significant financial savings are achieved through the implementation of the SAP. The total annual savings for pilot local government units amounted to 4,968,428 dinars. The savings for citizens and businesses were even higher, totaling 6,622,044 dinars. Thus, the overall annual savings on both sides exceeded 11,000,000 dinars. This highlights the cost-effectiveness of SAP, demonstrating its financial benefits alongside the administrative efficiencies.[11]

First, from a personal perspective, a SAP implies the grouping of administrative procedures and exchange of data related to the same life situation or event (birth, death, etc.). The analysis of all SAP established within the project revealed that the most important introduced SAP concerned social and child protection.

Second, from an organizational perspective, various organizational units within the local self-government administration can participate in the work of a SAP, or administrative units in combination with a public enterprise or a public institution of that local self-government unit. This does not conclude the circle of participants in the realization of a SAP, as in certain areas (especially environmental protection) entities from neighboring local self-government units, or national authorities (when it comes to inspection services), i.e., legal entities and institutions founded by the Republic of Serbia or an autonomous province (when it comes to hospitals that are publicly owned), can be involved.

Third, from a normative point of view, especially when it came to grouping procedures within the administration of a local self-government unit, there was no need for major normative interventions.

Fourth, a SAP can also be established in electronic form, according to the Law on E- Administration from 2018. The introduction of an electronic registry

[11] J. Jerinić, D. Vučetić, M. Stanković, p. 316.

office (with a Document Management System – abbreviated as DMS, in its basis) would enable simple electronic data exchange between the organizational units of the specific local self-government system and provide electronic services to citizens and business entities. With the digitization of administrative procedures and processes, most could gradually transition to an electronic form on the eUprava Portal.

## 5. Conclusion

SAP constitutes a strategic milestone in Serbia's administrative reform agenda. The paper introduces the concept of a Single Administrative Point (SAP), explaining it as an approach to consolidate and streamline public service delivery through a single point of access. It discusses how this "one-stop shop" model aligns with principles of new public management and administrative simplification that are gaining global prominence. The paper traces the origins of SAP to the EU Service Directive and doctrine of simplifying administrative procedures. It defines SAP as a physical or digital point for citizens and businesses to access public services without altering the core competencies and jurisdictions of government bodies. The goal is to enhance administrative efficiency, transparency, accessibility and user-centricity.

The paper provides examples of SAP implementation across Serbian local government units, covering various models of integrating services across municipal departments or through partnerships among agencies. It analyzes key organizational, normative and personnel considerations in establishing SAPs. An important insight is the prioritization of SAP in the social services domain for improving delivery to vulnerable groups. The paper also discusses the increasing transition from physical to electronic SAPs as part of e-governance reforms.

The paper examines relevant provisions in Serbia's LGAP and e-Government Law which provide the foundation for SAP. Additionally, it provides a detailed discussion of the recent Government Regulation that comprehensively outlines the procedures, conditions, criteria and cooperation requirements for establishing SAPs at various levels of administration.

While Regulation provides a clear framework, SAP implementation poses complex coordination, resource and change management challenges. The success of SAPs will depend on the government's ability to foster a citizen-centric administrative culture and build capabilities across sectors. Aspects like staffing, infrastructure, data exchange protocols, and user accessibility must be addressed. The cost-benefit analysis of SAP pilots proves its potential in generating significant savings in time and resources for both government bodies and citizens/businesses.

As analyzed in this paper, SAP provides a centralized means for accessing diverse public services and administrative procedures through a unified point

of contact, without altering the competencies and jurisdictions of existing state organizations.

SAP represents a profound shift towards a citizen-centric, efficient and collaborative public administration system. Yet, realizing its full potential requires overcoming challenges in inter-agency coordination, resource availability, consistent service quality and process re-engineering, continuous monitoring and user feedback.

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# ADMINISTRATIVE CONTRACTS IN SERBIAN LAW

*Abstract*

*With the Procedural Law, the new Law on General Administrative Procedure (LGAP) from 2016, a new substantive concept was introduced into the legal system of Serbia - administrative contract. The LGAP regulates the conditional existence of administrative contracts, only if this is provided for by a separate law.*

*In the paper, the author takes a critical look at the legal construction of the administrative contract in Serbian law, presenting certain understandings from legal theory. A brief comparison of the administrative contract with public-private partnership and concessions was also made.*

*Finally, at the end of the paper, the presentation concerns the importance and role of administrative contracts that they should have in Serbian law.*

**Keywords:** Administrative Contracts, Public Interest, Law on General Administrative Procedure from 2016.

## 1. Administrative Contracts in Serbian Law

An administrative contract is such a contract which is in the legal regime of administrative law.[1] It is a special type of contract concluded with the state (i.e., as a rule, with its administration). Just like an individual, the state can also appear in the role of a co-contractor, conclude a contract and be bound by it. In that case, the contracting parties are equal. The contracts of this type are subject to the general contractual legal regime. However, the state can also conclude other types of acts that are similar to a contract, but then it does not play the role of a private legal person, but of the holder of power. Administrative contracts are not a classic contractual relationship, but a special administrative-legal relationship reflecting the the disruption of the contractual balance. This is the reason that these contracts cannot be considered to be private law contracts, but public law contracts. With these administrative contracts, the public interest is in the foreground and it prevails over the private interest, suppressing it.

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[1] More about administrative contracts: Milan Rapajić, "Upravni ugovori kao uslužni poslovi javne uprave", *Uslužni poslovi* (ed. Miodrag Mićović), Univerzitet u Kragujevcu Pravni fakultet, Kragujevac, 2014.

Administrative contract did not exist in Serbian law as a legal category for a very long time. However, in the period from 1910 until the Second World War, there were certain preconditions for the development of administrative contracts"[2]. Before the adoption of the Law on State Accounting, the state concluded contracts under the private law regime. But, with the passing of time, the needs of the public administration have grown. The legal relationships between the state and natural persons, which were established through the contracts on public procurement or public works, often resulted in disputes"[3]. The above mentioned Law on State Accounting foresaw certain provisions regulating public procurement contracts which were different from the Civil Code rules and which were in such cases applied as subsidiary. Then other exceptions to the general regime of contract law appeared in 1921 and 1922 when the Law on State Accounting was modified. Based on these changes and amendments, a Rulebook on the implementation of the provisions from the Section B of the Law on State Accounting was passed. "The primary goal of these provisions was not the protection of public affairs, but the suppression of the corrupt behavior of public bodies when entering into contracts which made profit or incurred losses to the state. The disputes which arose under these contracts were, by rule, adjudicated by civil law courts"[4]. Thus the Law on State Accounting regulated that the public bidding procedure had to be completed before concluding a contract. Direct award could be made only in clearly designated cases.[5] The new Law on State Accounting (came into effect in 1936) also regulated that the exceptions from private law rules could be applied to certain contracts which the state concluded with the persons in domain of private law. The Law also provided that the public bidding procedures could be in written or oral form and it was the minister or the managing boards of companies who decided which bidding model would be used.[6] The Law defined the elements that had to be included in the call for bids. Public servants and members of the National Assembly were excluded from the public procurement procedure. National bidders were required to submit a bond in the amount of 5% of the total contract cost, while the foreign bidders were required to provide twice as much. The Board for the assessment of state procurements, which was the part of the Ministry of Finance, monitored the work of the Commission which conducted the public procurement procedure. The competent minister signed the contracts

[2] Dobrosav Milovanović, "Razvoj upravnih ugovora u pravu Srbije i Jugoslavije", *Pravni život - Ugovor i njegovo izvršenje* (ed. Slobodan Perović), Udruženje pravnika Srbije, Beograd, Vol. 42, No. 11/12, 1993, p. 2154.

[3] Ljubomir Radovanović, "Upravni ugovori", *Arhiv za pravne i društvene nauke*, knjiga XIII (XXX), Beograd, Vol. 16, No. 2, 1926, p. 287.

[4] Dražen Miljić, *Upravni ugovor i oblasti njegove primjene*, doktorska disertacija, Univerzitet u Beogradu Pravni fakultet, Beograd, 2016, p. 286.

[5] The cases of direct award involved low-value contracts, the contracts containing confidential information, urgent situations, such as the imminent danger of natural disasters, when certain services can be obtained only from a single provider, when procuring high precision goods, homemade crafts, the goods produced by state-owned workshops employing disabled people, military merchandise, or in cases when previous bidding procedures were unsuccessful.

[6] A call for bids had to be published in the Official Journal three times.

with a possibility to transfer signatory authority to another person. The signed public procurement contract was considered to be "a public document based on civil law - court procedure"[7]. The change of the contract to the detriment of the state could take place only with the consent of the State Council or based on the opinion of the Ministry of Finance Counseling Board. The state reserved the right to a unilateral termination of the contract if the co-contractor failed to comply with contractual provisions, that is if it failed to complete its contractual obligations[8]. Administrative courts were granted the jurisdiction to adjudicate the legality of acts that were made for the purpose of the execution of the contracts and whether the procedure which preceded the adjudication was performed based on the Law on State Accounting. However, the issues related to the existence of contract, whether the obligations are met and what legal effects it produced were left to be decided by competent courts in civil litigation.

After the Second World War, administrative contracts were an unknown category in the positive law. In former socialist Yugoslavia, all the contracts which the state concluded were executed under the civil law regime, while the jurisdiction for adjudicating disputes which arose under these contracts lay with regular courts. "If some legal acts proclaimed a certain deviation from the private law regime, such specific features applied to all parties to the contracts, regardless whether they were natural persons or the state itself. This process was particularly enhanced by the concept of social ownership which was defined based on the assumption that there was unity of public and private interest. In such a relationship of involved interests, there was no need to give the state certain privileges that would guarantee the achievement of highest values"[9]. Nevertheless, there were some opinions, presented by Professor Dragaš Denković that the legal system of Yugoslavia knew about administrative contracts. However, there was no mentioning of the term "administrative contract" in its positive law, given the fact that the disputes which arose under such contracts were resolved according to civil law rules. This legal author stated that various "legal acts regulate the procedures which are encountered during the conclusion of administrative contracts: public bidding, (*L' adjudication*), call for bids, (*appel d' offre*), direct award (*marche de gré à gré*), restrictions in regard to choosing the other contracting party, unilateral modification of the obligations of another contracting party with an adequate compensation for the damaged party (French theory on unilateral modification of contractual obligations in the public interest), modification of contractual obligations due to circumstances which cause damage to other contracting party with adequate compensation (in France – theory of un unpredictability), mandatory

[7] Law on State Accounting, 1936, Art. 97.

[8] In such situations, the state could opt to leave the procurement to another person based on the bidding procedure, or direct award, or to execute procurement at the expense of the person which breached the agreed contractual provisions. There was also an option to offer the co-contractor a new deadline for the execution of its contractual obligations. In such cases certain percentage of the total cost of the contract would be the penalty for each day exceeding the contractual deadline.

[9] D. Miljić, p. 292.

conclusion of the contract, prior consent, i.e. an approval for the conclusion of the contract, mandatory deposit of a bond, tariff system of power distribution enterprises, prescribed by the tariff system of the Federal Executive Council, debt repayment contract, approval for exploring raw mineral deposits and approval for their exploitation, etc. There are other examples which can even better demonstrate that our positive law regulates many disputable situations in a similar way to the rules of French theory of administrative contracts. In this context, all the above said supports the argument that there is potential for introducing administrative contracts, particularly when we do have administrative disputes that could be adjudicated as the disputes of full jurisdiction"[10]. Professor Ratko Marković noted (referring to the legal system of 1990) that: "in our current legislation, especially the legislation of the Republic of Serbia (the Law on Public Services from 1991 and the Law on Concession from 1997) there are traces of the legal regime of administrative contracts (particularly related to the conclusion of the contract and its validity where the contractors are not private legal entities), but that such legal regime is not properly defined or comprehensive (particularly in relation to adjudicating disputes which arise in connection with the implementation of the contracts). Administrative contract is not the institute of our positive law (yet), and therefore, such a legal act, related to execution of administrative activities, is non-existent in our legal system"[11].

One of the significant novelties which the new Law on General Administrative Procedure[12] (hereinafter referred to as LGAP) introduced into the legal system of the Republic of Serbia is administrative contract. With the adoption of this Law, Serbia joined the group of countries which recognize administrative contract as a legal category. However, in Serbia, this legal category has just started its life. Administrative contract is bilaterally binding written act, which is, when it is provided for in a specific law, concluded between a public body and a party and which creates, modifies and terminates legal relationship in an administrative matter"[13]. As for the subjects which participate in conclud-

[10] Dragaš Denković, "Upravni ugovori i obligacioni odnosi radnih organizacija koje vrše javna ovlašćenja", *Anali Pravnog fakulteta u Beogradu*, Vol. 18, No. 1-2, 1970, p. 63-64.

[11] Ratko Marković, *Upravno pravo – opšti deo*, Univerzitet u Beogradu Pravni fakultet, Beograd, 2002, p. 289.

[12] The Law on General Administrative Procedure, *Official Gazette of RS*, No.18/2016, 95/2018 – authentic interpretation and 2/2023 – decision of Supreme Court.

[13] In theory, objections have already been raised in relation to the existence of two legal definitions of administrative matter, which is the starting point for legal definition of the concept of administrative contract. The first definition of administrative matter is given in the Law on Administrative Disputes of 2009 where it is defined as an individual, undisputed situation of public interest where the need to establish an authoritative rule of conduct of contracting parties arises directly from legal regulations. (Article 5 of the Law on Administrative Disputes, *Official Gazette of RS*, No. 111/2009). According to the Law on General Administrative Procedure (*Official Gazette of RS*, No. 18/2016, 95/2018 – authentic interpretation and 2/2023 – decision of Supreme Court), "Administrative matter is an individual situation in which a public body by directly applying laws, other regulations and general acts, legally and actually influences the position of the party by passing administrative acts and guaranteeing acts, concluding administrative contracts, undertaking administrative actions and offering public services. An administrative matter is also any other situation which is defined as such by law". It has already been noted that different definitions of administrative matter in the laws which regulate administra-

ing administrative contracts, on one side there is the state, i.e. a public subject (more precisely, a public administration body or the public body which is authorized to perform public functions). This is a mandatory contracting party in a legal administrative relationship. On the other side, there is a co-contractor which can be a natural or legal person that fulfills conditions for the execution of certain activities in the public interest. "Other contracting party shall execute the tasks defined in the administrative contract regardless of the occurrence of unforeseen circumstances (theory of unpredictability). In such an event, this contracting party is entitled to compensatory damages to be paid by the public administration body"[14]. Administrative contracts are always concluded for the purpose of realization of certain public activity which is in the public interest. In Serbian law, administrative contracts also operate under a specific regime with considerable deviations from the regime of civil law contracts. Indeed, the distinction between an administrative and a civil law contract is that the first is concluded between the administrative body and a party in the public interest. All other contracts which a public body concludes and which are characterized by an explicit concurrence of wills in a contractual relationship (for example, purchase and sale agreement), do not represent administrative contracts. The disputes which arise under these contracts are adjudicated in regular courts. As for the conclusion of administrative contracts, the administrative procedure which is used in Serbian law (in Croatian, too) represents a procedural path for a specific contracting line of action. The same administrative procedure is used for concluding the agreements in the pre-contractual phase. This phase includes the assessment of legal conditions, as well as of the condition whether the purpose of the fulfilment of public interest is met in the concrete administrative matter. Thus, it is first determined whether the conclusion of the contract will be lawful and purposeful and then the contracting parties may proceed with its conclusion that is with its signing.

The content of administrative contract should not be contrary to public interest or the legal interests of third persons. It can be concluded only in written form. If an administrative contract is not concluded for the purpose of achieving public interest, or if other conditions for its validity, foreseen by law, are not met, or if it lacks validity as an administrative act for any other reason prescribed by law, the administrative contract will be void. In cases when only a part of the administrative contract is void, the entire contract will be void unless it is obvious that it could have been concluded even without the void part. It has been pointed out that "the court competent to adjudicate administrative disputes shall determine complaints whether an administrative contract is void or not"[15].

tive dispute, or administrative procedure, can lead to difficulties in their application. More in: Dragan Milkov, "Povodom Nacrta Zakona o opštem upravnom postupku", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 47, No. 1, 2013, p. 90.

[14] Predrag Dimitrijević, *Upravno pravo – opšti deo*, Medivest KT, Niš, 2019, p. 208.

[15] *Ibidem*, p. 210.

Administrative contracts can be modified as a result of changed circumstances. "If circumstances arise after the contract is concluded which could not have been foreseen at the time of its conclusion and which would render fulfilment of the obligation for a contracting party significantly more difficult, the party may request the contract to be modified or adjusted to new circumstances. The competent body will reject the party's request with a decree if the conditions for the modification of the contract are not met, or if such modification would cause damage to public interest which would be larger than the damage caused to the party" (Article 23 of LGAP). "The public body can terminate administrative contract: 1) if there is no consent of the party for modification of the contract due to changed circumstances; 2) if the party fails to meet its contractual obligations; 3) if it is necessary to avert serious and immediate danger to the life and health of people and public safety, public peace and order, or to avert the disruptions in the economy, which cannot be done by means that would impinge upon the acquired rights, to a lesser extent. The public body can terminate administrative contract by passing a decree which expressively states the reasons and clear explanations for the termination" (Article 24 of LGAP). As we can see, the party may not terminate the contract - it is the exclusive privilege of the administrative body.

The administration assumes the role of the protector of public interest in the course of the execution of administrative contracts, but only when the contractual obligations are not met. Here we should *de lege ferenda* adopt the solutions from the French law according to which the administration is entitled to manage and control the execution of the contract, as well as to unilaterally change the contractual obligations under certain conditions (it is the theory of unilateral modification of the contract or the theory of arbitrariness)[16].

The party may not terminate administrative contract if the public body fails to fulfill its contractual obligations, but it can file a complaint.[17] The complaint is filed in relation to the administrative contract, but not against the administrative contract, within six months from the date when the public body failed to fulfil its obligations from the administrative contract. Contrary to Croatian rule where the complaint has devolutive effect, in Serbian law the complaint has remonstrative effect.

[16] "One of the specific aspects of administrative contract lies in the authority of the administrative body to unilaterally modify, in the course of the contract execution, the scope of obligations which the co-contractor has assumed, i.e. to demand the increase or decrease of these obligations. The authority of the administrative body to unilaterally modify administrative contracts is based on the requirements of the public administration. Although this authority of the public body to modify administrative contracts is wide, it is not unlimited. As a matter of fact, the theory of unilateral modification of administrative contracts represents a compromise between public body interests and the private interests of the co-contractor, given the fact that the co-contractor is entitled to damage compensation for the obligations that were imposed on him and that would disrupt the financial balance of the contract. Unilateral modification of contract clearly makes the main difference between the administrative contract regime and the civil law contract regime". Slavoljub Popović, "Specifičnosti upravnih ugovora u romanskom pravu", *Pravni život*, Savez udruženja pravnika Srbije, Beograd, No. 11/12, 1993.

[17] More about complaints in administrative proceedings: Milan Rapajić, "Prigovor u upravnom postupku i zaštita prava korisnika javnih usluga", *Usluge i prava korisnika* (ed. Miodrag Mićović), Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2020.

If any of contracting parties to the administrative contract causes damage to another party, the party may seek damage compensation in a civil litigation before competent court. The legal provisions which regulate obligatory relations are applied to administrative contracts as subsidiary. The administrative court has the jurisdiction to adjudicate disputes which arise under administrative contracts, which is the same situation as in German law.

Legal structure of administrative contracts in Serbian law has been largely criticized in legal theory. It has been emphasized that the legal definition of administrative contract is circular. Administrative contract is one of the formats of administrative action. The subject of administrative contract is defined as creation, modification and termination of a legal relationship in an administrative matter, while the administrative matter is defined as an individual situation in which the public body influences the position of the party with its administrative action. In this way the legal definition of administrative matter closes the circle: the administrative contract signed between the public body and the party regulates the legal relationship in an individual legal situation where the public body, by concluding the administrative contract, legally and actually influences the position of the party. The third and the most important criticism is that the definition of the administrative matter from LGAP does not include public interest, or anything else that would suggest that not every subordinate contract, signed by a public body, is in fact an administrative contract. Thus the legal definition of administrative contract assumes that it is not necessary that the conclusion of the contract or the execution of contractual obligations is aimed at achieving or protecting the public interest, satisfying the public needs, fulfilling the public purpose or achieving the public or general goals – all these aims that only could justify the legal regulations that radically enhance contractual position of one party, the holder of public power, compared to already weak position of the co-contractor. It is true that the legislator has stipulated that the content of administrative contract cannot be contrary to public interest; however, the fact that the content of a contract is not contrary to public interest does not mean that the contract is concluded for the purpose of realization or protection of public interest"[18].

General legal regime, under which administrative contracts operate, is partially regulated. It needs to be supplemented with specific legal regulation of various types of administrative contracts. The rules of LGAP are structured in such a way that make the party's already subordinate position in relation to the public body even more difficult, to the extent not allowing the party to terminate the contract, which the party is entitled to base on general rules of civil or contract law. It is underlined *de lege ferenda* that not only the party, but the public body, too, should be subject to limitations in regard to the procedure of concluding administrative contracts. The privileged position of public body as a contracting party can be justified only if it serves public interest. Another criticism is based

[18] Marija Karanikić Mirić, "Restriktivnost zakonskog određenja pojma upravnog ugovora u srpskom pravu", *Perspektive implementacije evropskih standarda u pravni sistem Srbije* (ed. Stevan Lilić), Knjiga 7, Beograd, 2017, p. 190.

on the opinion that the contracting party with larger powers should have larger responsibilities. LGAP does not regulate these issues and it is, therefore, believed that it is necessary to define for each separate type of administrative contract, the obligations of the public body with regard to the method of concluding administrative contract, as well as the "mechanisms which would direct its contractual action towards the protection of public interest"[19].

We will further analyze one contract concluded by administration which is not legally determined as an administrative contract.[20] Namely, the LGAP regulates that administrative contract is concluded when this is provided for by a specific law. This means that Serbian legislators have created administrative contracts which Professor Vladimir Vodinelić marked as "small solutions". "Small solutions mean that administrative contracts are accepted only in cases strictly designated as the exceptions from the regime of civil law contracts. In such cases administrative contract represents an exception compared to administrative act, as a regular form of administrative action. Big solution would mean that administrative contracts are allowed in principle, unless it is regulated otherwise. In this case an administrative contract would represent a principle and not (as an exception) an alternative format of administrative action, applicable, by rule, as any other administrative act, but not applicable only in exceptional cases"[21]. Indeed, our legislation has inaugurated rather general and incomprehensive legal regime for administrative contracts since such a regime, according to accepted "small solution" principle is not always applied - only in cases when it is stipulated by a specific law. In other situations, which are not regulated by a specific law, subordinate contracts (the term accepted from German law) operate under the regime of general rules of contract law, except in those cases when the public body and the party have agreed on a different arrangement within the legal system rules, mandatory laws and customary law.

Taking into account such a regulative structure of administrative contracts in Serbia, a question is raised whether courts can adjudicate if a contract is an administrative contract in the absence of clear legal wording. In theory, it has already been emphasized that certain contracts concluded by administration resemble administrative contracts, so there is a dilemma whether they can be, in fact, qualified as such taking into account the above mentioned characteristics of administrative contracts. Here we can mention three contracts, signed by administration, which are legally determined but which are questionable in terms whether they can be qualified as administrative contracts. They are: a public procurement contract, a contract delegating the execution of public affairs[22] and a

[19] *Ibidem*, p. 191.

[20] There are other opinions; thus, Professor Zoran Tomić says: "In Serbian law, the Law on public-private concession foresees, among other things, a particular administrative contract, i.e. a public contract which forms a contractual relationship, different from the institutional relationship." Zoran Tomić, *Opšte upravno pravo*, Univerzitet u Beogradu Pravni fakultet, Beograd, 2018, p. 234.

[21] Vladimir V. Vodinelić, "Upravni ugovor između prihvatanja i odbijanja", *Pravni život*, Vol. 42, No. 11/12, 1993, p. 2120.

[22] As early as in 1993, Professor Stevan Lilić pointed out that "although it regulates public services, the Law on Public Services does not mention administrative contracts. However, reviewing comparative experiences of

contract on public-private partnership. We will further analyze a contract on public-private partnership. The public-private partnership was introduced into Serbian legislation with the Law on Public-Private Partnership and Concessions[23]. The public-private partnership, in terms of this Law, represents a long-term cooperation between a public and a private partner for the purpose of securing funding, construction, reconstruction, management and maintenance of infrastructural and other objects of public interest, or providing services of public interest, which can be either contractual or institutional. A public-private partnership may or may not comprise the elements of concession. The Law makes a difference between contractual and institutional public-private partnership. In case of a contractual public-private partnership, public and private partners regulate their mutual rights and obligations with a contract on public-private partnership with or without the elements of concession. In Serbian law this contract is known by its short name as a public contract and operates under specially regulated regime. According to Article 4, paragraph 1, line 3 of the Law on Private-Public Partnership and Concessions "Public contract is a public-private partnership contract, with or without elements of concession, concluded in a written form between a public and a private partner, which stipulates the mutual rights and obligations of contracting parties with the aim of realizing a public-private partnership project.", while a public-private partnership project is defined as "the project which is prepared, proposed, approved and realized according to one of the models of public-private partnership consisting of a series of interconnected activities which are executed in a specified order for the purpose of acheiving the defined goals within a specified period of time and with specified financial means, which is approved in compliance with the Law as a public-private partnership project with or without the elements of concession. (Article 4, paragraph 1, line 1 of the Law). The Law regulates in details the content of the public contract and stipulates specific rules for the conclusion, approving the conclusion, modification and financing of the public contract. One party in the public contract on public-private partnership is the public partner (the holder of public power) which can be qualified as a public body as regulated in Article 1 of LGAP[24]. Private partner is the other party in the contract. This means that it can be a domestic or foreign, natural or legal entity,

foreign countries (particularly France), it could be concluded that our positive legislation recognizes some sort of administrative contracts, "hidden" in certain formulations of this Law". Professor Lilic analyzed the provision from Article 6.2 of the Law on Public Services of that time which stipulated the following: "When a Republic or autonomous province, city or municipality delegates the execution of affairs or services (...) to other natural or legal persons, their mutual rights and obligations are regulated by a contract. Since this formulation stipulates that the mutual rights and obligations of the state and "other natural and legal persons" (private persons) to whom it has delegated the execution of public affairs are to be "regulated by a contract", it can be concluded that "the contract" here is actually an administrative contract". Stevan Lilić, "Administrativni ugovori i javne službe", *Pravni život*, Beograd, No. 11/12, 1993, p. 2149.

[23] Law on Public-Private Partnership and Concessions, *Official Gazette of RS*, No. 88/2011, 15/2016 and 104/2016.

[24] This means that a public partner can be: a state body or organization, the body or organization of the autonomous province or a local self-government unit, a public enterprise, institute, specific body which performs a regulatory function or a natural or legal entity with delegated public authority.

or a consortium of such entities. As for the public contract, it represents a subordinate type of contract, concluded by administration. Finally, we need to give the answer to the question whether, in addition to the fact that public contact is a subordinate type of contract concluded by administration, it is also, by its nature, an administrative contract. According to the Law on Public-Private Partnership and Concessions (taking into account all that has been said on legal regulation of administrative contracts in Serbian law), public contract cannot be qualified as an administrative contract because the legislator did not explicitly define the public contract as a type of administrative contract; the legislator actually did quite the opposite – it is stipulated that the issues related to public contracts from the original law, which are not specified in the Law on public-private partnership and concessions, should be regulated by the law governing obligatory relations. This means that, based on the explicit legal provision, the public contract operates under the general legal regime of civil law, i.e. contract law (as subsidiary), and not under the specific rules of LGAP related to administrative contracts. Also, specific legal provisions on public contract are different from the administrative contracts regulated by LGAP. Thus, one of the principles of public-private partnership is the principle of the autonomy of will.[25], which according to the Law on Public-Private Partnership and Concessions assumes freedom of contracting parties to regulate mutual rights and obligations according to their own free will based on this Law, the law regulating obligatory relations and other laws and good customary practice. Here it has been pointed out that there are fundamental differences between the administrative contract based on LGAP and public contract based on the Law on Public-Private Partnership and Concessions. Namely, the Law on Public-Private Partnership and Concessions regulates specific rules on the termination of public contract by a unilateral expression of will, even in cases where a public contract could be characterized as a form of administrative contract. These specific rules from the Law on Public-Private Partnership and Concessions exclude the application of some LGAP provisions, which actually constitute the essence of the legal regime for administrative contracts. These are substantive and procedural provisions related to the termination of administrative contract as a result of unfulfillment. The principle of equality of contracting parties from the obligatory relationship is curtailed in the specific legal regime of administrative contracts. Mutual relations of the parties to public contract are generally based on the equality of co-contractors and their wills are of the same importance. Also, the scope of influence of the principle of obligatory fulfillment

[25] It is pointed out that the established practice related to the autonomy of will of contracting parties in a public-private partnership has been relativized: "the autonomy of will of contracting parties can only be viewed rather conditionally and relatively, more as a proclaimed principle, and, unfortunately, in practice often as its antipode. Therefore, the relationship between public and private subject is generally based on the axiom of parity, equality and partnership, while in the realization of a large number of these projects the relationship of contracting parties is not marked by synergy and equality, but rather by tensions, inequality and asymmetry." More in: Jugoslava Vojnović, *Koncept javno-privatnog partnerstva sa posebnim osvrtom na normativni aspekt u pravu Evropske unije i državama članicama*, doktorska disertacija, Univerzitet u Beogradu Pravni fakultet, Beograd, 2020. p. 57.

of contractual responsibilities is limited, since the party is explicitly, by a legal norm, forbidden to terminate the contract due to unfulfillment, and, also, it has no right to terminate it as a result of changed circumstances. As for the public contract, i.e., the obligatory relationship it is based on, it can be terminated due to unfulfillment in an out-of-court action by both the public and private partner producing a unilateral expression of will, under the conditions which are defined in details in the Law on public-private partnership and concessions. While the party in the administrative contract cannot terminate the contract in an out-of-court-action, the private partner can, according to the provisions of the Law on Public-Private Partnership and Concessions, the public contract and the rules of obligatory relations. Also, while the private partner can terminate the public contract because the public partner has failed to meet its contractual obligations, the private partner from the administrative contract cannot do it. Namely, one of the specific traits of the particular legal regime which is applied to administrative contracts is that the party cannot terminate administrative contract because the public partner fails to meet its contractual obligations, whatever they are.

## 2. Concluding Remarks

Administrative contract is one of the synonyms for administrative action and it serves for overcoming the problems encountered in traditional execution of administrative affairs. It is the agreement of public administration on one side, and a natural or legal person on the other side, aimed at achieving the public interest. In theory, it has been pointed out that administrative contract allows larger participation of citizens in public affairs and, at the same time, excludes arbitrariness in administrative action and, regardless the extent of the participation of non-legal subjects, it should be emphasized that it is the instrument which is of no less importance than administrative act as a prevailing form of administrative action. It also has been noted that administrative contract unburdens state budget so that the state can redirect the remaining funds to other budget lines. An administrative contract comprises the elements of both public and civil law. It includes the aspects of a civil law contract and an administrative act. In this way, a specific legal institute is constituted which has the regime which is adequate for securing a free formation of a contractual relationship along with enabling the public administration to achieve the public interest. Regardless the fact that administrative contract comprises the elements of both public and private law, the public elements remain dominant. Administrative contract represents a type of an administrative action which is based on the principle of legality. In the countries where it is the result of an administrative-judicial practice, or where it is a legal category, the following aspects are defined: the procedure preceding its conclusion, who can be a contracting party, the formats for its conclusion, its duration and the legal protection in case of a dispute. Administrative contract needs

to adjust to requirements of public interest all the time. It has also been pointed out that administrative contract has some characteristics of the external acts of administration since its legal effect extends beyond the scope of administrative body. Here we are speaking about an individual act of administration related to a concrete case, which is closed after the expiration period.

Administrative contract is introduced into Serbian law with the Law on general administrative procedure from 2016 which dedicates five articles to this matter. Coming into effect, this Law was assessed in the public as a legal act which is created to enforce the reform of administrative procedure aimed at enhancing the legal security, improving economic ambient and strengthening the relationship between the administration and citizens in Serbia. However, the regulation of administrative contract through the Law on general administrative procedure has left many issues unresolved, such as: the fields of their application, the procedure for their concluding, then the deficiencies related to voidance and voidability, etc. The position of contracting parties has not been clearly defined, as well as the domains for the application of obligatory relations rules. Speaking about the regulation of administrative contract, it has been noted in critical tone that there is a problem how to adjust private law rules to a public law institute whereas the question of damage compensation, which both parties are entitled to, falls under two different legal regimes. One regime is foreseen for public administration and involves the jurisdiction of regular courts, while the other regime is foreseen for the other contracting party and involves the jurisdiction of administrative courts. When a new institute is introduced into a legal system, it needs to have sufficient qualitative distinctions in relation to already existing institutes. Thus, administrative contract needs to have in its structure the elements which will distinguish this contract from an administrative act or a civil law contract. Therefore, we can join those who argue that administrative contract, according to the Law on General administrative Procedure, does not possess specific traits that could, in a qualitative and quantitative way, contribute to its becoming a separate institute, different from a civil law contract. The only characteristic trait of the administrative contract in relation to a civil law contract is given in Article 25 of this Law which states that the party cannot terminate the administrative contract if a public administration representative fails to fulfill its contractual obligations. However this characteristic is not enough to have a completely new institute established on its basis. All the solutions offered in the Law on general administrative procedure could be as well guaranteed through a civil law contract, without the need for establishing a new institute.

Under the influence of European integration processes, the neighboring countries (Croatia, Montenegro and Macedonia) have introduced administrative contract into their positive laws. However, it has been noted that there is no sufficient information on the effects of the application of this institute. Finally, it is our opinion that Serbia could have opted for a better solution - to introduce administrative contract into its legal system with a separate, specific law and not through the Law on general administrative procedure.

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## UPRAVNI UGOVORI U SRPSKOM PRAVU

*Sažetak*

*Procesnim Zakonom, novim Zakonom o opštem upravnom postupku iz 2016. u pravni sistem Srbije uveden je novi materijalni pojam – upravni ugovor. U ZUP-u je regulisano uslovno postojanje upravnih ugovora, samo ako je to posebnim zakonom predviđeno.*

*U radu autor se kritički osvrće na pravnu konstrukciju upravnog ugovora u srpskom pravu izlažući pojedina shvatanja iz pravne teorije. Izvršeno je i kratko poređenje upravnog ugovora sa javnoprivatnim partnerstvom i koncesijama.*

*Konačno naposletku rada izlaganje se tiče značaja i uloge upravnih ugovora koju bi trebalo da imaju u srpskom pravu.*

**Ključne reči:** upravni ugovori, javni interes, Zakon o opštem upravnom postupku iz 2016.godine.

Katja Štemberger Brizani*

# ADMINISTRATIVE CONTRACTS IN SLOVENIAN LAW: ANALYSIS OF THE EXISTING REGIME AND COMPARISON WITH SERBIAN LAW

*Abstract*

*The paper discusses administrative contracts from the perspective of Slovenian law and compares this regime with Serbian law. It first addresses the theoretical characteristics of administrative contracts as they were established in Slovenian theory and case law, and then the law applicable to them. The main part presents the elements of the legal regime of administrative contracts as found in special laws, namely the unilateral modification of a contract in the public interest, the changed circumstances, the invalidity of the contract, and the public law termination of the contract. The last part examines the legal regulation of administrative contracts in Serbian law on the General Administrative Procedure Act. The paper concludes by presenting the main findings of the topic and proposing some de lege ferenda solutions.*

**Keywords:** Administrative Contracts, Slovenian Law, Specific Legal Regime, Serbian Law, Comparative Overview.

## 1. Introduction

Administrative contracts have been attracting the attention of administrative theory for more than a century. They can be found in almost all European continental legal systems either as an institution regulated by law or as an institution established only in theory and/or case law. These are contracts concluded by public law entities, in their capacity as public authorities, with third parties in the pursuit of the public interest and, because of their specific characteristics, are (or at least should be) subject to different rules than private law contracts.[1] They are also present in Slovenian and Serbian law, which, however, regulate these contracts differently.

The purpose of this paper is to present administrative contracts from the perspective of Slovenian law and to compare them with the Serbian legal system. By applying established (research) methods of legal science, conclusions will be

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[1] Rajko Pirnat, "Pravni problemi upravne pogodbe", *Javna uprava*, Vol. 36, No. 2, 2000, p. 143; *Cf.* Dejan Milenković, "Upravni ugovori u zakonima o opštem upravnom postupku zemalja Zapadnog Balkana", *Strani pravni život*, Vol. 61, No. 3, 2017, pp. 69-70.

drawn as to the adequacy of the current legal regime in Slovenian law and possible suggestions for its improvement will be made, also taking into account the Serbian experiences.

The hypothesis underlying this study is that Slovenian positive law adequately regulates administrative contracts and therefore no legislative changes are necessary.

## 2. Slovenian Law

### *2.1. Features of Administrative Contracts*

In Slovenian law, administrative contracts are recognized only in theory and case law but are not regulated by (a uniform) law, or at least not as a specific legal institution. They can be found in various sectoral laws governing so-called *per naturam* administrative contracts, i.e. contracts that contain elements of administrative contracts, although they are not expressly designated as such by law.[2]

An administrative contract in Slovenian law can be characterized by the following features:[3]

- at least one of the contracting parties must, as a rule, be a public law entity, i.e. a person governed by public law or any other holder of public authority (which may also be a person governed by private law)[4] ("the parties' criterion");
- it is concluded in the public interest ("the aim criterion");
- it contains provisions that imply the supremacy or superiority of the public law entity and which would not normally be accepted by the other party in a typical private-law contract ("the content or special provisions criterion");[5]
- it contains legal provisions that are consensual by nature, but also those which are authoritative by nature;
- the public law entity has specific rights, in particular the possibility to modify the contract unilaterally;
- the other contracting party is entitled to financial compensation for these actions by the public law party, but cannot challenge these actions or demand the performance of the contract.[6]

[2] Katja Štemberger, "'Upravna pogodba kot posebni institut upravnega prava – kje smo in kako naprej?", *Pravnik*, Vol. 76, No. 5/6, 2021, p. 249.
[3] R. Pirnat, p. 151.
[4] Katja Štemberger, *Upravne pogodbe v slovenskem pravu*, doktorska disertacija, Univerza v Ljubljani, Pravna fakulteta, Ljubljana, 2022, pp. 179-180.
[5] Judgement of the Supreme Court of the RS, No. III Ips 31/2012 of October 15, 2013.
[6] Judgement of the Supreme Court of the RS, No. III Ips 80/2018 of February 12, 2019; Judgement of the Supreme Court of the RS, No. II Ips 21/2018 of February 14, 2019.

To qualify a contract as an administrative contract, it must meet at least one (or both) of the material criteria, i.e. the aim criterion and/or the content or specific provisions criterion, in addition to the formal criterion (the parties' criterion), which is obligatory.[7] An administrative contract can also be explicitly defined as such by a specific (sectoral) law (*per legem* administrative contracts), but no such law exists (yet) in the current legislation. Slovenian law therefore follows the same criteria for the identification of administrative contracts as French law. It also follows the latter as regards the relationship between the administrative act and the administrative contract, which are not, as a rule, mutually interchangeable legal institutions, but rather the administrative contract (e.g., a concession contract,[8] a public funding contract)[9] complements the administrative act issued before the conclusion of the contract (e.g. the decision selecting the most successful tenderer or awarding public funds). Nevertheless, in the Slovenian legal order, we can also find contracts that are concluded instead of an administrative act, e.g. an expropriation contract, an urban planning contract, a settlement between an administrative authority and a person who was a party or an accessory participant in the procedure for issuing an administrative act in an administrative dispute, but not also a settlement in administrative procedure, as it can only be concluded by two parties with opposing interests, not by an authority and a party to an administrative procedure.[10]

### *2.2. Legal Regime for Administrative Contracts*

Administrative contracts are subject to the public law regime (as *lex specialis*), if such a regime exists, while private law rules, i.e. the Obligations Code (OC),[11] apply only to issues not covered by specific rules. Such specific rules can be found in particular in the field of concessions, which are also the most thoroughly regulated (but still distinctly deficient) of all administrative contracts *per naturam*. They are scattered across a number of (general[12] and specific) laws, complemented by the Public-Private Partnership Act (PPPA)[13] as the systematic law for public-private partnership concessions and the Certain Concession Contracts Act (CCCA),[14] which is the basic regulation for the award of works concessions and service concessions, falling within the scope of Directive 2014/23/EU of the

[7] Katja Štemberger, "Pogodba kot alternativa upravnemu aktu v slovenskem in primerjalnem pravu", *Javna uprava*, Vol. 56, No. 1/2, 2020, p. 17.
[8] Judgement of the Supreme Court of the RS, No. III Ips 64/2014 of October 28, 2015.
[9] Decision of the Supreme Court of the RS, No. II Ips 19/2013 of February 5, 2015.
[10] For more on this, see Katja Štemberger Brizani, "Administrative contract in administrative matters: Slovenian law in comparative perspective", *Bratislava Law Review*, Vol. 8, No. 1, 2024, pp. 153-168.
[11] *Official Gazette of the RS*, No. 97/07 as amended.
[12] Services of General Economic Interest Act (SGEIA), *Official Gazette of the RS*, No. 32/93 as amended; Institutes Act, *Official Gazette of the RS*, No. 12/91 as amended.
[13] *Official Gazette of the RS*, No. 127/06.
[14] *Official Gazette of the RS*, No. 9/19 as amended.

European Parliament and of the Council of February 26, 2014 on the award of concession contracts (Directive 2014/23/EU[15]).[16]

In the absence of a specific (legislative or contractual) regime, the rules of civil law governing typical contractual relations shall apply to administrative contracts. Although the case law initially[17] held that these rules should be applied ("in full") by analogy, more recent case law has taken the view that they can only be applied "in so far as the public law elements of the (administrative) contract do not preclude it", i.e. *mutatis mutandis*.[18] The legal regime of administrative contracts has been developed, based on the theoretical framework, predominantly by case law, which is a peculiarity given the otherwise over-normalized nature of the Slovenian legal system. Administrative contracts in Slovenian law are thus the result of the interaction between theory and, in particular, case law, which is also characteristic of the development of administrative contracts in French law.

However, the rules of the law of obligations are not adapted to administrative contracts, as they govern relations between (equal) private parties, whereas administrative contracts are characterized by the opposite: the public law entity, as the guardian of the public interest, has a stronger position in the contractual relationship and special rights that have no equivalent in private-law contracts. Therefore, solely based on the provisions of the OC, without a specific legislative basis or an agreement between the parties, the public law party to the contract cannot exercise its (sovereign) powers to protect the public interest. Any unilateral interference with a contractual relationship that does not comply with the provisions of the law or the contract would constitute a breach of contract for which liability for damages is prescribed. Moreover, the public law party to the contract would also be in breach of the principle of legality, which requires that any action taken by the authorities must have a basis in law or in a legal regulation, which cannot be found in the provisions of the OC.

However, some of the elements of the legal regime of administrative contracts specific to French law can also be found in Slovenian law, i.e. in sectoral laws.

### *2.3. Elements of the Legal Regime of Administrative Contracts in Slovenian Law*

#### 2.3.1. Right to Unilaterally Modify a Contract in the Public Interest

Slovenian law does not specifically provide for the unilateral modification of an administrative contract in the public interest, which however does not

[15] *OJ L* 94, March 28, 2014, pp. 1-64

[16] Katja Štemberger, '"Public and Private Law Aspects of Breach of the Concession Contract in Slovenian Law", *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave*, Vol. 23, No. 2, 2023, pp. 249-250.

[17] Judgement of the Supreme Court of the RS, No. III Ips 31/2012 of October 15, 2013; Judgement of the Supreme Court of the RS, No. II Ips 190/2017 of December 21, 2017.

[18] Judgement of the Supreme Court of the RS, No. III Ips 37/2020-3 of January 19, 2021; Judgement of the Supreme Court of the RS, No. II Ips 50/2019 of June 19, 2020.

mean that such a modification is not possible under the current regime. It can be achieved in several different ways, all typical for concession contracts. According to theory[19] and case law,[20] such a modification can be achieved indirectly in the case of concession contracts, through an amendment of the concession act after the conclusion of the contract. By concession act, the grantor determines those elements of the concession relationship which are in the public interest, and which are non-negotiable with the concessionaire. The concession contract may therefore regulate only those issues that are not regulated in the concession act or may define in more detail those issues that are already defined in the concession act.[21] In the event of a conflict between the provisions of the concession act and the concession contract, the provisions of the concession act shall prevail, which derives from the general rules of contract law (mandatory content of the contract laid down by regulation, Art. 17(2) of the OC), and specifically from Art. 39(2) of the SGEIA.

Since the concession act is a regulation and, as such, may be subject to amendment, provided that the conditions for permissible retroactivity are met, i.e. that there is a reason in the public interest overriding the principle of legitimate expectations and that the concessionaire is granted a (sufficiently long) period of adjustment and/or monetary compensation for the interference with the principle of legitimate expectations. In French law terms, this compensation can be compared to the right to financial equilibrium which accrues to a co-contractor as a result of the (lawful) exercise of the prerogatives of the public law party to the contract.[22] Consequently, the concession contract will also have to be adapted to this amendment of the concession act (through an annex to the contract); otherwise, the provisions of the concession act will directly apply.

Moreover, such a modification can also be achieved by an administrative decision if it is provided for by law or by a legal regulation. Namely, it is a specific authoritative entitlement for which the administration must have a legal basis (principle of legality). If the issuer of such a decision is a State or other authority, authorization in a bylaw is sufficient, while for specialized legal entities governed by public law, as holders of public authority, a direct basis in law is required. Without legal authorization, any interference in the contractual relationship by an individual administrative act is unlawful. In addition to the existence of a legal basis, this measure must also be proportionate.[23]

[19] R. Pirnat, p. 159.
[20] Judgement of the Administrative Court of the RS, No. I U 779/2010 of January 31, 2012.
[21] Aleksij Mužina, *Koncesije: pravna ureditev koncesij v Sloveniji in EU,* Primath, Ljubljana, 2004, p. 474.
[22] Judgment of the Supreme Court of the RS, No. III Ips 20/2019-7 of September 24, 2019, point 22.
[23] Such an authorization is provided, for example, in Health Services Act (HAS), *Official Gazette of the Republic of Slovenia*, No. 23/05 as amended, Art. 44f and in Freshwater Fisheries Act, *Official Gazette of the RS*, No. 61/06, Art. 35(3).

### 2.3.2. Changed Circumstances

Administrative contracts are subject to both the public law and private law regime of changed circumstances. The public law regime applies only to concession contracts, subject to the SGEIA, while others (other concession contracts and administrative contracts *per naturam*) are subject to the general rules of the law of obligations. According to Art. 50 of the SGEIA, the concessionaire must perform the concessioned economic public service within its objective possibilities, even in the event of unforeseeable circumstances caused by force majeure,[24] but cannot request the rescission of the contract or its modification. However, it shall be entitled to claim from the grantor reimbursement of the costs incurred by it in the performance of the concessioned public service in unforeseeable circumstances (the right to financial equilibrium). This ensures the continuity of the concession contract the object of which is usually an activity in the public interest that must be carried out without interruption.[25]

The private law regime of changed circumstances, on the other hand, gives the affected party the right to request the rescission of the contract (in court), but not its modification, unless otherwise agreed in the contract (it is a dispositive provision) or if the affected party agrees to a modification of the contract (instead of rescission). This is not in line with the principle of continuity of public service and the protection of the public interest. In addition, the private law regime is not adapted to the concession award procedure, as it allows only reference to changes in circumstances that occur after the contract is concluded, but not after the binding tender is submitted, meaning that the tenderer bears a disproportionately higher burden of the risk than the grantor, as circumstances can change significantly during this (relatively long) period.[26]

Provisions on changed circumstances can also be found in the CCCA. It is one of the legally permissible grounds for modifying the concession contract during its term. However, such modification is only permissible based on an agreement between the parties. Moreover, it may not change the general nature of the concession and in the case of concessions awarded by the contracting authority, the change may not exceed 50% of the value of the original concession.

[24] The term "force majeure" is incorrectly used, as force majeure leads to "impossibility of performance of the contract" and not only to "difficulty of performance".

[25] Janez Ahlin, "Uporaba pravil Obligacijskega zakonika za razmerja iz koncesijske pogodbe: koncesijska pogodba na meji med javnim in zasebnim", *Lex Localis*, Vol. 6, No. 2, 2008, pp. 258-259.

[26] For more on this, see Katja Štemberger Brizani, "Changed circumstances and concession contracts: Slovenian law in a comparative perspective", *Anali Pravnog fakulteta u Beogradu*, Vol. 71, No. 4, 2023, pp. 669-694; Aleksij Mužina, Katja Štemberger Brizani, "Javna naročila in koncesije: spremembe pogodb zaradi povišanja cen in spremenjenih okoliščin", *Podjetje in delo*, Vol. 50, No. 3/4, 2024, pp. 481 *et seq*.

### 2.3.3. Invalidity of an Administrative Contract

There is no positive legislation in Slovenian law regulating the invalidity of administrative contracts in general, and therefore the rules of the law of obligations (on the nullity and voidability of contracts) must be applied. However, many of the issues related to the invalidity of administrative contracts cannot be resolved by them, e.g. the consequences of the annulment or revocation of the decision on which the administrative contract is based, after its conclusion.[27] Moreover, administrative contracts cannot, as a rule, be subject to the provisions of the OC on unilateral prohibitions (Art. 86(2) of the OC), nor the provision on conversion of the contract (Art. 89 of the OC).

The legislator has addressed some of these issues by certain laws, but not comprehensively, i.e. by the PPPA, which regulates specific grounds of nullity for public-private partnership contracts. Moreover, concession contracts governed by the CCCA are subject to the provisions of the Legal Protection in Public Procurement Procedures Act,[28] governing the voidability of concession contracts. The latter is a special form of contract voidability, different from civil law avoidability in that it can also be challenged by third parties with a legal interest, such as the unsuccessful tenderer and public interest litigants. Furthermore, the time limits for the voidability of a contract are narrower than under the OC.[29] In addition to these laws, certain sectoral laws also provide for specific grounds of nullity for concession contracts.[30]

### 2.3.4. Public Law Termination of an Administrative Contract

The withdrawal of the rights and obligations that are the subject of the contract by an administrative decision of a public law entity is the typical public law form of termination of an administrative contract before the expiry of the period for which it was concluded. It is therefore a unilateral measure taken by the competent authority (*ex iure imperii*) by an administrative act and is permissible only if there is a legal basis for it. In the current legislation, it can be found, in particular, in the area of concession relations. Administrative law points to two forms of withdrawal of concession: "for breach" and "in the public interest,"[31] which is a modality of the right to unilateral termination of a contract in the public interest.[32] The main difference between the two is that a withdrawal of the concession

[27] R. Pirnat, p. 154.
[28] *Official Gazette of the RS*, No. 43/11 as amended.
[29] Art. 42 *et seq*.
[30] Social Welfare Act (SWA), *Official Gazette of the RS*, No. 03/07 as amended, Art. 47d; Pharmacy Practice Act, *Official Gazette of the RS*, No. 85/16 as amended, Art. 53.
[31] Cf. SGEIA, Art. 44(1), first and second indent.
[32] Nicolas Dourlens, Roland de Moustier, "Les clauses de résiliation dans les contrats publics", *Contrats et Marchés Publics*, No. 2, 2014, pp. 49-50.

for breach is the result of the conduct of the concessionaire, whereas a withdrawal in the public interest is the result of reasons other than the concessionaire's own, namely if it is no longer in the public interest to exercise the concession. Therefore, only in this form of withdrawal does the concessionaire have a right to compensation, which means a right to financial equilibrium. However, the withdrawal of a concession is not only a right but also an obligation for the grantor, as the legal regime does not give the grantor any discretion in making this decision.[33]

However, it is often difficult to distinguish the withdrawal of a concession for breach from the contractual sanction of rescission of the contract, which is also linked to a breach. The issue is not merely theoretical but has also practical implications since the public and civil law forms of termination of a contract are subject to different premises. The withdrawal of a concession is subject to an administrative procedure and exercised by an administrative decision, whereas the rescission of a concession contract is not subject to an administrative procedure, but the right to rescission is exercised by a unilateral declaration of the will of the beneficiary.[34] In contrast to the rescission of the contract, which usually can be used by both parties, the withdrawal of the concession is reserved exclusively for the public law entity (the grantor). The legal remedies are also different, since in the event of (unlawful) withdrawal of the concession, the offender may seek protection in administrative procedure and/or before an administrative court, whereas disputes relating to the civil law termination of contracts are settled before the ordinary courts of law.

According to administrative theory[35] and case law,[36] the breach shall lead to the withdrawal of the concession, if it constitutes not only a breach of the concession contract but also other public law acts governing the concession (e.g. the concession act, a decision to unilaterally modify the contract, a decision issued by the grantor in the supervision procedure, a decision issued in the inspection procedure). Rescission of a contract is *a contrario* a sanction only for breach of contract, but not for breach of other legal acts.

However, not every breach of a contract entitles the party loyal to the contract to rescind it. It follows from case law, that the (gravity of the) breach must also be assessed separately in light of the public interest pursued by the administrative contract. If the public interest requires the continuation of the administrative contract despite its breach, rescission is not possible because it is a disproportionate sanction.[37]

In addition to the withdrawal of the concession, the relationship may be terminated also by other public law forms, e.g. by the (compulsory) purchase

[33] Cf. SGEIA, Art. 44.
[34] Judgement of the Administrative Court of the RS, No. III U 90/2009 of January 19, 2010.
[35] Rajko Pirnat, "Koncesijska pogodbna *de lege ferenda*", *VIII. dnevi javnega prava*, Portorož, 10.-12 junij 2002, Institut za javno upravo, 2002, p. 76.
[36] Judgement of the Administrative Court of the RS, No. III U 90/2009 of January 19, 2010.
[37] Judgement of the Supreme Court of the RS, No. II Ips 50/2019 of June 19, 2020.

of the concession,[38] transfer of the concession,[39] or takeover of the concession,[40] giving these contracts a public law character.

### 3. Serbian Law

Administrative contracts were introduced into Serbian law by the General Administrative Procedure Act (GAPA)[41] in 2016. Although administrative contracts are theoretically a highly complex institution, combining both public law and private law elements, the legislator has devoted only a few articles to this form of administrative functioning (Art. 22 to 26 of the GAPA). It has therefore regulated administrative contracts only in general terms, leaving the details to sectoral legislation.

It is clear from the content of the articles that the legislator was inspired by the German regime, where administrative contracts are also regulated in the General Administrative Procedure Act (VwVfG),[42] and the specifics are (or should be) regulated by sectoral laws. However, it only adopted some (less important) features of the German regime. German law distinguishes between subordinated administrative contracts and coordinated administrative contracts. While the former are concluded in a relationship in which there is a situation of superiority and subordination, coordinated administrative contracts are concluded between entities of equal position. Subordinated administrative contracts are generally used to replace an administrative act, which means that they are a form of alternative dispute resolution in administrative matters.[43] The administrative authority may therefore (in the absence of contrary legal provisions) – instead of issuing an administrative act – conclude a contract with a party to an administrative procedure. Serbian law, on the other hand, has only accepted coordinated administrative contracts.[44] An administrative contract is a bilaterally binding written act concluded, where provided for by a specific law, between an authority and a party, which creates, modifies, or terminates a legal relationship in an administrative matter (Art. 22(1) of the GAPA). It is therefore characterized by formal criteria (participation of the authority) and the subject-matter of

[38] SGEIA, Art. 43.
[39] SGEIA, Art. 46 and 47.
[40] SGEIA, Art. 45.
[41] *Official Gazette of the Republic of Serbia*, No. 18/2016 as amended.
[42] German General Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG) of May 25, 1978, in the version published on January 23, 2003 (BGBl. I, p. 102), as last amended by Art. 24(3) of the Law of June 25, 2021 (BGBl. I, p. 2154).
[43] Natassa Athanasiadou, *Der Verwaltungsvertrag im EU-Recht*, Beiträge zum Verwaltungsrecht, Mohr Sierbeck, Tübingen, 2017, pp. 131-132.
[44] *Cf.* Dragan L. Milkov, Ratko S. Radošević, "Neke novine u Zakonu o opštem upravnom postupku, Upravno postupanje", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 50, No. 3, 2016, p. 74; Dražen S. Miljić, "Upravni ugovori prema Zakonu o opštem upravnom postupku", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol 52, No. 2, 2017, p. 521.

the contract, whereas in German law the status of the contracting parties is irrelevant.[45] However, authorities may also conclude private-law contracts, which makes the delimitation of these contracts less clear. In contrast to German law, where the administrative authority has a general power to conclude an administrative contract (in the absence of any contrary legal provisions), in Serbian law an administrative contract can only be concluded if a specific law so provides. According to the authentic interpretation of this provision,[46] it must be interpreted strictly linguistically, which means that the special law must expressly define the contract as an administrative contract; otherwise, the legal regime of the GAPA does not apply to it, even if the contract establishes, modifies or terminates a legal relationship in an administrative matter. Although the explicit definition of a contract as an administrative contract surely simplifies their identification, the development of new (innominate) contractual relationships can lead to a situation where a contract with characteristics of an administrative contract is left outside the legal regime of administrative contracts because the legislator has not (yet) explicitly defined it as such.

The legislator has laid down some "specific" rules for administrative contracts in the GAPA (e.g. modification of the contract due to changed circumstances, right of the administration to terminate the contract). However, this regulation is very deficient as it does not regulate the procedure for concluding an administrative contract, the consequences of defects in concluding the contract, and the right to the financial equilibrium of the co-contractors, and it is therefore not substantially different from the regime of contracts governed by private law.

Moreover, Art. 26 of the GAPA provides that other provisions of this Act (*mutatis mutandis*) and the provisions of the law governing contractual relations (subsidiarily) shall apply to administrative contracts. It is not clear which provisions of the GAPA the legislator had in mind since administrative contracts are not administrative acts (nor do they replace them), neither material or guarantee acts, but a bilateral legal relationship. Furthermore, the legislator has also not placed administrative contracts under the jurisdiction of administrative courts, as is the case in other comparative law systems (but not Slovenian), although they (predominantly) fall within the scope of administrative law.

Due to all these shortcomings, administrative contracts are *de facto* not used in Serbian practice, and, unlike Slovenian law, the case law concerning them has not (yet) been developed. It is, therefore, an institution that is accepted in positive law (and even then only in the GAPA, not in sectoral laws), but not in (contractual) practice.

[45] Hartmut Maurer, *Allgemeines Verwaltungsrecht*, 18. Aufl., C. H. Beck, München, 2011, § 14, Rn. 11; Volker Schlette, *Die Verwaltung als Vertragspartner*, Mohr Siebeck, Tübingen, 2000, p. 138.
[46] *Official Gazette of the Republic of Serbia*, No. 95/2018.

## 4. Conclusion

A comparison between Slovenian and Serbian law has shown that the two countries have taken different paths in implementing administrative contracts. Serbian law has followed the example of German law and enacted the basic features of administrative contracts in the GAPA, leaving the specifics to the sectoral laws, while Slovenian law has not adopted a (general) legislative framework for administrative contracts, but they are scattered in many sectoral laws. However, it is not possible to (fully) establish a legal regime for administrative contracts without specific legislative regulation, i.e. only through theory and case law, since the general contract law does not resolve all the challenges relating to these contracts, even if it is applied *mutatis mutandis.*

Therefore, Slovenian law should also regulate the basic features of administrative contracts at the general level, which will apply to all administrative contracts except where otherwise provided for by specific laws, and therefore follow the example of Serbian law in this respect. Nevertheless, the GAPA is not the appropriate law to regulate this matter, rather a separate law should be adopted. Administrative contracts are not a procedural institution, and they are usually concluded only after the administrative procedure has been ended. Moreover, an indirect legal authorization, such as a legislative provision providing a public entity to conclude a contract with all the characteristics of an administrative contract, should (continue to) be sufficient to conclude an administrative contract. A different requirement (also known in Serbia) is overly formalistic and undermines legal certainty and the predictability of the law.

Given all of the above, it is possible to reject the initial hypothesis, as the current legal regime does not (fully and adequately) address all aspects of administrative contracts *per naturam.* Therefore, certain legislative changes are necessary.

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Bojana Todorović*

# ADMINISTRATIVE CONTRACTS IN THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE: AN INSTRUMENT OF DEMOCRATIZATION OF PUBLIC ADMINISTRATION OR A "LEGAL IRRITANT?"**

*The end is in the beginning and lies far ahead.*[1]

*Abstract*

*Administrative contracts were introduced into Serbian law as a new instrument of administrative activity on the basis of the 2016 Law on General Administrative Procedure. They were aimed at bringing about a more active role of citizens in their relations with the public administration. Nevertheless, due to their fragmentary and contradictory legal regime, the fact that they are "similar, but different" from contracts with a much longer history in Serbian law, administrative contracts "irritate" the legal system and have not yet taken root in special administrative domains. This paper critically analyzes the positive legal framework of administrative contracts through the prism of its normative models, with the aim of providing de lege ferenda guidelines for its improvement.*

**Keywords:** Administrative contracts, Law on General Administrative Procedure, Comparative Law, Public Procurement, Public-Private Partnerships and Concessions.

## 1. Introduction

Describing the process of transferring a legal institution from one legal system to another, Prof. Gunther Teubner coined the term "legal irritant," which explains the essence of that process better than the well-established concept of *legal transplant*. This is because the term *transplant* tends to be misleading and lead to the conclusion that after the complex operation of transferring a legal institution from

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[1] Ralph Ellison, *Invisible man*, Random House, New York, 1952, taken from: Meg Mason, *Sorrow and Bliss*, Weinfeld and Nicholson, London, 2022.

one legal environment to another, the "immune response" of the latter only has two options – to integrate, i.e. accept a "foreign body" in its original form, or to reject it.[2]

To the contrary, Teubner points to a whole series of reactions or changes that occur as a result of the *irritation* caused by the "transplantation" of legal institutions. First, such an operation prompts the re-assessment of *entrenched theoretical views*; second, it induces the adaptation of the *legal environment* in which it is placed, and, finally, the *institution itself* undergoes certain changes in order to be able to function in the new legal setting.[3] The described phenomenon does not necessarily imply something negative, but rather serves as an external impulse for carefully considering how the transplanted legal institution interacts with its novel legal environment.

It is through the described lens that this paper observes administrative contracts in the legal framework of the Republic of Serbia, established by the Law on General Administrative Procedure (LGAP).[4] Given that seven years after their introduction into the Serbian legal order, administrative contracts still have not taken root in special administrative domains and they continue to represents a "legal curiosity" in academic and professional circles, the author starts off with the premise that it is necessary to (re)assess their *meaning* and *goals* in light of a broader discourse on the evaluation of the (in)effectiveness of LGAP and its individual provisions.[5] The aim of this academic endeavor is to provide *de lege ferenda* guidelines for the improvement of the legal framework of administrative contracts in Serbian law. This is done by, first, critically analyzing *de lege lata* legal solutions in light of foreign legal solutions that served as a normative model to the domestic legislator (2) and, second, by outlining guidelines for improving the legal framework based on the observed shortcomings and comparative lessons (3).

## 2. A Critical View of the Legal Framework of Administrative Contracts in the Republic of Serbia

Administrative contracts were introduced into the legal system of the Republic of Serbia as a separate legal institution with the 2016 LGAP. Despite the fact that their embedment among the instruments of administrative activity represents one of the biggest novelties of that law, the legal framework established by LGAP is fairly rudimentary, comprising only five articles (Articles 22–26). *In concreto*, it envisages administrative contracts as "bilaterally binding legal act(s),

[2] Gunther Teubner, "Legal irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", *The Modern Law Review*, Vol. 61, No. 1, Oxford, 1998, p. 12.
[3] *Ibidem*.
[4] *Official Gazette of the Republic of Serbia*, No. 18/2016, 95/2018 – authentic interpretation and 2/2023 – decision of the Constitutional Court.
[5] Which was the central focus of the regional conference "Analysis of the Law on General Administrative Procedure in Service of the Economy and Citizens", held in Belgrade, on October 13, 2023, Eurosfera, *https://eurosfera.org/*, 29. 11. 2023.

concluded between the (public) authority and the party, when a special law stipulates so and by means of which a legal relation in an administrative matter is created, modified or terminated" (Article 22, paragraph 1). Moreover, "the content of administrative contracts shall not be contrary to the public interest, nor the interest of third parties" (Article 22, paragraph 2).

It follows from the cited provisions that LGAP only foresees the legal *possibility* of concluding administrative contracts, whereas their introduction into special administrative domains is left to sectoral legislation. This conclusion is supported by the authentic interpretation of Art. 22 by the National Assembly, which expressly stated that a particular contract will be considered *administrative*, only if it is designated as such by a special law. To the best of the author's knowledge, this has been done only once to date – the Railway Act (RA)[6] from 2018 qualified the *contract on the conditions and method of financing the management of public railway infrastructure* (Article 2, paragraph 1, item 65 and Articles 21–27 of the RA) and the *contract on the obligation of public transportation* (Article 2, paragraph 1, item 66 and Articles 112–117 of the RA) as administrative.

The remaining provisions dedicated to administrative contracts concern the conditions under which it is possible to modify the contract due to changed circumstances (Article 23), the authority's right to unilaterally terminate the contract (Article 24), the administrative legal protection of the party on the grounds of an objection (Article 25), the respective application of other provisions of LGAP, as well as the subsidiary application of the Law of Contracts and Torts (LCT)[7] to questions that are not regulated by a special law or LGAP (Article 26).

Such a fragmentary legal framework of administrative contracts inevitably raises a myriad of questions.[8] In the lines that follow, the author focuses on three such questions that significantly impede the further development of this legal institution in the Serbian legal system and its implementation in special administrative domains.

### *2.1 Method and Reasons Behind the Introduction of Administrative Contracts into Serbian Law*

Being a "bridge between public and private law,"[9] administrative contracts were supposed to contribute to "the realization of one of the European standards, reflected in the active role of citizens in relations with the public administration."[10]

[6] *Official Gazette of the Republic of Serbia*, No. 41/2018 and 62/2023.

[7] *Official Gazette of SFR Yugoslavia*, No. 29/78, 39/85, 45/89 – decision of the Constitutional Court, *Official Gazette of FR Yugoslavia*, No. 31/93, *Official Gazette of Serbia and Montenegro*, No. 1/2003 - Constitutional charter, *Official Gazette of the Republic of Serbia*, No. 18/20.

[8] Bojana Todorović, "The New General Administrative Procedure Act – A Stepping Stone Towards a Modern and Efficient Public Administration in Serbia", *European Review of Public Law*, Vol. 29, No. 4, 2017, pp. 1419-1422.

[9] B. Todorović (2017), p. 1419.

[10] GAPA Proposal with EM and AE, p. 5.

This proclamation aimed at demonstrating that the domestic administrative apparatus had undergone a profound change – as of the adoption of LGAP, it would not only exercise "power" by issuing administrative acts, but also cooperate with citizens and businesses by concluding contracts.[11] Sending out a political message of the reformed public administration is a "recipe" taken from German law.[12] The public law contract (Ger. *öffentlich-rechtlicher Vertrag*) from the federal Administrative Procedure Act (Ger. *Verwaltungsverfahrensgesetz* – VwVfG)[13] was supposed to show that citizens were placed on an equal footing with the State and its administration, therefore cutting ties with the dark legacy of the Second World War.[14] The contractual instrument of administrative activity received its procedural garb not as a result of thorough nomotechnical considerations and systemic "interventions," but rather a "nice idea," without a clear goal of how this institution fits into the rest of the legal system and the effects its introduction can lead to.[15] This approach is in stark contrast with French law, in which the legal regime of administrative contracts – including the fundamental principles on which it rests – is the result of a decades-long evolution of the contractual practice, first recognized and then carefully and thoroughly shaped by (administrative) court decisions, before obtaining its modern-day legal form.

Moreover, the introduction of this institution in LGAP was a result of the requirement to align domestic legislation with the principles and standards of the European Administrative Space. This is evidenced by the fact that representatives of the European Union (EU) participated in the working groups tasked with drafting LGAP,[16] as well as by the example of countries in the region (Albania, Croatia, Montenegro, and North Macedonia), where administrative contracts had also been introduced into their respective general administrative procedure acts, "as a measure of harmonization with the administrative law of the EU."[17]

The introduction of administrative contracts under the influence of an *external* factor instead of as a response to the necessity of *internal* (contractual)

[11] Bojana Todorović, *Mehanizmi rešavanja sporova iz upravnih ugovora*, doktorska disertacija, Pravni fakultet Univerziteta u Beogradu, Beograd, 2023, p. 76; Dario Đerđa, "Upravni ugovori u hrvatskome pravnom sustavu – regulacija i prostor za njeno poboljšanje", *Fondacija Centar za javno pravo* – Analize, 2012, p. 2.

[12] Đerđa points out that such a normative outcome is the result of the fact that foreign experts who took part in the working groups for drafting the law were predominantly from Germany, D. Đerđa, p. 3.

[13] *Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 1 des Gesetzes vom 4. Dezember 2023 (BGBl. 2023 I Nr. 344) geändert worden ist.*

[14] Paul Stelkens, Heinz Joachim Bonk, Michael Sachs, *Verwaltungsverfahrensgesetz (VwVfG): Kommentar*, C.H. Beck, 9. Auflage, München, 2018, Article 54, para. 2.

[15] Ulrich Stelkens, "Kodifikationssinn, Kodifikationseignung und Kodifikationsgefahren im Verwaltungsverfahrensrecht", *35 Jahre Verwaltungsverfahrensgesetz – Bilanz und Perspektiven* (eds. Hermann Hill, Karl-Peter Sommermann, Jan Ziekow), Berlin, 2011, p. 282.

[16] GAPA Proposal with EM and AE, p. 2.

[17] Dejan Milenković, "Upravni ugovori u Zakonima o opštem upravnom postupku zemalja Zapadnog Balkana", *Strani pravni život*, Vol. 61, No. 3, Beograd, 2017, pp. 67-80.

practice in the domestic legal system, diluted their proclaimed democratic potential both in Serbia and the aforementioned countries, since their practical implementation is negligible.[18] This lack of a planned and systemic approach led to at least two more consequences, which will be discussed in the following sections.

### *2.2 Contradiction of the Objective(s) and the Legal Regime of Administrative Contracts*

We have already seen that qualifying the administrative contract as a new instrument of administrative activity under the umbrella of the expanded notion of administrative matter,[19] was supposed to prompt a more active role of citizens and their organizations *vis-à-vis* the public administration. In other words, to *strengthen* the protection of their *rights* and *interests*.

However, the Analysis of the Effects of LGAP reveals a diametrically different *essence* of administrative contracts, stating that "[their] legal specificity is reflected in the deviations from the general regime of contractual (civil) law by which the *powers of the public authority* are *strengthened* in relation to the other contracting party, in order to achieve the public interest" (emphasis added).[20] This contradiction spilled over into the legal regime of administrative contracts.

An illustrative example are the provisions that establish the relationship between the contracting parties, i.e. their rights and obligations. Article 23 of LGAP first envisages the right of both contracting parties to request the modification of the contract, in order to adapt it to new circumstances that could not have been foreseen at the time of conclusion of the contract, provided the fulfillment of contractual obligations becomes significantly more difficult for one of them (paragraph 1). However, this equality is deviated from in favor of the authority already in the following paragraph, by prescribing an additional reason due to which the authority may reject the party's request – "if the modification of the contract would cause damage to the public interest that would exceed the damage the party may suffer" (paragraph 2).

The scale is further tipped in favor of the authority through its power to unilaterally terminate the contract in the following situations: (1) if the party denies its consent to amend the contract due to changed circumstances (Article 24, paragraph 1, item 1); (2) if the party fails to fulfill its contractual obligations (Article 24, paragraph 1, item 2) and (3) if this is necessary in order to eliminate

[18] Marko Turudić,"Croatia", *Les principes des contrats publics en Europe* (eds. Stéphane de la Rosa, Patricia Valcárcel Fernandez), Bruxelles, 2022, pp. 205-206.

[19] Article 2 of LGAP defines the administrative matter as "an individual situation in which the authority, in the direct application of laws and other regulations and general acts, legally or factually affects the position of the party by rendering administrative acts, rendering guarantee acts, concluding administrative contracts, conducting administrative actions and providing public services" (paragraph 1), as well as "any other situation defined by law as such" (paragraph 2).

[20] GAPA Proposal with EM and AE, p. 15.

a serious and imminent threat to the life and health of people, public peace and order, or economic disturbances, provided that this cannot be done by other means which are less detrimental to acquired rights (Article 24, paragraph 1, item 3). The authority terminates the contract by issuing an administrative act decision [*rešenje*], in which it states detailed reasons for termination (Article 24, paragraph 2). The other contracting party does not have equivalent powers should the authority refuse its request to modify the contract or if it fails to fulfill its contractual obligations. In the latter case, the party may protect its rights by filing an objection [*prigovor*] (Article 25) within six months from the day the authority failed to fulfill its obligation(s) stemming from the administrative contract (Article 147, paragraph 2, item 1). Competent to decide on the objection, along with any claims for damages, is the head of the same authority whose non-fulfillment of the contractual obligation the objection is directed towards, i.e. the other contracting party (Article 148, paragraph 1). The competent head of the authority decides on the objection on the basis of an administrative act, whereby it determines the further fulfilment of the authority's obligations from the administrative contract and the request for damages (Article 149, paragraph 3, item 1). Such an administrative act, as well as the ones issued in other cases in which the authority unilaterally terminates the contract, may be challenged by means of an administrative appeal and/or lawsuit initiating an administrative dispute.[21]

The described imbalance in the rights and obligations between the contracting parties, the fact that the first line of legal protection of the party is before the same body whose (in)action it challenges, which also decides on the request for damages, are in no way compatible with the aspiration to improve the position of the party *vis-à-vis* the public administration. Moreover, the mere designation of the contracting parties as "authority" and "party" indicates that the legislator has not deviated much from the traditional view of the administration as superior to individuals, which the altered definition of administrative matter and newly introduced instruments of administrative procedure aimed to achieve.

Based on the highlighted elements of the legal regime, the administrative contract rather corresponds to the description from the Analysis of the Effects of LGAP (see above). However, the general legal regime of administrative contracts established by LGAP does not consistently and completely reflect this other "side" of this institution either. Reference to public interests, which should be the *differentia specifica* of administrative in relation to civil contracts, is only touched upon by stipulating that the content of the contract must not be "contrary" to them – a requirement that (should) apply to all legal institutions. Moreover, LGAP does not foresee any legal sanction in the event that the content of the contract runs against both the public interest and the interests of third parties (Article 22, paragraph 2), which is certainly not compatible with the proclamation that adminis-

[21] Depending on the position of the competent authority on the hierarchy ladder.

trative contracts are concluded "for the purpose of creating a certain public benefit for citizens and legal entities."[22]

Furthermore, failure to regulate important questions of the life cycle of administrative contracts (such as the procedure for their conclusion, interpretation and filling legal gaps, the reasons and consequences of the invalidity of the contracts, as well as other grounds for amending or terminating them), and relying on the rules from the LCT[23] does not contribute to the protection of public interests, but instead brings the administrative contract closer to civil contracts, which are characterized by the equality of the contracting parties.[24] Consequently, the general legal regime of administrative contracts from LGAP lies halfway between administrative law and the law of obligations.

This meandering in the understanding of administrative contracts and their legal regime from LGAP occurred due to the previously described absence of a planned and systemic approach in their legal regulation, as well as due to combining certain elements of French and German law, without having had a comprehensive overview of said comparative "models." One of the distinguishing features of the French *contrat administratif* is the inequality of the contracting parties, reflected in stronger powers established in favor of the authority and, under certain conditions, manifested in the stage of execution of administrative contracts. The most notable of these powers include: 1) the right to unilaterally terminate the contract in the public interest; 2) the right to unilaterally amend the contract and 3) the right to impose sanctions against the private co-contractor.[25] Inspired by French law, countries in the region (albeit with certain differences in terms of reasons and other elements) also envisaged the public authority's right to unilaterally terminate the contract in the public interest and/or due to the party's failure to fulfill its contractual obligations, as well as the right to unilaterally amend the contract.[26]

It seems to us, however, that this feature of administrative contracts from French law has been taken out of context and overemphasized. First of all, such unilateral powers may be inherent to the very essence of administrative contracts in French law, to the extent that they are implied even when they are not explicitly prescribed (at least with respect to unilaterally terminating the contract), but since they have been established in favor of *public interests*, and not the *interests of the authority*, it is the competent administrative court that is tasked with assessing, in each particular case, whether the conditions for their activation in the public interest have been met, not the authority itself.[27] Besides, this possibility is rarely

[22] *Ibidem*, p. 5.
[23] Pursuant to Article 26 of LGAP.
[24] Marija Karanikić Mirić, Tatjana Jevremović Petrović, "Administrative Contracts in Serbian Law – Specificities of the New Statutory Regime," *Review of Central and East European Law*, Vol. 45, No. 1, 2020, pp. 29-30; B. Todorović (2023), p. 83.
[25] Nicolas Gabayet, "France", *Les principes des contrats publics en Europe* (eds. Stéphane de la Rosa, Patricia Valcárcel Fernandez), Bruxelles, 2022, p. 253.
[26] D. Milenković (2017), pp. 76-77.
[27] Laurent Richer, François Lichère, *Droit des contrats administratifs*, 11e édition, LGDJ, Paris, 2019, p. 239.

resorted to in practice because it is very financially burdensome for the authority, entailing an entire plethora of instruments aimed at financial compensation of the private co-contractor, in order to re-establish the financial equilibrium of the contract.[28] What is more, in certain cases (admittedly set very restrictively), the private contractor has the possibility to turn to the administrative court for relief from its contractual obligations, if these have become excessively burdensome.[29] Finally, in the phase preceding the conclusion of the contract, the contractual imbalance is reflected in the additional restrictions imposed on the authority, in order to ensure public funds are managed in a transparent and rational manner, and that the contract is concluded with the candidate that is best equipped to respond to that goal.[30] Unlike its Serbian counterpart, French law recognized that the protection of private contractors "is also in the interest of public service, since only in a predictable atmosphere, with guarantees of fair compensation, would engaging in contractual relationships – especially long-term ones – with public authorities be in the interest of private entities."[31]

To conclude, broad reliance on the subsidiary application of the rules of the LCT for all matters related to administrative contracts that are not regulated by the provisions of LGAP is inspired by German law, in which the position of the contracting parties in the administrative contract is, despite the possibility of the authority to unilaterally terminate the contract in the public interest, more balanced.[32] This applies to both public law contracts that are mostly subject to the administrative legal regime, as well as to other contracts that are formally in the civil law regime but can (and, in our opinion, should) be brought under the umbrella of the term *administrative contract*. The variety of legal regimes of administrative contracts and their mutual (in)compatibility is one of the weakest points of German law in this domain and another serious consequence of the partial imitation of this comparative "model"[33] – which leads us to the next section.

### *2.3 The Relationship Between Administrative Contracts From LGAP and Public Procurement, Public-Private Partnerships and Concession Contracts*

It follows from Article 22 of LGAP that the introduction of administrative contracts into special administrative domains is left up to special laws, short of any guidelines that would enable a systemic approach. Quite expectedly, such a legal solution raises the question as to *what are*, in fact, administrative contracts?

[28] B. Todorović (2023), pp. 46-50.
[29] *Ibidem*, pp. 48-50.
[30] N. Gabayet, pp. 252-253.
[31] B. Todorović (2023), p. 48.
[32] Regarding public law contracts, this authorization is prescribed by Article 60 of the VwVfG, and is allowed in order to prevent or eliminate serious consequences for the common good (paragraph 1), and the decision to terminate the contract in that case must be made in written form and reasoned, in order to preserve legal certainty (paragraph 2).
[33] B. Todorović (2023), pp. 67-69.

In order to provide an answer to that dilemma, the proponents of the law suggested that "there are certain types of administrative contracts in our legal system that are regulated by special laws,"[34] highlighting the Law on Public-Private Partnerships and Concessions (LPPPC)[35] and the Law on Public Procurement (LPP)[36] as such examples. These contracts could, based on their various characteristics (e.g. the determination of the contract, the contracting parties, or the link between the subject matter of the contract and public interests), be qualified as administrative.[37] In fact, there are comparative examples of such an approach, for instance, in France or Croatia.[38] Moreover, the Draft LGAP from 2012 expressly stipulated that administrative contracts are concluded *precisely* in the area of concessions, public-private partnerships and public procurement, with the possibility of introducing them in other areas as well, on the basis of special laws.[39]

The drafters of the pertinent LGAP opted for leaving the closer regulation of administrative contracts up to those special laws, not only due to the fact that these predate LGAP and could, therefore, not have designated the contracts they regulate as administrative, but also because "they were written with a different paradigm – the desire to attract investors," which is why they "protect the private party more than the corresponding provisions of LGAP."[40] In this way, a potential conflict between incompatible legal regimes,[41] which causes doctrinal headaches and practical problems in German law, has been avoided.

As already pointed out, the public law contract was introduced into the German *VwVfG* without a clear vision of how to demarcate it from already existing and in practice highly widespread and economically significant contracts, which include public procurement and concession contracts. While the former are subject to the administrative legal regime, which is why the jurisdiction for resolving disputes is entrusted to administrative courts; the latter ones are subjugated to the general contract law regime, tailored according to the requirements stemming from relevant EU directives, including a specialized mechanism of legal protection and the jurisdiction of civil courts. Finally, the legal nature of the third type of contracts, and therefore the rules that apply to them, is assessed on

[34] GAPA Proposal with EM and AE, p. 5.
[35] *Official Gazette of the Republic of Serbia*, No. 88/2011 and 15/2016.
[36] *Official Gazette of the Republic of Serbia*, No. 91/2019 and 92/2023.
[37] D. Đerđa, pp. 1–2; M. Turudić, pp. 198–199; Dejan Milenković, *Upravni ugovori – teorija, zakonodavstvo, praksa*, Centar za javnu upravu, lokalnu samoupravu i javne politike Fakulteta političkih nauka: Čigoja štampa, Beograd, 2014, pp. 151-173.
[38] Article 5, paragraph 1, item 7 of the Croatian Concession Act, *Official Gazette of the Republic of Croatia*, No. 69/17, 107/20; M. Turudić, pp. 198-199.
[39] Article 30, paragraph 2 of the Draft Law on General Administrative Procedure, *https://www.srbija.gov.rs/prikaz/168120*, 20. 10. 2023.
[40] Zoran Tomić, Dobrosav Milovanović, Vuk Cucić, *Praktikum za primenu Zakona o opštem upravnom postupku*, Ministarstvo državne uprave i lokalne samouprave, Beograd, 2017, p. 48.
[41] Which is further deepened by the dilemma concerning which legal regime has priority – the one from the GAPA as a general, albeit temporally later law, or the special legal regime that predates the GAPA. *Ibidem*.

a case-by-case basis.[42] In situations where the same contract can be qualified as both a public law contract and a public procurement or concession contract, the multitude of competing legal rules and/or paths of legal protection could lead to grave legal uncertainty for citizens and business entities.[43]

Although the Serbian legal solution prevents the described confusion as to what set of legal rules is applicable, it fails to encourage the further development of administrative contracts, also missing the opportunity to contribute to their clear(er) demarcation from public procurement contracts, public-private partnerships and concessions. Why do we still consider this to be highly relevant?

In addition to being an important instrument of economic development,[44] and their prevalence in practice, the private sector has been pushing for modifications of the LGAP provisions on administrative contracts, in order to expressly exempt public-private partnerships and concession contracts from their application. The argument put forth is that the LGAP privileges the public contractor and thus "significantly limits certain rights of private parties."[45]

Moreover, the Law on Railway (LoR) stipulates that the administrative contracts it regulates may also be awarded as public-private partnerships and concessions (Article 78 of LoR), in which case the application and provisions of LPPPC come into consideration, bringing us right back to the original dilemma of the relationship between administrative contracts from LGAP and this latter category of contracts.

Finally, the European integration process imposes the obligation to comply with EU standards regarding the award and legal protection of contracts in the fields of public procurement and concessions.[46] Due to the fact that EU law does not differentiate between *public* and *private* contracts, the aforementioned standards would necessarily "spill over" to "similar, but different" contracts from LGAP, which increases the possibility of discrepancies between domestic and EU law.[47]

## 3. De Lege Ferenda Guidelines for the Improvement of the Legal Framework

Insight into the French and German administrative contract laws enabled us to observe the positive legal framework established by LGAP with new eyes and to better perceive its shortcomings in order to trace the path to its improvement.

[42] This problem of the conflict of legal regimes of administrative contracts in German law is further exacerbated as a consequence of the federal structure and the different rules that apply to contracts on public procurement and concessions, depending on their financial value. More on that: B. Todorović (2023), pp. 254-296.

[43] Ulrich Stelkens "Abschnitte zum Europarecht zu §54", *Verwaltungsverfahrensgesetz: Kommentar* (eds. Paul Stelkens, Heinz Joachim Bonk, Michael Sachs), C.H. Beck, 10. Auflage, München, 2023, pp. 2127-2128.

[44] Bojana Todorović, Nikola Ilić, "Pravno-ekonomska analiza korupcije u javnim nabavkama: Slučaj Srbije u procesu evropskih integracija", *Pravo i privreda*, Vol. 56, No. 7-9, Beograd, 2018, pp. 234-235.

[45] Foreign Investors Council – FIC, *The White Book 2019: Proposals for improvement of the business environment in* Serbia, Chapter 20: Public-Private Partnerships (eds. Miroljub Labus, FIC), pp. 102-103.

[46] On this in more detail: B. Todorović (2023), pp. 93-108 and pp. 169-214.

[47] *Ibidem*, pp. 204-211 and p. 397.

We realize that for the existence of an efficient and functional legal regime of administrative contracts, it is imperative to align legislation and practice. In other words, if the contracts that are most frequently resorted to in practice and stand out for their economic, strategic or other relevance are excluded from the normative framework of administrative contracts, the *purpose* of the institution of administrative contracts in that legal system becomes questionable.

A prerequisite for bringing administrative contracts from the normative pedestal into practical life is the existence of a coherent and harmonized legal regime – general and special – to which they are subjected. This is evidenced by French law, in which such harmony has been achieved, and German law, where the plurality and mutual inconsistency of legal regimes of administrative contracts, including avenues of legal protection, is a source of great legal uncertainty.

Finally, it is necessary for each country to adapt the contractual activity of the administration to its own needs and specific legal, economic, political and social context, so that it is functional and effective in achieving the set goals, within the limits imposed by the positive legal framework and European and/or international standards to which it has committed itself.

In the context of Serbian law, the comparative legal lessons learned lead us to the conclusion that before embarking on the modification of the legal framework established by LGAP, it is necessary to take a few steps back and ask ourselves the fundamental questions *whether*, and, if so, *why* it is important that this institution exist in the domestic legal order and *what goals* we want to achieve with it. Answers to those questions should bring us closer to resolving the dilemma that still perseveres in academic and professional circles, namely, what *are* administrative contracts, i.e. in what relation do they stand with public procurement, concessions and public-private partnerships contracts. Thus, it appears that in light of the quote with which we opened this paper, in the end we returned right to the beginning. In other words, in a bid to offer guidelines for some final legal regulation of administrative contracts, we return to the starting point, that is, the need to define what administrative contracts *are* in the context of the administrative procedural legislation of the Republic of Serbia.

The first step on that path would be to conduct a thorough study that would examine the need for such contracts in particular administrative areas, which the existing contractual arrangements between the public administration and the private sector cannot satisfy. Only on the basis of this practical *input* will we be able to consider a normative framework that could meet those needs.

Moreover, the positive legal framework of administrative contracts itself should enable the realization of the set goals. If the main goal is to demonstrate the greater democratization of public administration, then the contractual position of the private party should be strengthened, giving it the opportunity to influence the content of the contract, its course, and even the possibility of being released from contractual obligations in precisely defined situations, adapted to

the specificities of such an institution. In that case, it seems appropriate to rely on the general contract law rules, as well as the jurisdiction of civil courts to resolve contractual disputes.

Conversely, if it is important to emphasize the specificity of administrative contracts in relation to civil contracts of the administration, in order to protect the public interest more adequately, then it would be necessary to, first, adapt the definition of administrative contracts to include that important element and, second, prescribe legal consequences in the event that the content of the contract runs against the proclaimed public interests, as well as the legal interests of third parties. Otherwise, third parties are protected only formally.

Additionally, we consider it imperative to foresee the basic principles on which the procedure for selecting a private contractor and contract award would be based, which should not be deviated from even by special laws. This would avoid the situation that LoR potentially leads to, foreseeing the possibility of awarding the contracts it regulates directly, i.e. based on the decision of the authorities and without having conducted some form of competitive tendering,[48] which does not contribute to the protection of public interests and paves the way for corruption and other malpractices. Similarly, placing emphasis on the achievement and protection of public interests supports the jurisdiction of the administrative judiciary for disputes arising from administrative contracts.[49]

The experiences of our normative role models point toward gathering the most important rules and principles that are common to all administrative contracts in one place – for example, in the form of a special law – in order to improve legal certainty.[50] In that separate piece of legislation or LGAP itself, it would be good to provide appropriate guidelines – concerning the specificity of the sector in which administrative contracts are introduced, the subject matter of the contract, i.e. the predominant interest that it aims to pursue – which would be based on the previously defined goal of such contracts and which the legislator would be guided by when introducing them into special domains, in order to make sure this is done in a systematic way. In each individual case, it would be assessed whether it is necessary and advisable for contracts in a certain sector to be qualified as administrative, which is especially important if we maintain the stronger position of the authority *vis-à-vis* the private contractor – which in itself and without appropriate instruments to remedy a disturbed financial balance, renders this kind of instrument less attractive to potential contractors. Unfortunately, this opportunity was missed when LoR was passed, since it fell short of an explanation why it is believed that "the introduction of contractual relations

[48] See Article 114, paragraph 1, item 1 of LoR.

[49] A prerequisite for this is the adjustment of the legal framework regulating administrative disputes, which currently does not provide for that possibility, as well as the improvement of the capacity of the domestic administrative judiciary in order for such legal protection to be truly effective.

[50] In the context of French law: B. Todorović (2023), pp. 42-43; as for German law: *Ibidem*, p. 68

for the management of railway infrastructure and for the obligation of public transportation" would enable "controlling the expenditure of funds, in order to ensure efficient, effective work and raise the quality of services of infrastructure managers and railway carriers."[51]

Lastly, we think it is good that administrative contracts continue to *irritate* and encourage us to reconsider the need for such an institution, as well as the modality that would best respond to the requirements of our practical reality, so that such a "plant" could finally take root in domestic "soil."

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Zoran Jovanović**

# PROVISION OF PUBLIC SERVICES AS A FORM OF ADMINISTRATIVE PROCEDURE IN THE CONTEXT OF PUBLIC ADMINISTRATION REFORM

*Abstract*

*The current Law on General Administrative Procedure was adopted with a significant number of novelties aimed at adapting to new needs, a new social reality, creating preconditions for modernization of the entire administration, a better relationship with citizens and the economy, as well as improving administrative behavior and administrative procedures.*

*One of the mentioned novelties is also the expansion of LGAP (Law on General Administrative Procedure) matter, which refers to new forms of administrative action. An administrative action (which is the terminology of the current LGAP), in addition to situations where administrative acts are passed, also includes situations where guarantee acts are passed, administrative contracts are concluded, administrative actions are undertaken and public services are provided.*

*The question of whether the novelties of the Law on General Administrative Procedure provided a good basis for the expected improvements and met the expectations of science and practice, opens up space for scientific and professional discussion on numerous topics.*

*In the paper, according to its topic, the authors will specifically refer to the key aspects of the provision of public services – from an objective need to include the provision of these services in LGAP, that is, the correctness of such regulation, through the way of performing public services and the legal protection of the public service users. A detailed treatment of the mentioned topic presupposes an indication of the advantages/disadvantages of such legal regulation of the provision of public services, but also proposals for improvements in this area.*

**Keywords:** Public Administration, Administrative Actions, Provision of Public Services, Legal Protection of Users.

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## 1. Introduction

The socio-political changes that took place in the Republic of Serbia in the early 2000s significantly determined the new course of the country and its aspiration to joinimportant international organizations. That membership was supposed to contribute to the introduction of European standards when it comes to the state's attitude toward the public sector, toward raising the competitiveness of the economy, and ultimately toward raising the standards of an individual. Comprehensive reforms followed. They implied changing the existing or establishing a completely new legal framework for regulating relations in various areas.

The aforementioned changes were a necessity for the reorganization of the state, into a modern and efficient organization that would finally transform its relationship with citizens and the economy. In this sense, the reform of the state and, more broadly, public administration is a central concept when it comes to the transformation of the entire social system.

The state administration reform strategy, which referred to the period 2004-2013 and later, the Public Administration Reform Strategy from 2014 took more serious steps in that direction. The aforementioned documents provided for a series of concrete activities aimed at first providing the necessary legal framework for the operation of the state administration and local self-government system, as well as "fine-tuning" of the adopted legal framework, institutional and professional strengthening of administrative capacities, and also connecting public administration reform with the European integration process.[1] In other words, it means the final transformation of the entire public administration into a service for citizens. Later, the adoption of other strategic documents followed. The completion of the reform process of the entire administration was not possible without changes to the handling of administrative matters, that is, changes to the Law on General Administrative Procedure itself. It is precisely the novelties introduced by the new Law on General Administrative Procedure (hereinafter: LGAP) that represent the central part of this paper, more precisely, one of the "novelties" – the provision of public services that are now covered by this regulation for the first time.

Undeniably, the previous LGAP was a "reliable procedural support" and "legally and professionally harmonious and stable" for many years. But the need for certain corrections nevertheless appeared so that it could include new social circumstances and needs.[2] Therefore, in 2016, a completely new Law on General Administrative Procedure was passed.[3] It was supposed to enable adaptation to

[1] The Public Administration Reform Strategy of the Republic of Serbia, *Official Gazette of RS*, Nos. 9/2014, 42/2014 correction and 54/2018.

[2] Zoran Jovanović, "Pružanje javnih usluga sa posebnim osvrtom na novi Zakon o opštem upravnom postupku", *Zbornik radova: XXI vek - vek usluga i uslužnog prava* (ed. Miodrag Mićović), Kragujevac, 2016, p. 260.

[3] Law on General Administrative Procedure, *Official Gazette of RS*, Nos. 18/2016, 95/2018 – authentic interpretation and 2/2023 – Decision of the Constitutional Court

new needs, a new social reality, create preconditions for the modernization of the entire administration, a better relationship with citizens and the economy, as well as the improvement of the administrative process and administrative procedures, as we already mentioned at the beginning of the paper.

## 2. A New Law or an Amendment to the Existing One

The determination of the legislator to enact a completely new LGAP was more a "different political and conceptual determination" than a real legal necessity. However, there was a need to align the main administrative-procedural law with the Constitution from 2006, as well as with certain international standards, all in the context of reform of the entire public administration and administrative justice.

The new (current) Law on General Administrative Procedure was adopted in 2016. Some of its provisions were applied on June 1, 2016 and full application started on June 1, 2017.

The main objectives of the new LGAP are: a) modernization and simplification of the administrative procedure and making it more efficient; b) more effective realization of public interest and individual interests of citizens and legal entities in administrative matters – easier and more complete realization and protection of both legality and freedom and rights of citizens in the process of direct application of regulations in administrative matters; c) establishing a public administration that is oriented towards citizens, providing them with services according to the users' needs, guaranteeing them the quality and accessibility of public services; d) increasing legal certainty and improving the business environment and the quality of public service provision; e) nomotechnical improvement (formulation of norms conformed to legislative skills), language simplification in the formulation of norms and a more logical system of legal provisions.[4]

There is little to complain about regarding the thus formulated goals of the new law. However, how much the wording of a significant number of provisions of this law *de facto* contributes to the achievement of these goals is still up for debate, especially when it comes to the provision of public services, which are now included in LGAP for the first time.

It is assumed that the legislator decides to pass a new law when the solutions of the existing law cause so many problems in practice, and it is therefore necessary to remove such a regulation from the legal order and pass a new regulation that will adequately manage relations in the target area. However, a significant number of experts in the field of theory and practice of administrative law and the authors of this article as well, agree that the norms of the new LGAP often contain numerous ambiguities, unnecessary use of theoretical definitions, vagueness of the newly introduced solutions and contradictory formulations that

[4] *Explanation of the Law on General Administrative Procedure*, pp. 2-3, *https://rsjp.gov.rs/upload/Obrazlo-%C5%BEenje%20ZUP.pdf*, 28. 10. 2023.

hamper its practical application.[5] The new LGAP contains a significant number of novelties that should fundamentally enable such administrative action according to the standards of the European Administrative Space. However, the "defects" it contains create certain dilemmas in its application and they certainly do not contribute to the achievement of the objectives of passing the new law, as we have already mentioned.

## 3. Provision of Public Services According to LGAP

Compared to the previous law, the subject of LGAP has now been expanded, so it contains provisions on the adoption of administrative acts, the conclusion of administrative contracts, the adoption of guarantee acts, the undertaking of administrative actions and the provision of public services.[6] Also, the very concept of administrative matters has been expanded so that, in addition to issuing administrative acts and public documents, it now includes other forms of administrative action. In the part of the law entitled "Administrative action" there are provisions on the administrative act, guarantee act, administrative contract, administrative actions and the provision of public services.[7]

At this point, before going into a more detailed analysis, we will first review how public services are regulated by LGAP, and then the justification of this way of encompassing the provision of public services.

The provision of public services is considered to be the performance of economic and social activities, i.e. actions that are legally determined to be carried out in the general interest, which ensures the exercise of rights and legal interests, namely, meeting the needs of public service users, and which do not represent another form of administrative procedure.[8]

The provision of public services also includes the performance of activities, i.e. administration of actions done by authorities, which ensure the exercise of rights and legal interests, namely, meeting the needs of public service users, and which do not represent another form of administrative procedure.[9]

Following the same article, we can conclude that the goal is to provide public services in an orderly and quality manner, under equal conditions, and to ensure the realization of the rights and legal interests of the public service users, meeting their needs. In other words, the goal is to ensure the provision of public services, the appropriate level of services, continuity of services and equality of users in the accessibility of public services.

[5] Stevan Lilić, "Implementation of the new LGAP – disputed issues (administrative matter, administrative actions, provision of public services)", *Savremena uprava*, No. 3, 2019, p. 22.
[6] LGAP, Article 2
[7] LGAP, Articles 16 – 32
[8] LGAP, Article 31, Paragraph 1
[9] LGAP, Article 31, Paragraph 2

The first part of the definition can be understood as the activities that fall under public services. In this sense, the Law on Public Services[10] provides: public service in the sense that this law is considered to be institutions, companies and other forms of organization established by law, which perform activities, i.e. jobs that ensure the realization of citizens' rights, i.e. meeting of the needs of citizens and organizations, as well as the implementation of other legally determined interest in certain areas.

However, the second part of the definition, which, to put it simply, talks about the administrative actions performed by authorities that do not represent another form of administrative action, is not the clearest. What this type of work entails, remains undefined and unclear, and the legislator themself uses a negative definition.

As a rule, the part of work that is related to the exercise of public authority, whether it is work of an original nature or entrusted work (passing administrative acts and issuing public documents) is carried out according to the rules of administrative procedure. Thus, the question is whether the provision of public services is performed from the position of public authority, meaning, whether these services are provided according to the rules of administrative procedure or the rules contained in other regulations.

For example, the real-life situation of buying and selling (purchasing) real estate implies that, besides signing the main sales contract that refers to the real estate, as the new owners we also conclude (sign) a standard contract with the "water supplier," "power supplier" and other services. There we basically have a provider and a user of certain services, who have corresponding rights and obligations determined by the contract. Thus, a contractual, obligation relationship is established, which is determined as such by the relevant substantive law.[11] The question arises whether a single procedural law, as it is the case here with LGAP, is appropriate to cover, or more precisely, to change the legal relationship regulated by substantive regulations.[12]

## 4. Protection of Rights of Public Service Users

The provision of public services as a form of administrative action is not regulated in detail by LGAP, but the emphasis is put on the protection of public service users.[13] As a means of protection, the law provides an objection procedure to the public service provider, if they do not ensure orderly and quality, under

[10] Law on Public Services, *Official Gazette of RS*, Nos. 42/1991, 71/1994, 79/2005 - oth. law, 81/2005 - oth. law corr., 83/2005 - oth. law corr., and 83/2014 - oth. law corr.

[11] Law on Communal Services, *Official Gazette of RS*, Nos. 88/2011, 104/2016 and 95/2018, paragraphs 13 and 14

[12] The same conclusion is drawn by other authors dealing with the same topic, Dragan Milkov, Stevan Lilić, Milan Rapajić.

[13] Ljubodrag Pljakić, "Administrative Proceeding in the New Law on the General Administrative Procedure", *Pravni život*, Vol. 2. No. 10, 2016, p. 248.

equal conditions, enforcement of rights of citizens and organizations, meeting their users' needs.[14]

In this case, the objection is not a means of disputing an administrative act, that is, a decision made in an administrative procedure, but an objection as a regular legal means for refuting certain administrative actions provided for by law.

There are conflicting opinions on the issue of objections as a regular legal remedy (in addition to appeals), which also represents another novelty, in the theory of administrative law.

LGAP provides an objection as a regular legal remedy in the following cases: a) non-fulfillment of obligations from the administrative contract; b) administrative actions; c) in the provision of public services (method of provision).

In the case of public services, an objection is raised for the reason that public services are not provided properly, in a quality manner and under equal conditions, while the negative condition is that no other legal remedy can be raised in the administrative procedure. The deadline is 15 days from the day when the public service was not provided in such a way as to ensure the exercise of rights and meeting of the users' needs in an orderly, high-quality manner and under equal conditions.[15]

The objection belongs to the remonstrance legal means, which means that it is decided by the head of the body whose action it refers to. As the objection is not regulated by distinct regulations, the provisions on the form and content of the complaint are applied accordingly. Furthermore, in the further course of the complaint procedure, the manager takes a decision on it. Upon receipt of the objection, the manager checks the procedural prerequisites (whether it is timely, permitted, declared by an authorized person or processed by the given deadline). In case of deficiencies regarding the aforementioned process prerequisites, the manager will reject the complaint. Otherwise, the manager will decide on the merits of the complaint, that is, they will accept or reject the complaint. If it is accepted, the decision orders to take legal measures to eliminate deficiencies in the provision of the services.

In a situation where the objection is rejected, the party may file an appeal (in case of the first instance decision). Upon deciding on the appeal, assuming that the party is still dissatisfied, it is possible to initiate an administrative dispute.

The significance of the objection lies precisely in the fact that it provides an administrative legal way of protection against irregularities in their undertaking, where it was not the case until now. It essentially represents the first step in the initiation of administrative proceedings.[16]

If we regard things in a broader context, the legislator's intention was not to provide public services according to the rules of administrative procedure, but

[14] LGAP, Article 32

[15] LGAP, Article 147, Paragraph 2

[16] Milan Rapajić, "Prigovor u upravnom postupku i zaštita prava korisnika javnih usluga", *Zbornik radova: Usluge i prava korisnika* (ed. Miodrag Mićović), Kragujevac, 2020, pp. 693-694.

only to ensure the protection of public service users through an administrative procedure. Therefore, the provision of public services itself is not a form of administrative action, nor can it be, but is the subject of administrative protection of the public service users' rights, and it is achieved through objections.[17]

## 5. Conclusion

In this part of the paper, in addition to summarizing the most significant criticisms of the legal text of the current LGAP, the authors of this paper will also offer possible suggestions as to how certain obvious shortcomings of the legal text, at least when it comes to the provision of public services, can be improved in the future.

The general objection to the current text of the law is related to the expansion of LGAP regarding the so-called new forms of administrative action. Therefore, in addition to the usual adoption of administrative acts and issuance of public documents, now the rules of administrative procedure also refer to the conclusion of administrative contracts, the adoption of guarantee acts, the undertaking of administrative actions and the provision of public services. In addition to the fact that the term "administrative action" itself creates grounds for discussion, we note that the legal norms of LGAP concerning these new forms of administrative action are not applied or are only applied accordingly. The particular connection with LGAP is established only after an objection is raised, which is essentially the first step in initiating administrative proceedings in a specific case.

Concerning the provision of public services, the question is whether it is necessary to include this type of activity in LGAP. Especially in the context of the fact that in this situation the procedural law regulates (changes) something that is already regulated by another substantive law. Apparently, the obvious intention of the legislator was not to "regulate" the provision of public services with norms of this law but rather to establish the protection of public service users through the administrative procedure, that is, to raise the legal protection of the public service users' rights to a higher level. The question of the effectiveness of this kind of protection is rightfully raised here. As Prof. D. Milkov suggests, "a party dissatisfied with the provision of public service (for example, the heating in the apartment does not work) may raise an objection to the manager of that public service company, and then file an appeal against his decision, and then initiate an administrative dispute. ... according to the authors of LGAP, it is now more effective than the party immediately turning to the court and asking for a temporary measure for the court to order the heating to be turned on."[18]

[17] Ratko S. Radošević, "Pružanje janih usluga u oblasti biomedicine", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 52, No. 3, 2018, p. 1321. Predrag Dimitrijević, "Reforma upravnog postupka", *Zbornik radova: Vladavina prava i pravna država u regionu*, Istočno Sarajevo, 2014, p. 193.

[18] D. Milkov, *Upravno pravo II*, upravna delatnost, Novi Sad, 2017, pp. 228-229

The fact is that public services were provided even before the adoption of the new LGAP, and in that sense they are not a novelty. Bearing in mind the practical benefits and dilemmas created by this manner of legal regulation of public services, we think that it is better to "liberate" a procedural law such as LGAP (which regulates the procedure for decision making in administrative matters) from unnecessary substantive law institutions, especially concerning the provision of public services.

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Jelena Vukadinović Marković*

# IS THERE A PLACE FOR ARBITRATION IN DISPUTES ARISING FROM ADMINISTRATIVE CONTRACTS**

*Abstract*

*The paper seeks to analyse arbitrability of disputes in administrative contracts with special reference to disputes arising from the contracts on public-private partnership, concessions and public procurements. The first part of the paper aims to define general notion of arbitrability, the focus being on determining the subjective and objective arbitrability of disputes. The second part of the paper deals with the issue of admissibility of arbitration as a means of settling disputes in administrative contracts. Based on an interpretation of normative solutions and arbitration and court practice, a proposal is made to recognise arbitrability in this type of disputes as well.*

**Keywords:** Administrative Contract, Arbitration, Subjective Arbitrability, Objective Arbitrability.

## 1. Instead of an Introduction

As means of amicable dispute resolution, arbitration relied on the confidence of the parties to a dispute that a third chosen party to whom they are submitting the dispute in hand would resolve such dispute in a satisfactory manner. Since the time of ancient Rome, it has been recognised that a person entrusted by the parties to resolve a dispute can give a final judgement based on merits. Modern arbitration, as it is known today, took its shape in the 18th and early 19th centuries.[1] Other than on expertise, trust in arbitration is based on moral integrity of the chosen person. In this sense, trust and confidence characterize arbitration. However, even though the parties may be willing to resolve all disputes in this way, not all disputes are capable of arbitration and not all disputes may be subjected to arbitration. Hence, the right to submit jurisdiction to a chosen person is not absolute. To the contrary, it is limited by a decision of a State to

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[1] For more on historical development of dispute resolution by arbitration see: Jelena Vukadinović Marković, *Postupak rešavanja sporova pred međunarodnim trgovinskim arbitražama*, Beograd, 2022, pp. 19-22.

reserve adjudication of certain kinds of disputes to national courts by prescribing overriding mandatory provisions, public policy rules or exclusive jurisdiction of national courts for certain kinds of disputes. In this way, States define the scope of arbitrability of disputes, which reflects the extent to which States accept arbitration as an alternative dispute resolution method. Generally speaking, the States recognise arbitrability in disputes arising from private relationships, but not in those arising from public relationships. Thus, disputes of commercial nature are deemed to be arbitrable, while disputes in criminal law or family law are traditionally considered to be non-arbitrable. There is, however, a large number of relationships between these two groups that belong to the so-called grey area in arbitration. These include disputes in competition law[2], intellectual property law[3], and disputes arising from administrative contracts.

## 2. Notion of Arbitrability

The arbitrability of disputes means the capability or admissibility of disputes to be settled by arbitration. It is determined by positive regulations and is a condition precedent for the validity of an arbitration agreement.[4] However, arbitrability is neither uniquely determined, nor forever defined. The recognition of arbitrability depends both on the inherent nature of the disputed relationship, and on the solutions available in the positive legal regulations of the State of the seat of arbitration and the State of execution of the arbitral award. Therefore, one cannot speak of a single and universal notion of arbitrability. In addition, the meaning of arbitrability often changes with time. There are different interpretations at different periods of time even in the same State or court. Thus, arbitrability is a mystery, like a woman wearing a veil.[5]

The capability of a dispute to be settled by arbitration is manifested in two forms: as subjective (*ratio personae*) and as objective arbitrability (*ratio materiae*).[6] Commentators approaching this issue from the point of view of procedural law theory also distinguish jurisdictional arbitrability, whereby they mean that a national court does not hold exclusive jurisdiction over a specific dispute.[7] For the purpose of this paper we shall concentrate on the objective and subjective

[2] See Jelena Vukadinović, *Uloga arbitrabilnosti u procesu rešavanja sporova pred međunarodnom trgovinskom arbitražom*, doktorska disertacija, Univerzitet u Beogradu Pravni fakultet, Beograd, 2016, pp. 213-235.

[3] Jelena Vukadinović, "Arbitraža i/ili medijacija kao način rešavanja sporova iz prava intelektualne svojine", *Pravna riječ*, No. 52, 2017, pp. 133-145.

[4] For more on notion of arbitrability in terms of effect of an arbitration agreement see. J. Vukadinović (2016), pp. 106-108; Maja Stanivuković, *Međunarodna arbitraža*, Službeni glasnik, Beograd, 2013, pp. 101-102.

[5] Lin Ching-Lang, *Arbitration in administrative contracts: comparative law perspective*, Institut dȇtudes politiques de paris - Sciences Po, Paris, 2014, p. 15.

[6] Distinction between subjective and objective arbitrability is championed by Philippe Fouchard, Berthold Goldman, *Fouchard, Gaillard, Goladman on International Commercial Arbitration,* Kluwer Law International, 1999, p. 312; Jelena Perović, *Ugovor o međunarodnoj trgovinskoj arbitraži*, Službeni list SRJ, Beograd, 2002, 107 ff.

[7] Gordana Stanković., Borivoje Starović., Ranko Keča, Nevena Petrušić, *Arbitražno procesno pravo*, Udruženje za građansko procesno i arbitražno pravo, Niš, 2002, p. 102-103.

concept of arbitrability, bearing in mind that the domestic Law on Arbitration [8] defines objective arbitrability by introducing a qualification relating to the exclusive jurisdiction of national courts.

As already mentioned, disputes arising from international business contracts are traditionally deemed to be arbitrable. Such disputes are of a commercial legal nature, arising between persons of private law. Disputes arising between a State on the one hand and persons of private law on the other, belong to the so-called grey area of arbitrability. Whether or not such disputes will be deemed to be arbitrable will depend on the nature of the disputed relationship. In other words, whether disputes in the grey zone of arbitrability may be settled by arbitration depends on the interpretation of the fulfilment of the conditions for subjective and objective arbitrability.

### *2.1. Subjective Arbitrability*

The issue of subjective arbitrability refers to the capacity of contracting parties in an underlying transaction to conclude a binding arbitration agreement whereby they will submit a dispute arising from such transaction to arbitration for resolution. Apart from the capacity to enter into a binding arbitration agreement, subjective arbitrability is also construed as the capacity of the contracting parties to act as parties to a dispute before arbitration.[9] Parties to an arbitration agreement can be legal and natural persons as well as a State and its agencies. Their capacity is interpreted in light of the solutions accepted in national legislations based on the citizenship or nationality of the party to a dispute. The capacity of natural persons to conclude arbitration agreements is regulated within the scope of legal and business capacity. As regards legal persons, it is necessary to distinguish between private legal persons and legal persons of public law.[10] Private legal persons are generally recognized as having the capacity to conclude arbitration agreements,[11] which is interpreted according to the law of the seat or the nationality of the legal person.

When it comes to legal persons of public law, the situation is somewhat more complicated. When considering this issue, a distinction must be drawn between the capacity of a State and persons of public law to conclude an arbitration agreement (capacity to contract) on the one hand, and the right to invoke immunity, on the other hand. In other words, we should distinguish between the right to enter into an arbitration agreement and the capacity of a person to act

[8] Law on Arbitration, *Official Gazette of the Republic of Serbia*, No.46/200, Art. 5.

[9] Andrea Marco Steingruber, *Consent in International Arbitration*, Oxford University Press, 2012, Item 3.03.

[10] For more on this distinction see Art II of the European Convention on International Commercial Arbitration, *Official Gazette of the SFRY*, No. 12/63.

[11] See. J. Vukadinović (2016), p. 132 ff; In broader sense see Jelena Vukadinović Marković, Vitomir Popović, "(Ne) ugovornice arbitražnog sporazuma kao strane abritražnog postupka: teorija grupe kompanija", *Strani pravni život*, Vol. 66, No. 2, 2022, pp. 187-204.

as a party to arbitration proceedings.[12] We note that a distinction should also be drawn between the cases where a legal person of public law concludes a contract in its own name and for its own account and the circumstances where the implications of the concluded agreement also concern the State. In the latter case, the said legal person should be vested with the authority to act in legal relations in a specific way.[13]

The differences existing in the interpretation of the capacity to enter into an arbitration agreement between legal persons of public and private laws should be sought in the protection of the interest that is to be preserved in a particular dispute. State and its agencies find the motive for concluding certain contracts in the satisfaction and protection of general interests. On the other hand, persons of private law find the motive for concluding certain contracts in the satisfaction of their own, private interests. Hence, the consequences of concluding such contracts are also different. While the consequences of public law contracts are felt by a wide range of persons, this is not the case with contracts concluded by individual legal persons. Sanctions due to non-performance of the obligations assumed are felt in the former case not only by the contracting parties, but also, in a broader sense, by the citizens of the specific State. In this sense, the restrictions of the right of public persons to conclude arbitration agreements are justified by the lack of subjective arbitrability of a particular dispute, and not solely and exclusively by the lack of business capacity as in the case of natural persons. In other words, reasons for denying recourse to arbitration in a specific dispute are not only of a legal but also of a political nature. In this sense, one should understand differences in the interpretation according to which a State and its agencies can agree on jurisdiction of international commercial arbitration but are denied such an opportunity for domestic arbitration agreements.[14] The reasons should be sought in the protection of public interests and not in the lack of legal capacity of a State and its agencies to conclude a valid arbitration agreement.[15]

The right of a State to enter into arbitration agreements can also be deduced from interpretation of the solutions provided by international sources of arbitration law. Thus, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the New York Convention) does not specify which persons may conclude an arbitration agreement, but it may be inferred from interpretation of Article 1 of the Convention that the Convention also covers the awards made in disputes to which a

[12] Jean Francois Poudrette, Sebastion Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, p. 232.

[13] Julian Lew, Loukas Mistelis, Stefan Kroll, *Comparative International Commercial Arbitration*, Kluwer, 2003, p. 735.

[14] Traditional distinction between domestic and international arbitration was recognised in French law, which under Article 83 of the former Civil Procedure Code prohibited the State from concluding arbitration agreements. In practice, courts interpreted this Article as prohibiting the State from concluding domestic arbitration agreements.

[15] In this sense, see decision *Galakis v. Agent Judiciaire of the Treasury.*

State is a party.[16] On the other hand, the European Convention on International Commercial Arbitration allows in Art 2(1) for the possibility of a State concluding an arbitration agreement as a legal person of public law.[17]

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to as the Washington Convention) provides in Art 25 Para 1 that the jurisdiction of the Centre for settlement of disputes shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre for dispute settlement.[18] In addition to multilateral agreements, the arbitrability of these contracts is provided for in numerous bilateral agreements on the protection of and incentives to foreign direct investments, the so-called BITs (Bilateral Investment Treaties).[19]

In national laws, the issue of legal capacity of a State and its agencies to conclude arbitration agreements is regulated in different ways. As a general rule, the accepted position is that a State, its bodies, agencies and persons of public authority are entitled to conclude arbitration agreements. The most liberal in this regard are the countries of the common law system, especially Great Britain, which is "a consequence of not distinguishing between legal regimes of public law contracts and private law contracts."[20] Likewise, the domestic Law on Arbitration, Art 5, recognises that "Any natural and legal person, including a State, its bodies, agencies and companies in which the State has ownership interest, can enter into arbitration agreements." This article does not apply solely to the Republic of Serbia, but to any State conducting arbitration proceedings in Serbia. [21]

This general entitlement to enter into arbitration agreements is conditioned by the nature of the legal transaction in which a State and its agencies take part. In cases where public interest prevails, and where a State acts from the *iure imperii* position, recourse to arbitration is excluded. Resolving public law disputes falls to the jurisdiction of national courts. Reasons for this position may be sought in the role of a State in society and the perception of national courts as

[16] Art. 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Award provides: "The Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether natural or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

[17] Art. 2 of the European Convention on International Commercial Arbitration provides: "...legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreement".

[18] See Art 25 of the Washington Convention.

[19] Radovan Vukadinović, Jelena Vukadinović Marković, "Arbitrabilnost investicionih sporova iz ugovora o energetskoj povelji", *Pravo i privreda*, Vol. 57, No. 4-6, 2019, pp. 536-555.

[20] Bojana Todorović, *Mehanizmi rešavanja sporova iz upravnih ugovora*, doktorska disertacija, Univerzitet u Beogradu Pravni fakultet, Beograd, 2023, p. 134.

[21] M. Stanivuković, p. 97.

the only authorized bodies that take care of the legal order of a particular State. Hence, prescribing exclusive jurisdiction of national courts aims at safeguarding the sovereignty of the State as an achievement of civilization, and the inviolability of public authority.[22]

However, ascertaining whether public or private interest prevails in a legal relationship is not always a simple matter. In other words, difference between *iure imperii* and *iure gestionis* acts may be drawn based on legal nature of the concluded legal acts and the persons concluding such acts.[23] The public-law nature of a relationship is reflected, among other things, in the fact that the relationship of the contracting parties is one of superiority and subordination, and that State agencies are vested with the authority to conclude the acts under public law. In contrast, *iure gestionis* acts are characterized by the principle of equality of the contracting parties, as well as commercial nature of the assumed rights and obligations. However, even the criteria so defined do not always seem to be a reliable enough indicator, and an interpretation of the nature of a contract must be drawn from the purpose or goal of the act itself. [24]

The reasons for non-arbitrability of public law disputes can be sought in political history. At the beginning of the last century, many developing countries viewed arbitration as a product of capitalism and an attempt at economic neo-colonialism on part of industrially developed countries.[25] With time and under the influence of foreign capital, the rigid attitude towards arbitration began to shift. Opening the market to foreign investors also opened the issue of an adequate forum for dispute resolution. There was, on the one hand, a foreign investor who was not too enthusiastic about the national court of the State in which he invested, while on the other hand, the State, due to its traditional understanding of sovereignty, did not accept the jurisdiction of the national court of another State. Hence arbitration as a neutral, private law forum gained in importance. It is in this light that we may look at the back-door introduction of arbitration to administrative law disputes.[26] In this regard, it is necessary to distinguish between "pure" administrative disputes and those arising from such disputes, which are intrinsically of property law character. In other words, a State or its body or agency, may act as a party to arbitral proceedings in disputes that are objectively arbitrable.

[22] For more see Simon Greenberg, "ICC Arbitration and Public Contracts: The ICC Court's Experience of Arbitrations involving States and State Entities" *Contrats publics et arbitrage international* (ed. Mathias Audit), Bruylant, Bruxelles, 2011, p. 21.

[23] Radovan Vukadinović, *Međunarono poslovno pravo*, Službeni glasnik, Beograd, 2021, pp. 196-199.

[24] In the case of Victory Transport, the court held that certain acts may fall within the category of a public act. It included into such acts: internal administrative acts, such as acts on the status of an alien, acts on nationalisation, acts concerning the armed forces, diplomatic activities and public loans. See also decision in Enterprise Peyrot dispute.

[25] B. Todorović, p. 131.

[26] Aleksandra Maganić, Mihajlo Dika, "Mogućnost rješavanja upravnih stvari arbitražom", *Novosti u upravnoj i upravnosudskoj praksi* (ed. Ante Galić), Organizator, Zagreb, 2018, pp. 17–33. Aleksandra Maganić, "Granice arbitrabilnosti u rešavanju upravnih stvari", *Zakonitost*, No. 1, 2019, pp. 9-18.

*2.2. Objective Arbitrability*

A State determines its attitude towards arbitration as a private and parallel method of dispute resolution taking into account the scope and categories of disputes that are capable of being settled by arbitration. It was long considered that disputes of a public law character cannot be settled by arbitration, and that the sole and exclusive jurisdiction over such disputes lies with national courts. The grounds for this position were sought in the protection of public interest and the preservation of public order.[27] Public order has a twofold function. On the one hand, it determines the scope of party autonomy of the contracting parties in concluding an arbitration agreement, and on the other hand it sets limits to the recognition and execution of foreign decisions. In the former instance, public order determines the arbitrability of disputes, while in the latter, it shields the sovereignty of the legal order of a particular State.

In other words, whether or not a dispute is capable of arbitration is determined, on one hand, by the inherent nature and scope of the disputed relationship (right of the parties to freely decide on their dispute - to freely dispose of their rights and obligations). On the other hand, it is limited by mandatory rules, public order and good practices of the State of the seat of arbitration.

The Law on Arbitration of the Republic of Serbia provides that parties may resort to arbitration to settle property disputes regarding the rights they can freely dispose of, except for such disputes that are reserved to the exclusive jurisdiction of courts.[28] Broad categories of transactions from the fields of trade, commerce, business or economy are normally cited in the context of disputes wherein the parties can freely dispose of their rights. [29]

## 3. Arbitrability of Administrative Contracts

First and foremost, there is the question of whether the disputes in administrative contracts may be subjected to arbitration. The answer partly depends on what is considered to be an administrative contract from which a particular dispute may arise. The position broadly taken is that an "administrative contract is a bilateral legal act concluded by a State concerning the public service and for the protection of the public interest, placed under a special legal regime different from general rules of private law, *i.e.* a contract concluded between the public administration and an individual for the purpose of proper functioning of the public service, the notion of public service being of fundamental importance for

[27] Lin Ching-Lang, p. 29; Stavros Brekoulakis, *The protection of the Public Interest in Public Private Arbitration*, Kluwer Arbitration Blog, 3 May 2017.
[28] Law on Arbitration, Art. 5 Para. 1.
[29] J. Vukadinović (2016) p. 126.

the administrative contract".[30] Relevant for the topic of this paper are the administrative contracts concerning public procurement, concessions, public-private partnerships, utility activities and public service activities.[31] Art 22 of the Serbian Law on General Administrative Procedure defines the administrative contract as: "a bilaterally binding written act which, under provisions of a special law, is concluded between an authority and a party and which creates, changes or reverses a legal relationship in an administrative matter". It is characteristic of these contracts that one contracting party is a public authority; that the subject matter of the contract from which a dispute may arise concerns the exercise of public power and/or is interlinked with public interests; that they are subject to a specific legal regime and that the jurisdiction lies with administrative courts.[32]

A distinguishing feature of administrative contracts concerns the participants in the contract. In administrative contracts, one contracting party is always a person of public law.[33] Without going into further analysis of the participants in administrative contract, we note that it is not necessarily the State that concludes these contracts, this can be done by an authority/person vested with the power to sign this type of contract on behalf and for the account of the State. As stated above, the participation of a State or a public administration authority in the dispute, does not *eo ipso* present an obstacle to arbitration. Another distinguishing feature refers to the exercise of public powers, or the protection of public interests that are the object (purpose) of the contract.

The existence of public interest does not in itself preclude recourse to arbitration. The purpose criterion means that the object of the administrative contract is related to a public service, *i.e.* that a contracting party (contrahent), on the basis of such contract, assumes the right and duty to directly perform a public service. Another alternative criterion is the criterion of special powers, according to which a public law entity is given special, greater powers (*e.g.* to unilaterally change contractual provisions or unilaterally terminate the contract), in order to achieve a wider social interest, however in that case, the other contracting the party also enjoys certain rights in respect of the public law entity, or can exercise such rights before the administrative court.

[30] Dejan Milenović, "Upravni ugovori u Zakonu o opštem upravnom postupku zemalja Zapadnog Balkana", *Strani pravni život*, Vol. 61, No. 3, 217, p. 68.

[31] For the purpose of this paper, the contracts on public-private partnership, concessions, public procurement, have been interpreted as administrative contracts. In that sense, see Rajko Pirnat, "Pravni problemi upravne pogodbe", *Javna uprava*, Vol. 36, No. 2, 2000, p. 151-152; Katja Stemberger, "Public and Private Law Aspects of Breach of the Concession Contract under Slovenian Law", *HKJU-CCPA*, Vol. 23, No. 2, 2023, pp. 241-271; Without going into a detailed analysis, we note that there is a different, opposing interpretation according to which the above contracts cannot be treated as administrative contracts. In this regard, we refer to Dejan Milenković, Vladimir Đurić, "Ugovori i projekti javno-privatnog partnerstva i njihov uticaj na lokalni ekonomski razvoj u Srbiji", *Pravo i privreda*, Vol. 60, No. 4, 2022, pp. 695-713.

[32] For terminological definition of administrative contracts see B. Todorović, p. 10 ff. For legal nature of administrative contracts see: Predrag Dimitrijević, "Izvršenje upravnih ugovora", *Pravni život,* Vol 42, No. 11-12, 1993, p. 2252 ff.

[33] For more on parties to an administrative contract see Dražen Miljić, "Upravni ugovori prema zakonu o opštem upravnom postupku", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 51, No. 2, 2017, pp. 523-524.

A feature of these disputes concerns the potential effect the contract produces on the rights and obligations (interests) of a large number of persons. In other words, the effect of an administrative contract is not limited exclusively to the contracting parties (the so-called relative effect of the contract), but extends to a wider circle of persons, including participants in public procurement, for example those who were not awarded the job, as well as citizens who are the end users of services or works that are the subject matter of the contract. The protection of public interest itself may be the grounds for not recognizing the arbitrability of these disputes, but it does not necessarily present a fact that cannot be disputed.

In comparative law and practice, the arbitrability of disputes in administrative contracts is defined in different ways, depending on the understanding of the concept of public interest.[34] Thus, for example, under Article 2060 of the French Civil Code, the State and its bodies are not permitted to agree to arbitration as a means of settling disputes in which the public interest prevails. On the other hand, this Article refers only to domestic arbitration, and it may be argued that recourse to arbitration is permitted in international business transactions.[35] This view is supported by French arbitration practice.[36] The decision made in *Galakis* case [37] is considered a pioneering decision in French law on recognising arbitrability of disputes in administrative contracts to which one of the parties is a State or a state authority. Arbitrability of international legal disputes in administrative matters was subsequently confirmed in the *Inserm* dispute.[38] Limitations regarding the jurisdiction of arbitration in international disputes arising from contracts

[34] Lin Ching-Lang, p. 15.

[35] J. Perović, p. 110. For more details see Ph. Fouchard, E. Gaillard, B. Goldman, p. 330.

[36] See cases *Galakis*, *Myrtoon Steamship, Walt Disney*.

[37] *Galakis v. Agent Judiciaire of the Treasury,* Cour de Cassation, First Chamber, 2 May 1966.

[38] A dispute arose between the French National Institute for Health and Medical Research (Inserm), a French public entity, and a Norwegian foundation, with respect to an international cooperation agreement. The agreement provided for inter alia the construction in France of a building dedicated to research in neurobiology. It included an arbitration agreement. A dispute arose, and the French party seized a French court, which declined to hear the case because of the existence of an arbitration agreement between the parties. Subsequently, the Inserm requested the Paris First Instance Tribunal to appoint an arbitrator. The arbitrator was appointed and rendered an award in favour of the Norwegian company. A challenge against the award was brought before the Paris Court of Appeal. The Paris Court of Appeal decided that it had jurisdiction to hear the challenge, but rejected it on two grounds. Firstly, it found that the prohibition for States and State entities to arbitrate was limited to domestic contracts, and secondly that, pursuant to the principle of validity of arbitration clauses admitted in French law, the prohibition to arbitrate was not part of international public policy. However, an action was also brought in parallel by the French party before the French administrative courts, which were requested to annul the award on the basis that the arbitration agreement was null and void. The case was directly called to the French highest administrative jurisdiction, the Conseil d'Etat. The Conseil d'Etat decided that there were reasonable doubts with respect to the allocation of jurisdiction between civil and administrative courts, and it therefore decided to raise the case to the Tribunal des conflits, which is the French jurisdiction empowered to settle a conflict of jurisdiction between civil and administrative courts. The Tribunal des Conflits decided that "a challenge against an arbitral award rendered in France on the basis of an arbitration agreement contained in a contract concluded between an entity of French public law and a foreign company, which contract has been performed on the French territory and which concerns the interests of international trade, is to be brought before the court of appeal where the award is rendered pursuant to article 1505 of the Code of Civil Procedure even if the contract is to be characterized as administrative according to French domestic law".

concluded by a State and state authorities pertain to the matters in violation of the French international public order. There is no universally accepted definition of international order, which paves a way for different interpretation of this "elastic" norm, depending on the viewpoint of different national laws.[39] Some of the basic values-principles, or disputes for which there seem to be an agreement that they cannot be resolved by arbitration, concern the corruption of civil servants, drug sales, terrorism, etc.

When it comes to domestic disputes, the situation in French law is somewhat more complex. Disputes in contracts concluded by a State, local authorities, local administrative authorities are treated as disputes relative to the public order which fall under the jurisdiction of administrative courts.[40]

On the other hand, the German legal tradition takes a favourable view of the alternative methods of resolving disputes in administrative contracts.[41] Hence, it is common to have an arbitration clause in public-private partnership contracts concluded by the State with a foreign entity. These are contracts in property law, subject to a decision to conclude a certain legal act.[42] Arbitration proceedings do not seek to assess the legality of the act adopted by the State and its bodies, but rather to resolve the consequences arising from such decision.

In Serbian positive law, the legal protection mechanisms in administrative contracts are only partially regulated by the Law on General Administrative Procedure. Protection of an administrative authority is achieved to a large extent through the power to unilaterally amend or terminate the contract, while the right to damages can be exercised in civil proceedings, before a court of general jurisdiction. On the other hand, the protection of the party is achieved, first of all, by imposing an obligation on the administrative authority to issue a reasoned administrative act - decision, both in cases of contract amendment due to changed circumstances, where the request by the party to adjust the contract to the arising circumstances is rejected, and in cases of contract termination.[43] Depending on whether or not such decision is final, the party can dispute it by first lodging an appeal, and subsequently by bringing an action initiating an administrative dispute, or directly by filing a lawsuit. In the event that a public authority fails to fulfil its contractual obligations, the party may file a complaint with the head of the public authority with which the contract was concluded, and in doing so it may also file a claim for damages. Given that the complaint

[39] For details on the notion of public order see: Slobodan Perović, *Obligaciono pravo*, Beograd 1997, pp. 276-284.
[40] Florian Grisel, "The Private - Public Divide and its Influence over French Arbitration Law: Tradition and Transition", *The (Comparative) Constitutional Law of Private-Public Arbitration*, Oxford University Press, pp. 9 -13, *The Private-Public Divide and its Influence over French Arbitration Law: Tradition and Transition | Florian Grisel - Academia.edu*, 18. 6. 2024.
[41] B. Todorović, p. 296.
[42] Under Art 1030 Para 1 of the German Arbitration Act, any property-related claims can be subject to arbitration, as well as any claims not involving property, to the extent that the parties are entitled to conclude a settlement on the issue in dispute.
[43] Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, No.18/2016, 95/2018 – authentic interpretation and 2/2023 – decision of Supreme Court, Art. 23. Para. 2 and Art. 24 Para. 2.

is decided by a decision, the dissatisfied party can dispute it by means of an administrative appeal and/or a court action. At the same time, the Administrative Court may also decide on claims for damages (and return of seized property) as well as accessory claims, although this is not usually the case in practice. Therefore, it depends on the beneficiary of legal protection, which type of protection mechanism will be applied, whether administrative, a court action or a lawsuit.[44] Thus, the illegality of administrative acts passed in connection with the contract will be examined before the Administrative Court. However, if the dispute relates to damages, there is no reason to deny jurisdiction to arbitration. What is more, the Law on Public-Private Partnerships and Concessions provides that "parties to a public contract may agree to settle any disputes arising from such contract by domestic or international arbitration"[45], which leads to the inevitable conclusion that disputes in public-private partnership and concessions are arbitrable. This practically means that disputes in concession contracts, as a type of administrative contracts, cover obligation rights and duties that the parties may freely dispose of and are therefore arbitrable.[46] The arbitrability of concession disputes is also confirmed by the provisions of the Croatian Law on Concessions, which stipulate that the parties may agree to arbitration, unless otherwise specified by a special law.[47] It is worth noting that arbitration is possible only in disputes that occur in the phase following the conclusion of the contract, that is, in connection with its execution, and not in disputes related to the procedure for awarding public contracts.[48]

The issue of determining the scope of objective arbitrability of these disputes should also be interpreted through the lens of stipulated exclusive jurisdiction of state courts. It is rightly pointed out that decisions concerning exclusive jurisdiction qualify objective arbitrability.[49] However, commentators have argued that in certain cases, the exclusive jurisdiction of national courts does not affect arbitrability, if arbitration has been agreed upon. In theory, this phenomenon is called relative exclusive jurisdiction, and the field of foreign investments and concessions is cited as an example.[50]

In support of relative interpretation of exclusive jurisdiction of the courts, we also cite Art. 60 of the Law on Public-Private Partnership (PPP), which stipulates that only if "the parties have not agreed on dispute resolution by arbitration, the courts of the Republic of Serbia have exclusive jurisdiction". It may be properly

[44] For more details see: B. Todorović, p. 314 ff.

[45] Law on Public-Private Partnership and Concessions, *Official Gazette of the Republic of Serbia,* No. 15/2016 and 104/2016, Art. 60.

[46] Dario Đerđa, "Ugovor o koncesiji", *Croatian Public Administration*, No. 3, 2006, pp. 88-89.

[47] Art 97 Para 2 of Croatian Law on Concessions. For more on arbitrability of administrative contracts in Croatia see A. Maganič, "Granice arbitrabinosti", *Zakonitost*, No. 1, 2019, p. 11 ff.

[48] B. Todorović, p. 354 ff.

[49] Marko Knežević, "O pojmu i značaju arbitrabilnosti", *Zbornik Pravnog fakulteta u Novom Sadu*, Vol. 42, No. 1-2, 2008, p. 882.

[50] Vladimir Pavić, "National Reports: Serbia", *World Arbitration Reporter* (WAR), 2nd Edition, (eds. Loukas Mistelis, Laurence Shore, Hans Smit), JurisNet LLC, 2010, 3, 13–14.

concluded from interpretation of this article that arbitration is recommendable as a method of settling disputes in public-private partnerships.

We can observe public procurement disputes in the same vein. In the phase preceding the conclusion of the transaction, the announcement of tenders and the implementation of the public procurement procedure, the disputes that arise are resolved before the authority provided for in the Law on Public Procurement.[51] These disputes concern the legality of the procedure, omission to take actions and decision-making in the public procurement procedure, legality of public procurement contracts, etc. Judicial protection against the decisions of the competent Commission is available in the administrative procedure before the administrative court. However, the concern of legal relations that arise following the conclusion of the transaction is the prestation that has a pecuniary value. In this sense, disputes in damages arising from a violation of the law on public procurement are objectively arbitrable. In other words, deciding on damages arising in connection with the execution of a certain administrative contract falls under the jurisdiction of courts of general jurisdiction, and in this regard, we see no reason why the same claim cannot be decided by arbitration. Since in that case we are talking about property claims that the parties may freely dispose of, we can conclude that the settlement of such disputes in administrative contracts by arbitration is permissible under the Law on General Public Procedure.

## 4. Conclusion

There are lots of benefits of the alternative and consensual dispute resolution that courts generally cannot match. Some of them are simpler, more flexible and faster procedures, more effective dispute resolution according to the principle of fairness and not merely following strict legal rules, lower costs, confidentiality of the process, risk diminishing, parties control over the procedure, amicable settlement, higher satisfaction of the parties with the achieved result and, because of that, better acceptability of decisions by the parties.[52] However, arbitration can decide only in those disputes that are subjectively and objectively arbitrable. Traditionally, administrative disputes were considered not to be arbitrable. The reasons for such an interpretation can be sought on the one hand in the persons concluding a transaction governed by administrative law, and on the other hand, in the public interest, sought to be preserved within the scope of jurisdiction of the state court. With time, however, this position was given a more liberal interpretation, especially with regard to the contracts between a State as a public law entity and persons in public or private foreign law, in the matter of public-private

[51] Public Procurement Law, *Official Gazette,* No. 91/2019 and 92/2023, Art. 187.

[52] Dario Đerđa, Joanna Wegner, "Non-jurisdictional Forms of Disposing an Administrative Matter: Croatian and Polish Experiences", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 41, No. 1, 2020, p. 47.

partnerships, concessions and public procurement. This is attested by solutions provided by corresponding laws.

It is in this light that we should consider whether or not arbitration can find its place as a dispute resolution mechanism in the solutions of the Law on General Administrative Procedure.

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## IMA LI MESTA ARBITRAŽI U SPOROVIMA IZ UPRAVNIH UGOVORA

*Sažetak*

*Predmet rada predstavlja analiza arbitrabilnosti sporova iz upravnih ugovora s posebnim osvrtom na sporove iz ugovora o javno-privatnom partnerstvu, koncesijama i javnim nabavkama. Prvi deo rada posvećen je definisanju opšteg pojma arbitrabilnosti. Pažnja je usmerena na određivanje subjektivne i objektivne arbitrabilnosti sporova. U drugom delu rada razmatra se pitanje da li je arbitraža kao način rešavanja sporova dozvoljena u upravnim ugovorima. Tumačenjem normativnih rešanja kao i arbitražne i sudske prakse predlaže se priznavanje arbitrabilnosti i ovoj vrsti sporova.*

**Ključne reči:** upravni ugovor, arbitraža, subjektivna arbitrabilnost, objektivna arbitrabilnost

Mihajlo Rabrenović*

# EVALUATION OF THE EFFECTS OF THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE BASED ON THE OPINIONS OF SURVEY PARTICIPANTS

*Abstract*

*This paper presents an evaluation of the effects of the Law on General Administrative Procedure (LGAP) based on the opinions of participants in a survey conducted in the fall of 2023 by Belgrade-based Consulting firm Eurosfera. The survey was part of the preparations for an international conference on the Law on General Administrative Procedure (hereinafter: LGAP), held under the auspices of the National Assembly of the Republic of Serbia. This event served as a platform for the exchange of arguments regarding the further necessary state interventions in this area, including the need for amendments and supplements to the legislative framework. The main objective of the survey was to identify and analyze the effects of the current implementation of the law and its provisions. The survey included 630 respondents, consisting of lawyers, administrative officials, and citizens who had various contacts with LGAP. Based on the survey results, questions were raised about whether four interventions by the state are necessary, specifically: 1. amendments and supplements to certain provisions and mechanisms of the law; 2. better implementation of the law; 3. improved selection, reward, control, and professional development of personnel executing administrative procedures; and 4. establishing a legal organizational and software mechanism for measuring the effects of the law.*

**Keywords:** Law on General Administrative Procedure, Law Reform, Administrative Efficiency, Monitoring Methodology for Administrative Matters, LGAP Implementation Register.

## 1. Introduction

### *1.1. Importance of the Law on General Administrative Procedure*

The Law on General Administrative Procedure (LGAP) is a key normative act in the field of administrative procedure. Its significance lies in its aim to regulate the relationship between public administration and citizens, ensuring

* The Consulting firm Eurosfera, based in Belgrade (www.eurosfera.org); a full professor of strategic management in the public sector, is completing a doctoral dissertation on the topic: *Administrative Procedure at a Crossroads: The Legal Nature of Administrative Activities.*

predictability and legal certainty in a fair and efficient manner, all with the objective of making decisions that directly affect the rights and interests of parties in administrative matters. Thus, this law forms the foundation on which the entire administrative system functions, making its implementation crucial for all participants in administrative proceedings.

### *1.2. Purpose and Significance of the Research*

Since legal provisions in the appropriate procedure can be modified and adapted to circumstances and challenges, evaluating the effects of the existing Law on General Administrative Procedure becomes essential. This paper aims to analyze how the law is applied in practice. The work intertwines the views expressed in a survey and those found in academic works. The survey, conducted by the Consulting firm Eurosfera, included various actors in administrative procedures, such as lawyers, state officials, and citizens, offering a broader understanding of their experiences and opinions on the law's effects.

The goal of this paper is also to identify, based on respondents' views, specific potential areas for improvement of the law's provisions, provide recommendations for its amendments and supplements, and suggest ways to enhance its implementation. Based on the analysis of the survey results, the paper will offer certain guidelines for further reforms and contribute to improving the efficiency and fairness of the administrative system in Serbia.

A specific goal of this paper is to highlight the importance of applying quantitative methods in the study of social sciences, especially in the field of administrative procedures, and to encourage relevant authorities in this direction.

The research analyzes what respondents saw as improvements compared to the previous legal framework and which issues and shortcomings they identified in the current law. Respondents' views were collected on administrative matters[1] and on the impact of specific administrative laws and secondary legislation on the effectiveness of LGAP.

### *1.3. The Roots of the Connection Between Statistical Analysis and the Efficiency of Administrative Procedures*

The application of statistics, mathematics, and survey questionnaires in the analysis of the efficiency of administrative procedures and other processes has deep scientific and ideological roots, with the primary goal of achieving better

[1] The survey also focused on opinions regarding the following areas: the administrative act (Articles 16-17 of LGAP), the guarantee act (Articles 18-21 of LGAP), the administrative contract (Articles 22-26 of LGAP), administrative actions (Articles 27-30 of LGAP), and the provision of public services (Articles 31-32 of LGAP). A more detailed presentation of the survey results and an analysis of the participants' views on these issues will be provided in the author's doctoral dissertation.

results in less time with fewer resources. This type of analysis is supported by the theoretical and practical work of many individuals and social movements. Philosophers such as René Descartes and Francis Bacon emphasized the importance of rational thinking and empirical approaches to acquiring knowledge. Descartes' rationalism leads to the idea that everything that can be measured and quantitatively analyzed can be better understood and improved. This approach forms the basis for the application of statistics in administrative procedures, where efficiency is measured and analyzed through numerical data.

## 2. Methodology

### *2.1. Survey Description*

The research was conducted using a survey that included 630 respondents, who had various interactions with LGAP. Perhaps the best indicator of the relevance of analyzing the application of the Law on General Administrative Procedure and its effects in our society is the statement by Dr. Vladimir Orlić, Speaker of the National Assembly, at the time of the conference, which was quoted by the Consulting firm Eurosfera and shared with the media and participants: "The provisions of LGAP affect the position of both the economy and citizens, who participate in procedures before administrative authorities on numerous and important issues. The National Assembly of the Republic of Serbia, within its competence to pass laws and other general acts, supports professional, collegial, and well-reasoned discussions on all current aspects of this law, especially on the effects of its application. Given that the upcoming conference brings together experts from various fields, each offering their unique perspective on administrative and legal issues, I am confident that all participants will contribute significantly to a quality analysis, important conclusions, and useful proposals."[2]

Respondents were asked to comment on the improvements the new law has brought compared to the previous version, as well as the problems and shortcomings in its implementation.

### *2.2. Sample and Characteristics of Respondents*

The survey was completed by respondents who a) apply LGAP in the Government of Serbia or in ministries; b) apply LGAP in local government bodies; c)

[2] The fact that the analysis of this important law is recognized as an activity of special significance and of public interest, as well as having continuous support in the new session of the National Assembly of the Republic of Serbia, is illustrated by a letter sent on September 3, 2024, by its Secretary General, Srđan Smiljanić. The letter states that "the patronage also extends to the Collection of Scientific Papers, titled: *The Law on General Administrative Procedure: Contemporary Trends and Challenges*... We agree that this fact be mentioned in the imprint of the publication."

apply LGAP in public enterprises; d) apply LGAP in other public administration bodies; e) are engaged in academia (teaching Administrative Law or related subjects); f) adjudicate cases involving final administrative acts in the Administrative Court; g) are parties to the procedure; h) work as attorneys; i) are members of professional or other associations for the development of public administration and law; or j) work in private enterprises.

### *2.3. Data Collection and Analysis Methods*

The research was conducted through a survey involving 630 respondents who had direct contact with LGAP. The Google Forms platform was used, and its link was sent to target groups via all electronic communication channels, including email, Viber, WhatsApp, and Telegram. The sample included representatives from the various groups mentioned above. The survey was designed to provide a deeper understanding of user perceptions and experiences regarding the law's application. The data collected were analyzed using quantitative and comparative analysis, as well as descriptive statistics, to identify specific effects of the law on the efficiency of administrative procedures. The sponsorship of the National Assembly of the Republic of Serbia contributed to positioning the survey within a broader professional audience, motivating respondents to participate, and enhancing the relevance and importance of the results obtained.

Additionally, respondents shared their impressions of the relationship between LGAP and specific administrative procedures, and the influence of specific administrative laws, secondary legislation, and the level of training of officials on the effectiveness of LGAP. This research provides insight into the practical application of the law and helps identify areas that require improvement.

## 3. Results of the Research Conducted Through the Survey

Research on this topic somewhat resembles the thoughts of Philip Anderson, Nobel Prize laureate in physics, who associated particularly challenging scientific work with two vivid expressions: "riding a mad horse" or "walking through a minefield."

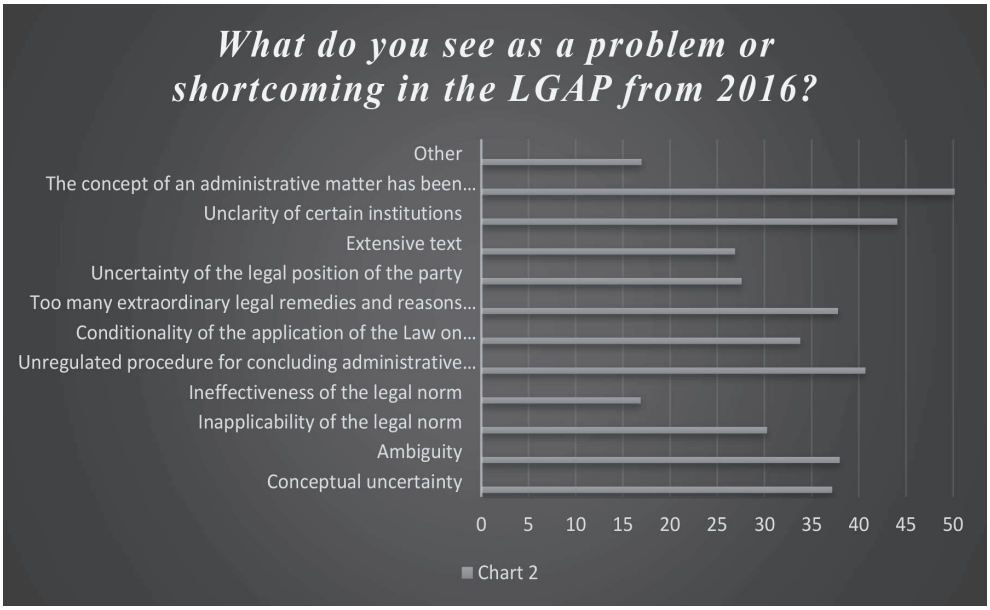
In the following section, due to space limitations in the paper, a portion of the survey results is presented, and three answers are illustrated with graphs. The survey was prepared using a combined method, allowing respondents to accept one or more offered answers or to add their own response.

*3.1. Question 1: What do you Consider an Improvement in the LGAP From 2016 Compared to the Previous Legal Text?*


**Graph 1** presents respondents' answers to the question "What do you consider an improvement in the LGAP from 2016 compared to the previous legal text?" It is noticeable that 20.6% of respondents believe that the new Law on General Administrative Procedure incorporated additional principles from the Court of Justice of the European Union. In the opinion of 50% of respondents, the benefit of this law is the introduction of e-government in communication between parties and the administrative body; 19.4% cite the introduction of an objection as a remonstrative legal remedy as an improvement; 23.5% believe that the new law has increased legal certainty; 25% consider the precise definition of the moment of initiating administrative proceedings as an improvement brought by the new law; 20.6% view the expansion of the concept of administrative matters as an improvement; 50% see a significant advantage of this law in the introduction of the obligation for the administrative body to collect data ex officio; 20.6% believe that a key advancement brought by this regulation is the significant increase in the efficiency and economy of procedures.

*3.2. Question 2: What do You See as a Problem or Shortcoming in the LGAP From 2016?*

Graph 2 provides respondents' answers to the question "What do you see as a problem or shortcoming in the LGAP from 2016?" The conceptual uncer-




tainty of the new law as a consequence was mentioned by 37.2% of respondents, while 38% cite its vagueness; 30.3% highlight the inapplicability of the legal norm as a problem, and 16.9% point out its ineffectiveness; 40.7% of respondents cite the unregulated procedure for concluding administrative contracts as a deficiency of the current law; 33.8% point to the fact that the application of LGAP is conditioned on special administrative procedures as a shortcoming; 37.8% believe that the number of extraordinary legal remedies and reasons for their application is excessive; 27.6% describe the legal insecurity of the party as a minus, while 26.9% see the voluminous text as a shortcoming; 44.1% of respondents mention the ambiguities of certain institutes; 50.3% of respondents consider the expansion of the concept of administrative matters to be a problem with the current law.[3]

### *3.3. Question 3: Please Evaluate the Legal Framework, Both Positive and Negative Aspects, Regarding the Administrative Act (Articles 16-17 of LGAP).*

The answers to this question are diverse: 34% of respondents gave the answer "very good," while 48% answered "could be much better and faster."[4]

[3] Several survey responses indicate that, in determining the content of the current Law on General Administrative Procedure (LGAP), the distinction between administrative matters, administrative activities, and administrative cases was not taken into account. The issues or shortcomings of the current LGAP were also raised in questions specifically related to administrative contracts, the provision of public services, and administrative actions.

[4] It was emphasized that there is insufficient transparency regarding the effects of the law's implementation in practice.

*3.4. Question 4: Please Evaluate the Legal Framework, Both Positive and Negative Aspects, Regarding the Guarantee Act (Articles 18-21 of LGAP).*

The answers to this question are also diverse: 28% of respondents gave the answer "good," while 42% answered "time for supplements and changes."[5]

*3.5. Question 5: Please Evaluate the Legal Framework, Both Positive and Negative Aspects, Regarding the Administrative Contract (Articles 22-26 of LGAP).*

Out of the total number of respondents, 21.1% state that administrative contracts, as a newly introduced concept in Article 2 of LGAP, have positive consequences, while 62% believe, for various reasons, that the consequences of introducing administrative contracts are negative.[6] The vast majority believe that the legal framework concerning this concept needs to be reorganized. Some respondents expressed the opinion that "the positive aspects lie in the aspiration for greater democratization of administrative activities and the establishment of a better position for citizens. However, this idea is not reflected in the legal framework. The private contracting party is referred to as a party, and there is a significant imbalance in the relationship between the contracting parties – to the detriment of the 'party,' which is entirely contrary to the proclaimed reasons for introducing this institute." Or: "The legal framework is vague, and important issues, such as the procedure for selecting a private contracting party, are not regulated." An interesting opinion is that it is negative "because there is no clear relationship established between contracts for public procurement, concessions, and public-private partnerships and administrative contracts under LGAP." Among the negative aspects, it is noted that "an ex ante analysis was also omitted, which would have indicated whether there are contracts in practice that deserve to be qualified as administrative, but which do not fall under the aforementioned categories of contracts from special laws. In other words, the relationship between the general

[5] Among the comments related to the assessment of the legal framework concerning the guarantee act, the following stand out: "The legal nature of the guarantee act is questionable." "The guarantee act lacks authority over the party to the administrative procedure, as the party is not bound by it." "It is debatable whether it can even be considered an administrative act, since its characteristics do not align with those of an administrative act." Alternatively: "Although its issuance increases legal certainty for the parties, I believe it burdens the activities of administrative bodies, as two administrative acts are issued in this case, not just one." "The guarantee act is issued when specified by special law. How should one proceed when the special law does not define it?"

[6] For illustration, some respondents went a step further by expressing the view that the administrative act is "a specific legal institute whose regulation is a logical consequence of its application within the theoretical understanding of the function of administration as a public service." Some respondents in their answers even questioned whether administrative contracts are applied at all. Among the comments, the following stands out: "The question arises as to whether all provisions of the Law on Contracts and Torts concerning contracts (considering its subsidiary application) can – without adaptation – be applied to administrative contracts?" Some comments point out the excessive asymmetry regarding the legal status of the two contracting parties: "If the party does not fulfill its contractual obligations, the contract can be terminated, but if the administrative body does not fulfill its obligations, the party cannot terminate the contract."

and special legal regimes, as well as the 'administrative' and 'civil' elements of administrative contracts, is not clearly defined."

### *3.6. Question 6: Please Evaluate the Legal Framework, Both Positive and Negative Aspects, Regarding the Administrative Actions (Articles 27-30 of LGAP).*

According to 26.7% of respondents, administrative actions are not adequately regulated by the current law; 18% of respondents provide arguments in favor of the new way of regulating the concept of administrative matters.[7]

### *3.7. Question 7: Please Evaluate the Legal Framework, Both Positive and Negative Aspects, Regarding the Provision of Public Services (Articles 31-32 of LGAP).*

Public services are adequately regulated in the opinion of 18% of respondents, while 48% believe, for various reasons, that the consequences of introducing administrative contracts are negative.

### *3.8. Question 8: Please Share your Opinion on Extraordinary legal Remedies in Administrative Procedures.*

When asked about their opinion on extraordinary legal remedies in administrative procedures, 47.2% of respondents believe that their redefinition is necessary.[8][9]

[7] Some respondents made the following observations: "The definition of administrative actions is a logical consequence of reducing coercion in administrative acts and actions, i.e. avoiding the previous legal solution where administrative actions were those that enforced coercion." "There hasn't been a clear distinction made between notification acts and administrative actions." "It is good that administrative actions have received their protection, allowing parties to file objections against administrative actions." "It could be made more precise." "It has only created confusion."
Some believe: "I apologize, but I must say that these are also absurdities. Look, if the authority (i.e. the civil servant) refuses to act (incompetence, negligence, bad intent, etc.), instead of the party immediately and directly contacting the superior (as has always been done), and the superior taking immediate measures against that official (in addition to ordering them to act, also taking disciplinary measures), we now have an objection that the party must file, and then a decision on the objection is awaited. The party waits for the decision on the objection. Essentially, it's a procedure within a procedure. This is outrageous." Others simply stated: "It could be better."

[8] "The inconsistency of LGAP is not only with this law but with others as well. However, none of our laws are aligned." For more on one perspective regarding proposals for restructuring, see: Predrag Dimirijević, Jelena Vučković, "Upravno-sudska žalba u ustavno-pravnoj tradiciji na prostoru Srbije i *de lege ferenda*", *Srpska politička misao*, Vol. 72, No. 2, 2021. pp. 251-270.

[9] The reasons cited for this are: a) there are too many extraordinary legal remedies, and b) it is difficult to meet the conditions for using these remedies. One particularly vivid comment describes it as "a forest where quality is lost." Among the comments, another notable one is: "For the Ombudsman to use extraordinary legal remedies, a much larger number of employees would be required."

*3.9. Question 9: In which segments do you see discrepancies between LGAP and the Law on Administrative Disputes? Please share suggestions for harmonization.*

According to 54% of respondents, various measures aimed at harmonization should be implemented.[10]

*3.10. Question 10: Please share your impression of the relationship between LGAP and special administrative procedures.*

The majority, i.e. 52% of respondents believe that the process of harmonizing LGAP with special administrative procedures has been omitted.[11]

*3.11. Question 11: The relationship between LGAP and: special administrative laws; secondary legislation; and insufficiently trained officials*

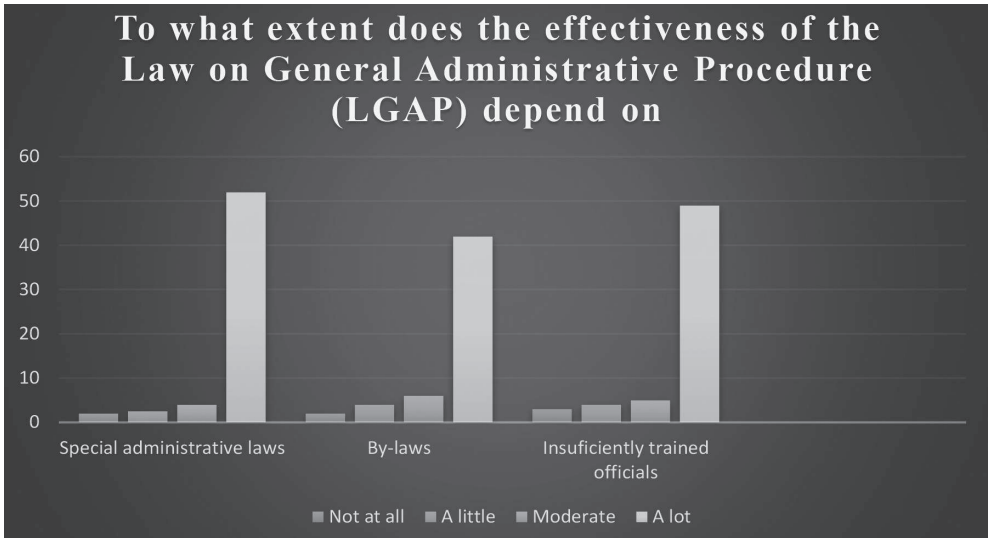
**The table** below presents three questions:

1. To what extent do special administrative laws influence the effectiveness of LGAP?[12]
2. To what extent does secondary legislation influence the effectiveness of LGAP?
3. To what extent does the lack of training of officials influence the effectiveness of LGAP?

[10] "Among the proposed measures are: 'identification of legal gaps and inconsistencies; harmonization of terms and definitions; reconsideration of legal remedies; review of deadlines for decision-making, and improvement of administrative officers and judges.' There are also views: 'The Law on Administrative Disputes (ZUS) was adopted before the Law on General Administrative Procedure (ZUP), so it is necessary to adapt the ZUS in parts concerning administrative matters in administrative disputes, representation of parties, as well as party legitimacy in administrative disputes.' Or: 'Deadlines should be prescribed for disputes in the Administrative Court, as some proceedings have not been concluded for five years.'"

[11] Some of the opinions are: "The laws on special administrative procedures have gone beyond regulating the specificities of these procedures and have become *lex specialis derogat legi generali* in relation to LGAP, even though they do not contain all the norms that regulate a special procedure." "Amend LGAP to regulate subsidiary versus analogous application." "In the amendments to LGAP, more clearly define in which cases and matters a special law may deviate from LGAP." Or: "They are unnecessary; a unified and simple procedure is needed." "Slow... cumbersome... complicated." "For the most part, they are mutually aligned." Another comment states: "The main blow to LGAP rules, particularly to its principles, is dealt by the Law on Citizenship of the Republic of Serbia."

[12] During his presentation at the conference *Analysis of the Law on General Administrative Procedure in the Service of the Economy and Citizens,* Prof. Dr. Marko Davinić emphasized that Article 3 of LGAP (General and Special Procedure) should be amended with the following text: "The necessity of regulating certain issues differently must be specifically justified in the draft law." Paragraph 4: "The Ministry responsible for public administration affairs shall give prior approval to the draft law, specifically examining the conditions regulated by Article 3, Paragraph 2 of this law."




From the diverse responses received, it can be seen that respondents have clear views on the influence of special administrative laws, secondary legislation, and insufficiently trained officials on the effectiveness of LGAP.[13]

## 4. Discussion

### *4.1. Analysis of the Survey Participants' Opinions with Interpretation of Results*

The survey results indicate a high degree of diversity in participants' perceptions of the effectiveness of the 2016 Law on General Administrative Proce-

[13] Some opinions expressed include: "Certain procedures should be more specifically regulated by secondary legislation." Or: "Special laws unnecessarily introduce special administrative procedures." "Special administrative procedures reduce the effectiveness of LGAP, as the norms of laws governing special administrative procedures are applied without considering LGAP norms." "Insufficiently trained officials certainly affect not only the effectiveness of LGAP but also the overall public perception of administrative bodies." "There is no efficient process for the party involved." "Ask ordinary citizens who are dissatisfied," etc.
"Officials work based on instructions and do not interpret or understand the meaning of the regulations, and the managerial staff is insufficiently experienced and trained."
Other comments include: "The insufficient training of personnel means they only follow instructions from supervisors and do not use their knowledge to interpret the law." Or: "The lack of transitional provisions in certain laws, which do not address the fate of ongoing but unfinished cases, raises questions about the jurisdiction of the second-instance authority."
Additionally: "A disadvantage is the shortage of employees in local governments, where those who feel underpaid move to the private sector, which places further strain on the remaining officials, many of whom are near retirement and handling these tasks." Or: "The biggest problem is untrained officials who slow down the entire system, delay the procedure, fail to implement the law, misinterpret provisions, make wrong decisions and conclusions, are unprofessional, and take mistakes personally, retaliating by making you wait much longer to correct an error or add missing information."
Among the more positive opinions: "Officials, if supported by leadership, perform their duties very responsibly."
In more direct critiques: "Officials are not untrained; they are incompetent and lack proper qualifications. Police officers, police station chief's coffee servers, women with agricultural high school diplomas, and I could go on, are handling administrative matters. This is the situation in Serbia."

dure (LGAP). The majority of respondents (50%) highlighted the positive effects of introducing e-government, demonstrating that technological modernization has a significant impact on the efficiency of administrative procedures. However, respondents also identified problems, particularly regarding the vagueness and conceptual uncertainty of the law (31%), indicating the need for clearer definitions of certain legal institutes. A large number of respondents (50.1%) indicated that the problem lies in the expansion of the concept of administrative matters, emphasizing the need for better definition and clarification of this concept. The regulation of administrative contracts was also marked as inadequate,[14] with indications for the need for amendments and revisions through various solutions.[15]

The provision of public services and administrative actions[16] were cited as examples of parts of LGAP where there is much room for improvement and, as such, require further analysis. Regarding the relationship between LGAP and special laws, 52% of respondents believe that the harmonization process between LGAP and special administrative procedures has been omitted. This process needs to continue, and the (re)activation of the Coordination Body for the harmonization of special laws with LGAP could help in this.

As for the alignment between the subject of LGAP and the Law on Administrative Disputes, there are also varying opinions.

### *4.2. Comparative Analysis with Other Studies*

A logical continuation, in order to determine what is being done and what is being achieved, would be the adoption of a document that would enable the monitoring of the effects of administrative procedures in all former Yugoslav states.

SIGMA reports that in their research, "administrative procedures were

[14] A similar view is expressed in the statement: "We consider it essential to (re)examine the meaning and objectives of the institute of administrative contracts as regulated by LGAP. In other words, it is necessary to once again raise the question of why it is important for us to have this institute in the domestic (administrative) legal system as a separate legal institute and what we aim to achieve with it." Bojana Todorović, *Mehanizmi rešavanja sporova iz upravnih ugovora*, doktorska disertacija, Pravni fakultet Univerziteta u Beogradu, 2023..

[15] An early critique of the current LGAP regarding administrative contracts and other solutions can be found in: Vuk Cucić, "Fino podešavanje Zakona o opštem upravnom postupku", *Anali Pravnog fakulteta u Beogradu*, Vol 61, No. 2, 2018. pp. 139-163.

[16] See Dragan Milkov, R. Radošević., "Upravne radnje", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 67, No. 1, 2023, pp. 1-16. "The new Law on General Administrative Procedure (LGAP), however, brings a shift, defining administrative actions in the context of a specific form of administrative conduct much more broadly, equating them with all actions of the administration that do not have immediate legal effect but instead factually affect the rights, obligations, or legal interests of the parties. The connection of various individual acts and actions of the administration without direct legal effect into one form of administrative conduct, which was artificially executed by introducing the objection as a 'legal remedy' in administrative procedures, prevents us from deriving a logical and meaningful concept of administrative actions from the legal norms. Instead of a concept, we receive a simple collection of various material acts of administrative bodies which, despite the intention of the drafters of LGAP, are not subject to an identical legal regime. These are actions whose connection to the administrative-legal regime is realized in different ways and has different meanings, making their relationship to the concept of administrative activity itself questionable."

evaluated based on eight elements derived from these standards, which include the key steps of the administrative process, as well as the main rights of the parties: ease of initiating administrative procedures (including the application of the 'Once Only Principle'); the possibility of electronic communication; the right of participants to be heard; the duration of the procedure; requirements regarding the content of administrative acts; delegation of decision making within administrative bodies; the balance between legal certainty and legality; and the functioning of the appeal process."[17] There is much room for improvement,[18] and there are certain, smaller or larger, indications in this direction. For complete success, resources and time are needed in addition to political will. Therefore, for now, the most accurate sentiment seems to be that "there is a lack of systematic monitoring of the implementation of LGAP, and there are no precise and official data on the application of certain provisions that were introduced as novelties by the law."[19]

## 5. Conclusion

### *5.1. Summary of Key Findings*

This research showed that e-government and the obligation to collect data ex officio were recognized by respondents as the most significant improvements that contributed to the efficiency of administrative procedures. On the other hand, conceptual vagueness, the expanded concept of administrative matters, and ambiguities regarding administrative contracts, the relationship between LGAP and special administrative procedures, as well as extraordinary legal remedies, were identified as the main challenges requiring further legal interventions.

### *5.2. Recommendations for Improving the Law on General Administrative Procedure*

After analyzing the obtained results, the following measures are considered necessary to improve the Law on General Administrative Procedure:

- Clarify conceptual ambiguities and work on overcoming them;

[17] *Implementation of laws on general administrative procedure in the Western Balkans*, SIGMA Paper No. 62:

[18] *Methodology for Monitoring and Supervising the Implementation of LGAP and Resolving Administrative Matters*, Ministry of Public Administration of the Republic of Croatia, or a somewhat different initiative in Montenegro.

[19] The views of Iskra Akimovska Maletić presented at the conference *Analysis of the Law on General Administrative Procedure* can be illustrative of the situation in many environments whose legal frameworks originated from the Yugoslav LGAP. In Serbia, a draft text of the *Methodology for Monitoring Procedures in Administrative Matters Based on LGAP* was put together at one time. Such measurement would provide important indicators along the way. See: Dobrosav Milovanović, "Pretpostavke za primenu Zakona o opštem upravnom postupku", *Pravni život*, Vol. 67, No. 10, 2018, pp. 149-167.

• Re-examine the expanded concept of administrative matters, administrative contracts, public services, and administrative actions;

• Introduce systematic measurement of the effects of LGAP based on predefined success indicators, with the reactivation of the Coordination Body with refreshed personnel;

• Harmonize the current law and special administrative procedures;

• Implement quality training for officials on a larger scale, using new technologies to increase the efficiency of administrative procedures, and

• Re-examine extraordinary legal remedies to ensure faster and more efficient legal protection for parties.

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# PART FOUR
# The Law on General Administrative Procedure (ZUP) and the Law on Administrative Disputes (ZUS)

Paola Savona*

# THE RIGHT TO BE HEARD IN ADMINISTRATIVE PROCEDURE AND ADMINISTRATIVE DISPUTES

*Abstract*

*The General Administrative Procedure Act and the Administrative Disputes Act are among the main pillars of a state based on the rule of law. They shape the relationship between the citizen and the public authority ensuring the respect of the rights and legal interests of natural and legal persons affected by an administrative decision and granting the necessary protection against unlawful acts (or failure to act) of the public bodies. A well-functioning administrative procedure as well as an efficient and effective system of administrative justice has then a strategic importance in enhancing trust in institutions, attracting national and international investments and boosting national economy.*

*The two acts have different purposes and regulate the action of different powers, but are strictly connected and need to be harmonized in order to ensure legal certainty and the necessary consistency of the legal system. This need of harmonization is taken in due account in the Judicial Development Strategy of the Republic of Serbia for the period 2020-2025, which envisages a comprehensive reform of administrative judiciary, including, among other things, the creation of a multi-instance system.*

*In such a complex reform process, the General Administrative Procedure Act adopted in 2016 represents an important reference. Given that this law is fully in line with European standards, the necessary harmonization of the Administrative Disputes Act with the General Administrative Procedure Act would, in many respects (e.g. in relation to the right to be heard, the status of party recognized, under certain conditions, to representatives of collective and public interests, or the possibility of restitution in the previous state), have the effect to align administrative judicial proceedings with the acquis communautaire and to enhance the protection of the rights and legal interests of the citizens affected by the public authorities.*

*The paper, following a comparative approach, focuses, in particular, on the right to be heard in administrative procedure and Administrative Court's proceedings, providing some suggestions on how the provisions of the Administrative Disputes Act might be amended in order to be harmonized with the Administrative Procedure Act and to comply with the case-law of the European Court of Human Rights on the right to a fair trial.*

**Keywords:** Administrative Procedure, Administrative Disputes, Right to be Heard, General Administrative Procedure Act, Administrative Court.

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## 1. Preliminary Remarks

The General Administrative Procedure Act and the Administrative Disputes Act are among the main pillars of a State based on the Rule of Law. They shape the relationship between the citizen and the public authority granting the necessary protection against unlawful acts (or failure to act) of the public bodies. A well-functioning administrative procedure and an effective system of administrative justice have then a strategic importance in enhancing trust in institutions, attracting national and international investments and boosting national economy.

The two acts have different purposes and regulate the action of different powers, but are strictly connected especially where, as in the Serbian system, the exhaustion of administrative remedies is a condition for access the judicial review[1]. Given the functional connection[2] between administrative procedure and administrative dispute, the acts regulating them need to be fully harmonized in order to ensure legal certainty and the necessary consistency of the legal system.

Such harmonization is still incomplete in the Serbian legal system, due also to different periods where the two acts were framed. The General Administrative Procedure Act (hereinafter GAPA), which was adopted in 2016,[3] enhanced the protection of the citizen, in line with European standards.[4] The new GAPA indeed, among other things, codified fundamental principles of the EU *acquis* in administrative law,[5] as the principle of predictability and legitimate expectations[6] and the principle of proportionality,[7] relieved the citizen involved in an administrative procedure from unnecessary burdens,[8] facilitated the communication between the public authority and the parties allowing the use of the electronic form, introduced important means of simplification as the unique administrative place.[9]

[1] Therefore, according to the European Court of Human Rights, the duration of second instance administrative procedure has to be taken into account in order to assess whether the right to a trial within a reasonable time has been respected (ECtHR, Le Compte and others v Belgium, 1981, para. 51; EU Court of Justice, 2017, Puskar C-73/16, paras. 58-70).

[2] Eberhard Schmidt-Assmann, *Das Allgemeine Verwaltungsrecht als Ordnungsidee*, Springer, Berlin, 2004, p. 374, who stresses how the administrative procedure may not replace the judicial proceeding (because of the independence and the specific guarantees connected to the latter), but it may unburden it.

[3] *Official Gazette of the Republic of Serbia*, No. 18/2016.

[4] See Dobrosav Milovanović, Vuk Cucić, "Nova rešenja Nacrta zakona o opštem upravnom postupku u kontekstu reforme javne uprave u Srbiji", *Pravni život*, Vol. 2, No. 10, 2015, p. 95.

[5] On the EU *acquis* in administrative law see: Paul Craig, *EU Administrative Law*, Third Edition, Oxford University Press, Oxford, 2018.

[6] The principle, directly grounded on the rule of law (see P. Craig, p. 606) is now stated in Art. 5, para. 3 GAPA and it is as well at the base of new institutes regulated by the Act, as the guaranty act or the starting of *ex officio* procedures from the moment in which the authority informs the party thereof. See D. Milovanović, V. Cucić, pp. 101-102.

[7] Article 6 GAPA. The principle of proportionality is in turn of fundamental importance for the judicial review of administrative acts, especially the ones that are expression of discretionary powers, see P. Craig, p. 642 ff.

[8] For instance the need to provide data that is already in official records detained by other authorities (Article 103 of the GAPA). On this provision see D. Milovanović, V. Cucić, pp. 96-98.

[9] On the implementation of Article 42 GAPA see Dobrosav Milovanović, "Pretpostavke za primenu Zakona o opštem upravnom postupku", *Pravni život*, Vol. 2, No. 10, 2018, pp. 158-159.

The Administrative Disputes Act[10] (hereinafter ADA), which was enacted in 2009, is, instead, yet not fully aligned to the European standards. Although the ADA represents an important advancement in comparison with the former ADA,[11] for example, in relation to the public hearing, it still needs further improvements, for instance, in relation to interim relief or the principles of adversarial procedure and parity of arms. Moreover, contrary to the other legal systems in Europe, where the judicial review of administrative acts is articulated in two or more instances,[12] in the Republic of Serbia the Administrative Court adjudicates in first and last instance, as no ordinary remedy is available in administrative disputes.

The Judicial Development Strategy of the Republic of Serbia for the period 2020-2025[13] recognizes the need of introducing the right to appeal in administrative disputes, envisaging a comprehensive reform of administrative judiciary, including, among other things, the creation of a multi-instance network of administrative courts. The Judicial Development Strategy takes as well into due account the need of harmonization of the new (or amended) ADA with the GAPA.

Given that the GAPA is in line with European standards, the necessary harmonization of the ADA with the GAPA will, in many respects (e.g. in relation to the right to be heard, the status of party recognized, under certain conditions, to representatives of collective and public interests, or the possibility of restitution in the previous state), have the effect to align administrative judicial proceedings with the EU *acquis* and to enhance the protection of the rights and legal interests of the citizens affected by a decision (or the failure to act) of the public authorities.

The paper focuses, in particular, on the right to be heard in administrative procedure and in judicial review proceedings, providing some suggestions on how the provisions of the ADA might be amended in order to be harmonized with the GAPA and to comply with the case law of the European Court of Human Rights on the right to a fair trial.

## 2. The Right to be Heard in Administrative Procedure in the European Area

The right of the citizens to participate to administrative procedure and to express their views before a measure limiting their rights or legal interests is issued is nowadays largely recognized in European legal systems[14].

[10] *Official Gazette of the Republic of Serbia,* No. 111/2009.

[11] *Official Gazette of the Federal Republic of Yugoslavia,* No. 46/96.

[12] The introduction of the right to appeal in administrative disputes is recommended by the Council of Europe (Recommendation REC(2004)20 on judicial review of administrative acts, para. 4), as it is of fundamental importance for granting justice and uniformity of case law.

[13] *Official Gazette of the Republic of Serbia,* No. 5/2020.

[14] In Germany, for example, the right to be heard in administrative procedure is deemed to be a constitutional principle requiring that a decision of the public authority shall only be based on the assumptions on which the

The right to be heard before the public authority takes a decision directly affecting the rights of an individual has been recognized as well by the European Court of Human Rights (ECtHR), which has strengthened the guarantee of fundamental rights by requiring a procedural protection in the event of their limitation[15], and by the Committee of Ministers of the Council of Europe, which has included the right to be heard among the principles that should guide administrative procedure.[16] The principle, which is considered "a key principle of good governance in a democratic state", requires that, when the rights or interests of an individual are likely to be directly and adversely affected by an administrative decision, he/she must be informed in good time and have the opportunity to make submissions, which may be written or made orally and include documentary evidence, opinions or statements.[17]

The right to be heard before the public authority takes an individual decision that would adversely affect his/her position is as well recognized in the standing case-law of the Court of Justice of the European Union.[18] According to the Court, the right to be heard is a fundamental principle of EU law, "which must be guaranteed even in the absence of any rule governing the procedure in question".[19] The rights of defence may not be excluded or reduced by any legislative provisions and must therefore be ensured both where there is no specific legislation and where the legislation exists but does not take account of the principle.[20]

parties have had the possibility to express their views, which have to be taken into account and documented in the rationale of the decision (see: Hartmut Maurer, *Allgemeines Verwaltungsrecht*, 15th Edition, C.H. Beck, Munich 2004, pp. 491-492, Eberhard Schmidt-Assmann, "Der Verfahrensgedanke im deutschem und europäischen Verwaltungsrecht", in: *Grundlagen des Verwaltungsrechts*, (eds. Andreas Vosskhule, Martin Eifert, Christoph Möllers), Vol. 2, Munich 2012, p. 518); in Italy the addressee of an administrative act has to be notified of the initiation of the procedure and has the right to submit written observations and documents, which the public authority is obliged to evaluate if relevant for the procedure (on this right see: Filippo Satta, "Contraddittorio e partecipazione nel procedimento", *Diritto Amministrativo*, No. 2, p. 299ff.; Marco D'Alberti, "La visione e la voce: le garanzie di partecipazione ai procedimenti amministrativi", *Rivista Trimestrale di Diritto Pubblico*, No. 1, p. 1ff; Guido Corso, *Manuale di diritto amministrativo*, 9th edition, Giappichelli, Torino, 2020, p. 249 ff. ; Domenico Sorace, Simone Torricelli, *Diritto delle amministrazioni pubbliche*, 10th edition, Il Mulino, Bologna, 2021, pp. 340-43; Marcello Clarich, *Manuale di diritto amministrativo*, 3rd edition, Il Mulino, Bologna 2017, pp. 238-242).

[15] In relation to the right to respect for private and family life (Article 8 ECHR), for example, the Court held that, although this provision does not contain any explicit procedural requirement, a measure directly interfering with the right must be fair and afford the opportunity of the persons concerned to be heard as to ensure that their interest are properly protected, otherwise the interference may not be regarded as "necessary" within the meaning of the Convention (McMichael v. the United Kingdom, 24 February 1995, No. 307-B and Buscemi v. Italy, No. 29569/95, Tysiac v. Polonia, 20 March 2007 No. 5410/2003).

[16] See, e.g., Resolution (77)31 on the protection of the individual in relation to the acts of administrative authorities, principle I and the Recommendation CM/Rec(2007)7 on good administration, Art. 14.

[17] *The Administration and You- a handbook*, Council of Europe, 2018, p. 32.

[18] At an early stage, the opportunity of the person concerned to make his/her point of view known was recognized in relation to procedures where sanctions might be imposed, but it was soon extended to all proceedings which are liable to culminate in a measure adversely affecting the addressee of the decision. For complete references and analysis of the relevant case law see: P. Craig, p. 312 ff.; Diana-Urania Galetta, "Il diritto ad una buona amministrazione nei procedimenti amministrativi oggi", *Rivista Italiana di Diritto Pubblico Comunitario*, No. 2, p. 155 ff.

[19] Case C-135/92, Fiskano v Commission (1994), para. 39.

[20] See cases T-260/94 Air inter SA v Commission (1991); C-560/14 M v Minister for Justice and Equality Ireland (2017); C-291/89 Interhotel v Commission (1991), P. Craig, p. 312.

The principle requires that the person concerned by a decision directly affecting his/her rights or legal interests must be placed in a position in which he/she can effectively make known his/her views on the matters on the basis of which the authority adopts the decision.[21] Relevant for the right to be heard is therefore the obligation of the public authority to inform the persons concerned of the initiation of the procedure.[22] Furthermore, the authority, in the final decision, shall take into account only those elements on which the persons that are adversely affected by the decision have had the opportunity to express their views.[23]

The Charter of Fundamental Rights of the European Union[24] includes the right to of every person to be heard before an individual measure, which would affect him or her adversely, is taken within the right to a good administration, granted in Article 41[25].

### 3. The Right to be Heard in the Serbian GAPA

Serbian legal system seems in line with European standards on the right to be heard in the administrative procedure. The GAPA indeed includes this right among the basic principles of administrative procedure, granting to the party the opportunity to submit observations on the facts relevant for deciding in an administrative matter and providing that, without prior observation to be submitted by the party, a decision may only be made if allowed by the law (Article 11). Furthermore, the Act entails several rules making the right to be heard effective.

First, those rules are to be mentioned that enable, or facilitate, the exercise of the right. In this respect, Article 91, paragraph 3, according to which the procedure initiated *ex officio* shall be deemed as instituted once the party has been informed of the institution[26], is particularly relevant, since the involvement of the party in the early stage of the procedure is a fundamental condition in order to ensure that the participation of the party is effective[27]. The provisions granting access to the case file[28] are as well important, as the knowledge of the information detained by the public authority is crucial to enable the parties to make relevant and effective

[21] Case C-135/92, Fiskano v Commission (1994), paragraph 40.
[22] Case C-323/82 Intermills (1984), paragraph 17, D. U. Galetta, p. 160.
[23] Case T-9/89, Hüels AG v Commission (1992), paragraph 38.
[24] Charter of Fundamental Rights of the European Union, *Official Journal of the European Union* C83/2, 2010.
[25] Although the provision of the Charter is applicable to the EU institutions and not to the Member States, the EU Court of Justice held that the right to be heard in the Charter is reflective of the previous general principle of law concerning the rights of the defence and the right to be heard and shall be applied, on this basis, to the Member States (see P. Craig, p. 313).
[26] On the relevance the provision for granting legal certainty see D. Milovanović, V. Cucić, pp. 101-102.
[27] See, in relation to a similar rule provided in the Italian system G. Corso, p. 250; D. Sorace, S. Torricelli, pp. 329-330.
[28] Art. 64 GAPA.

submissions in relation to proposed administrative decisions that might affect their rights of interest.[29] Finally, the provisions regulating the communication between the authorities and the parties are relevant, in so far as they enable a fast and efficient exchange between the authority and the citizen, in oral as in written form, including in electronic form, granting, at the same time, legal certainty and the cost-effectiveness of the procedure.

Secondly, the provisions of the GAPA are to be mentioned, which directly implement the principle in the procedure, especially the ones related to investigation (Article 106). Accordingly, the investigation procedure shall be conducted if the facts relevant for deciding in an administrative matter cannot be established or if the parties need to be provided with the opportunity to make a statement for the purpose of the protection of their rights and legal interests. The Act provides then that the parties shall be entitled to make a statement on the facts that have been presented as well as on the proposed evidence, to take part to the taking of evidence, pose questions to other parties, witnesses and expert witnesses, present the facts relevant for deciding on the administrative matter, propose evidence, present legal assertions and challenge the allegations contrary to its own;[30] that the authority shall be obliged to decide on requests and proposals of the party and that the procedure cannot terminate as long as the party is not offered the opportunity to make statements on the facts relevant for the decision on the administrative matter. In addition, the GAPA sets forth the obligation of the authorized official to schedule an oral hearing when opposing parties participate to the procedure or when on-site investigation needs to be carried out or a witness or an expert witness needs to be heard.[31] An oral hearing may as well be scheduled whenever it is needed for the clarification of the administrative matter.[32] Finally, the right of the party to submit observations is reflected in the rationale of the decision, which has to contain, among others, a brief presentation of the party's request, the factual situation and evidence on the basis of which it was issued, the reasons that were decisive in the assessment of each piece of evidence and the reasons why a request or a proposal has not been accepted.[33]

All these provisions seem to offer suitable protection of the right to be heard before the public authority takes a decision adversely affecting the rights and legal interests of the parties in line with European standards. In relation to this principle, however, as in relation to the other parts of the GAPA, the monitoring of the implementation of the Act would be important, in order to assess whether its implementation is consistent.[34]

[29] *The Administration and You- a handbook*, p. 31.
[30] Art. 106, para. 2.
[31] Art. 109, para. 1.
[32] Art. 109, para. 2.
[33] Art. 141, para. 4.
[34] On the importance of monitoring the implementation of the GAPA see D. Milovanović, pp. 159-160.

## 4. The Right to be Heard as a Core Element of the Right to a Fair Trial

In judicial proceedings, the right to be heard enjoys even stronger protection as it is an essential part of the right to a fair trial, which is granted by the European Convention on Human Rights,[35] the EU Charter of Fundamental Rights[36] as well as most constitutions of European Countries, including the Serbian one.[37]

In relation to the right to be heard, the right to a fair trial enshrined in Article 6, paragraph 1, ECHR, which applies to administrative disputes provided that the outcome is decisive for the individual's rights and obligations,[38] has two fundamental components, the right to a public oral hearing and the right to adversarial proceedings.

According to ECtHR case law, the right to an oral hearing is not an absolute right.[39] It may be expressly or tacitly waived.[40] Moreover, in exceptional circumstances, where the case is better dealt with in written form, a court may dispense with the oral hearing provided that the refusal to allow the hearing is reasoned.[41] A hearing might not be necessary due to the exceptional circumstances of a case, for example, when the case "raises no questions of fact or law that cannot be adequately resolved on the basis of the case file and the parties' written observations".[42] According to the ECtHR, the exceptional character of circumstances justifying the lack of the oral hearing essentially stems from "the nature of the issues to be decided by the competent national court" and not from the "frequency of such situations"[43]: disputes concerning highly technical matters, e.g. the ones related to social security benefits, may be better dealt with in writing than in oral arguments and national authorities may also have regard to the efficiency and economy when the legal issues are not especially complex and can be solved on the base of the case file.[44]

The right to adversarial proceedings, which is closely linked to the principle of parity of arms[45], is protected in a rigorous way in the ECtHR case law.[46]

[35] Art. 6.

[36] Art. 47.

[37] Art. 32 Constitution of the Republic of Serbia, *Official Gazette of RS,* No. 98/2006, 16/2022.

[38] ECtHR, Ringeisen v Austria, 1971, para. 94; Ferrazzini v Italy, 2001, para. 27. On this point see OSCE/ODIHR, *Handbook for Monitoring Administrative Justice*, 2013, p. 36; Arman Zrvandyan, *Casebook on European fair trial standards in administrative justice*, Council of Europe, 2016, pp. 13-19.

[39] De Tommaso v. Italy [GC], 2017, para. 163. For further references to the case law of the Court see the *Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)*, 2022.

[40] See, e.g., Salomonssonn v. Sweden, 2002, para. 64; SchulerZgraggen v. Switzerland, 1993.

[41] A. Zrvandyan, p. 76; OSCE/ODIHR, p. 61.

[42] Salomonsson v. Sweden, 2002, para. 36. For a summary of examples where the hearing is not necessary see Ramos Nunes de Carvalho e Sá v. Portugal [GC], 2018, paras. 190-191.

[43] See, e.g., Miller v. Sweden, 2005, para. 29; Mirovni Institut v. Slovenia, 2018, para. 37.

[44] See, e.g., Eker v. Turkey, 2017, paras. 29 and 31.

[45] The two principles, which apply in all types of judicial proceedings irrespective of their domestic classification, are interrelated and the Court employs them interchangeably. See A. Zrvandyan, p. 85.

[46] See Eduardo Garcia de Enterria, *Le trasformazioni della giustizia amministrativa*, Giuffrè, Milano, 2010, pp. 70-71.

Accordingly, the parties to a trial shall have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing a court's decision.[47] The court should then take the initiative to inform the parties to the proceedings of the existence of evidence or observations, including new information added to the case file after the institution of proceedings or evidence obtained by the court on its own initiative from public authorities or other sources.[48] It is not sufficient that the material is on file with the court.[49]

According to the standing ECtHR case-law, the right to adversarial proceedings must be exercised in satisfactory conditions: a party to the proceedings shall have the possibility to familiarize itself with the evidence before the court, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time.[50] As pointed out by the ECtHR, the adversarial principle is just as valid for the parties to the proceedings as it is for an independent member of the national legal service or a representative of the administration.[51] The deciding court itself must respect the adversarial principle when it adjudicates on the basis of a ground or objection, which it has raised on its own motion.[52]

As the right to public hearing, the right to adversarial proceedings is not absolute and its scope may vary depending on the specific features of the case in question.[53] The ECtHR, however, stressed that the desire to save time and expedite the trial does not justify disregarding such a fundamental principle.[54] Moreover, according to the Recommendation of the Council of Europe on provisional court protection in administrative matters,[55] the principle of adversarial proceedings should apply, save in case of urgency, in interim relief proceedings, although such proceedings, by their nature, need to be decided in a speedy way.

In relation to the right to an oral hearing and the principles of adversarial procedure and parity of arms, similar requirements and exceptions are stated in the case law of the EU Court of Justice, as such Court deems that Article 47 of the EU Charter, providing the right to an effective remedy and fair trial, has to be interpreted in the light of the ECtHR case-law on Article 6 ECHR.[56]

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[47] Kress v. France [GC], 2001, para. 74; Ruiz-Mateos v. Spain, 1993, para. 63; McMichael v. the United Kingdom, 1995, para. 80; Vermeulen v. Belgium, 1996, para. 33; Lobo Machado v. Portugal, 1996, para. 31.

[48] See OSCE/ODIHR, p. 65.

[49] *Ibidem*.

[50] Krčmář and Others v. the Czech Republic, 2000, para. 42; Immeubles Groupe Kosser v. France, 2002, para. 26. See OSCE/ODIHR, p. 65.

[51] Köksoy v. Turkey, 2020, paras. 34-35.

[52] Čepek v. the Czech Republic, 2013, para. 45, and Clinique des Acacias and Others v. France, 2005, para. 38.

[53] Hudáková and Others v. Slovakia, 2010, paras. 26-27.

[54] Nideröst-Huber v. Switzerland, 1997, para. 30.

[55] Recommendation No. R(89) 8 of the Committee of Ministers to the Member States on provisional court protection in administrative matters, principle IV, para. 1.

[56] See, case C-205/15, Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci, 2016 paras. 40 and 41 and the case law cited there. On the exceptions to the right to public hearing see, e.g., Andechser Molkerei Scheitz v Commission, C-682/13, 2015 and Case C-348/16, Sacko v Commissione Territoriale per il riconoscimento della protezione internazionale di Milano, 2017. On the principle of equality of arms see: Case C 205/15, Direcția Generală Regională a Finanțelor Publice Brașov v Vasile Toma, 2016.

## 5. The Right to be Heard in the Serbian ADA

The ADA adopted in 2009 introduced the right to an oral public hearing in administrative disputes as a general rule. The principle, enshrined in Article 2 of the Act, is further specified in Article 33, paragraph 1, providing that the Administrative Court shall decide based on the facts determined in an oral hearing.

The right to an oral hearing is not an absolute right as, pursuant to the ADA, the Court shall decide without holding an oral hearing if the matter of the dispute is such that it obviously does not require the direct hearing of the parties and a special determination of the factual state or if the parties explicitly agree to do so, being obliged in such cases to state the reasons for not holding a hearing.[57][58] A hearing is as well always required when the administrative procedure was participated by two or more parties with opposite interests or when the Court defines the factual state for deciding in full jurisdiction.[59]

In principle, the exceptions to the general rule to hold an oral hearing provided by the ADA, combined with the requirement to state the reasons where these exceptions occur, seem in line with ECtHR case law on the right to an oral hearing. Similar exceptions are to be found as well in other legal systems.[60] In Serbian system, the holding of a hearing seems to be not frequent, but, due to the lack of ordinary remedies in administrative disputes, it is not possible to assess whether the provisions of the ADA, which should be strictly interpreted in order to ensure that the exceptions remain exceptional as required by the ECtHR case-law, are always respected and thus whether such dispenses with the public hearing are justified and the decisions not to hold a hearing duly reasoned.

The normative framework seems instead concerning in respect to the right to adversarial proceedings, which is not protected in line with European standards.

The ADA indeed provides that, in preliminary procedure, if the Administrative Court does not dismiss the claim for the reasons provided by the ADA, annul the challenged act for essential failures that make its illegality manifest, or declare the challenged act null and void, it shall send a copy of the claim with the enclosures to the defendant authority and the interested party (when present) in order to give their response within the time limit set by the Court.[61] The Administrative Court is not required to communicate the responses of the other parties

[57] Art. 33, paras. 2 and 3.
[58] Art. 34, para. 1.
[59] Art. 34, para. 2.
[60] In Germany, e.g., the administrative court, after having heard the parties, may solve the dispute without a oral hearing by a ruling (*Gerichtsbescheid*) when the dispute does not present particular legal or factual difficulties and the facts of the case are clear; in Portugal, the administrative court may decide with a ruling without a public hearing when the case poses only questions of law, or, if it presents also questions of fact, the state of the proceeding allows to solve the dispute without further investigation. See Friedhelm Hufen, *Verwaltungsprozessrecht*, 11th Edition, CH Beck, Munich, 2019, pp. 571-578; Mário Aroso De Almeida, *Manual de Processo Administrativo*, 4th edition, Almedina, Coimbra, 2020, pp. 374-378; José Carlos Vieira de Andrade, *A Justica Administrativa*, 17th edition, Almedina, Coimbra, 2019, pp. 300-304.
[61] Art. 30.

(which may include evidence and new arguments, especially when presented by the interested party) to the claimant or to inform him/her about the submission of documents. The claimant is then not in the position to familiarize him/herself with the evidence and arguments of the other parties before the hearing.[62] Moreover, since the Administrative Court may decide not to hold an oral hearing (when there are no interested parties), the claimant does not always have the opportunity to know and comment documents submitted by the defendant authority to the Administrative Court after the institution of the proceedings.

The Administrative Court is as well not required to inform the parties when it intends to issue a decision based on an argument raised by its own motion, which is possible since, under the ADA, the Court shall examine the legality of the challenged act within the limits of the claim, but it is not bound by the reasons of the claim, and shall examine *ex officio* if the challenged act is null and void.[63] On the contrary, if the Court finds that the challenged act is null and void as well is in the case that it deems that the contested act has essential failures making it obviously unlawful, as already mentioned, the ADA provides that the claim is not to be sent to the defendant authority and the interested party for the response. In the second case, the Court may simply invite the defendant authority to make a previous statement,[64] but it is not required to grant this opportunity also to the interested parties, which have no right to comment or submit their defenses against the arguments raised by the Court *ex officio*.

The normative framework is even more concerning in relation to interim relief proceedings, which, according to the Recommendation of the Council of Europe on provisional protection in administrative matters (hereinafter the Recommendation), should comply, as a rule, with the principle of adversarial proceedings.

In comparison with the previous law, the ADA brought about a significant advancement in provisional protection by firstly providing the power of the Administrative Court to grant the postponement of the enforcement of the administrative act that decided on the merits of the administrative matter.[65] It is, however, not fully in line with the principles set forth in the Recommendation and in the standing case law of the EU Court of Justice. Contrary to those principles, indeed, the ADA, besides the possibility to suspend the enforcement of the contested act, does not grant to the Administrative Court the power to grant the provisional

[62] The possibility to access the case file, granted by the Court Rules of Procedure, is not sufficient to ensure the compliance with the right to adversarial trial, as it does not necessarily grants that the party has knowledge of all the submissions and documents relevant for the decision and adequate time to prepare its defenses.

[63] Art. 41. The provisions of the ADA referring to the cases where the act is null and void are not yet harmonized with the GAPA, but they should be interpreted in the light of the GAPA as cases for which the public authority is entitled, *ex officio* or upon request of a party, to annul a decision without limits of time that are provided in Art. 183, para. 1, no. 1 to 6. A different approach would indeed be formalistic and would not take into account the substance of this institute and the reasons supporting the reform.

[64] Art. 28, para. 1.

[65] See Dobrosav Milovanović, Paola Savona, "Privremene mere u upravnim sporovima u italijanskom i srpskom pravnom sistemu", *Pravni život*, No. 10, pp. 210-211.

regulation of the disputed matter.[66] Moreover, under the ADA, the suspension of the execution of the challenged act may be granted if its enforcement could cause a harm to the claimant that is difficult to recover and if the suspension is not against the public interest or it would not cause a greater or irreparable harm to the other parties, without the Court being required to evaluate if there is a *prima facie* case against the validity of the act, as provided by the Recommendation.[67]

The provisions of the ADA dedicated to provisional protection are inadequate also in relation to the right of the parties to be heard.

According to the Recommendation, save in case of urgency, the procedure for granting provisional protection shall be adversarial and shall allow access by interested persons.[68] When, in case of urgency, interested persons could not be heard before the court granted provisional protection, the matter shall be liable to a new examination within a short time, under a procedure conform to the adversarial principle.[69]

The ADA instead stipulates that the Court shall render a decision within five days from receiving the request for suspension,[70] granting no opportunity to the defendant authority and the interested parties to be heard. The ADA, indeed, does not require the Administrative Court to communicate the request for the suspension of the execution of the administrative act to the defendant authority and the interested parties (if present) and does not allow them to submit a response to the request. It does not requires as well the submission of the files of the case by the defendant authority, without which, for instance, it is often not even possible to determine whether the claim, to which the request for suspension relates, was lodged within the prescribed time limit. The protection of the public interest and of the interest of the other parties, which can be seriously affected by the granting of the suspension, is then to be ensured by the Court without knowing the files related to the administrative procedure and other facts relevant to the matter and without acquiring the defenses of the defendant authority and interested parties which are essential in order to evaluate to which extent their interests risk to be compromised by the suspension of the execution of the administrative act. Those parties are not even to be informed that a request for the suspension of the execution of the act has been filed and that an interim procedure is ongoing.

The right of the defendant authority and of the interested party to be heard is not ensured even after the suspension of the administrative act has been granted, a possibility allowed in the Recommendation, although limited to the cases

[66] A requirement expressed by the EU Court of Justice, e.g. in Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen AG and Hauptzollamt Itzehoe, 21 February 1991; case C-465/93, Atlanta Fruchthandelsgesellschaft GmbH and Others and Bundesamt für Ernährung und Forstwirtschaft, 9 November 1995); On this case-law see P. Craig, pp. 722-727.

[67] Principle II.

[68] Principle IV, para. 2.

[69] *Ibidem*, para. 3.

[70] Art. 23, para. 4.

of urgency. Once, indeed, the provisional protection is granted, the decision of the Court may not be modified, since not only the ADA does not grant against such decision, as against the judgments of the Administrative Court, the right to appeal, but it also does not provide, contrary to the Recommendation,[71] the power of the Court to review its decision granting the suspension of the administrative act during the course of the judicial proceedings. As a consequence, the suspension of the execution of the act lasts until the end of the judicial proceedings, which may occur a long time after the decision on interim relief has been issued. It may therefore happen that the suspension is granted and, after years, the Court rejects the claim as manifestly ungrounded or even dismisses it (because, for example, it has simply not been timely lodged) causing a serious harm to the parties, that would have been easily avoided if the right of the parties to submit observations before the decision granting the suspension was taken or soon after during a procedure of review had been granted.

## 6. Ways of Implementing the Principle of Adversarial Proceedings in Administrative Disputes

To align the Serbian system of administrative justice to ECtHR case-law on adversarial proceedings, the legislator has different options. In European legal systems, indeed, the principle of adversarial proceedings in administrative disputes is protected in several ways, whose main differences lay on the margin of discretion left to administrative courts in its implementation.

Some legal systems only entail general provisions in relation to the right to adversarial proceedings. This option is to be found, for example, in the Croatian ADA, which provides that, before rendering a judgment, the court shall provide all parties with an opportunity to declare themselves regarding the claims and allegations of other parties and all facts and legal issues which are the subject-matter of the administrative dispute,[72] and that the judgment may be based only on facts and evidence regarding which the parties were provided with an opportunity to declare themselves.[73]

In other systems, the discretion of administrative courts is reduced by way of complementing the statement of the principle with the indication of the main cases where the parties shall be informed and have an opportunity to express their views. In France, for example, the principle of adversarial proceedings is included among the general principles of the Code of Administrative Justice,[74]

[71] Principle III, para. 2.

[72] Art. 6, para. 1 (Principle of the Right to be heard). Exceptions to this principle are allowed only in the cases provided by the Law (Art. 6, para. 2).

[73] Article 55, paragraph 4.

[74] Code de Justice Administrative, Article L 5. On the right to adversarial proceedings in French system see: Mattias Guyomar, Bertrand Seiller, *Contentieux administratif*, Dalloz, Paris, 2019, pp. 385-397; Clémence Barray, Pierre-Xavier Boyer, *Droit du contentieux administrative*, Gualino, Paris, 2021, pp. 190-193.

which entails as well several rules implementing it. Accordingly, administrative courts shall communicate to the other parties the claim, the additional arguments announced in the claim, the (first) responses of the parties and the attached documents,[75] while further defenses and documents shall be communicated to the other parties only if they include new elements.[76] Any submissions and documents, which are relevant in the dispute, have therefore to be shared with the parties who shall be given the opportunity to submit their observations within a time limit set by the court.[77] Moreover, the Code requires the court to inform the parties where the decision might be taken on the base of an argument raised *ex officio* and to set a time limit to the parties within which they may submit their observations.[78] In Germany, the Code on Administrative Courts Proceedings provides that a decision may only be based on facts and results of evidence on which the parties concerned have been able to make a statement[79] and indicates in detail the cases where documents have to be communicated to the other parties as well as the procedural steps that the court may take only after having heard the parties. A margin of appreciation is left instead to the court in relation to the modalities and time limits in which the parties may express their point of view.

The discretion is, finally, reduced almost to null, in those systems, as the Portuguese and the Italian ones, where the law strictly marks the time of the proceedings directly setting the time limits for the submission of defenses, documents, responses and counter-responses, enabling the parties to know the defenses of other parties and providing, as a rule, adequate time to comment on them.[80] In both systems, it is further provided that parties shall be informed if the administrative court intends to solve the dispute based on a ground raised *ex officio* and granted the possibility to submit additional observations within a time limit provided by the law.[81]

In the legal systems analyzed, the right to adversarial proceedings applies as well in interim relief proceedings. Only in case of particular urgency, when an immediate decision is necessary for preventing the occurrence of an irreparable harm, administrative courts have the power to decide on the request for interim protection without having heard the other parties. The measures issued in such

[75] Art. R 611-1.

[76] Art. R 611-1, para. 2. According to the case law, communication is necessary whenever the court intends to use the submitted observations or documents for the decision. See M. Guyomar, B. Seiller, p. 391.

[77] M. Guyomar, B. Seiller, p. 387.

[78] Art. R 611-7.

[79] *Verwaltungsgerichtsordnung* –VwGO, Art. 108. On the right to adversarial proceedings in Germany see F. Hufen, pp. 546-547.

[80] On the principle of adversarial proceedings in Italian system see Fabio Merusi, "Il Codice del giusto processo amministrativo", *Diritto Processuale Amministrativo*, No. 1, p. 1 ff.; Margherita Ramajoli, "Giusto processo e giudizio amministrativo", *Diritto Processuale Amministrativo*, No. 3, p. 100 ff; Aldo Travi, *Lezioni di Giustizia amministrativa*, 11th edition, Giuffré, Torino, 2014, pp. 255-259. On the Portuguese system see M. Aroso De Almeida, pp. 378-382; J. C. Vieira de Andrade, pp. 296-300.

[81] Art. 73, para. 3 of the Italian Code of Administrative Courts Proceedings (*Codice del Processo Amministrativo)*; Art. 95, para. 4 of the Portuguese Code.

cases, however, are temporary as they are subject to review within a short time after having heard the parties concerned.[82]

In relation to the Serbian system, it seems necessary to introduce in the ADA a general provision, similar to the one entailed in Article 11 GAPA, stating that the decision of the Administrative Court shall be based only on facts and evidence regarding which the parties were provided with an opportunity to submit observations. In order to limit the discretion of the Court, this principle might be complemented with the requirement to communicate the responses of the defendant authority and the interested parties (at least in cases where they contain new arguments and evidence) as well as the submission of documents relevant for the decision to the other parties, eventually setting a time limit for submitting observations. Moreover, the provisions of the ADA allowing the Court to decide without sending the claim to the defendant authority and the interested party for the response where the act is deemed to be null and void or is affected by evident failures making its illegality obvious should be amended. A general rule might instead be provided, requiring the Court to inform the parties whenever it intends to solve the dispute based on an argument raised *ex officio* and granting to the parties the opportunity to submit their observations.

In order to grant the right to be heard, the provisions of the ADA related to provisional protection should be amended as well. Having in mind the serious implications that decisions on interim relief may have for public as for private interests, the time limit of five days assigned to the Administrative Court to decide should probably been reconsidered.[83] Such a short term, preventing the possibility of sending the request for suspension to the defendant authority and the interest party, is not necessarily justified by the features of interim proceedings since, although such proceedings shall be speedy, they do not have all the same degree of urgency. As it happens in other legal systems, the court might then be given either a longer time limit to decide[84] or no time limit,[85] in order to have the possibility to adapt the time of the decision to the particular circumstances of the case. Whenever such circumstances do not require an immediate decision of the Court, the defendant authority and the interested party should hence be given the opportunity to submit, within a short time, their responses, the files related to the procedure and other relevant documents before the Court decides on the request for protection. When instead, the decision is particularly urgent as the harm, which is to be prevented, is imminent and thus would occur if the Court does not decide within few days (or even few hours), the Court should be

[82] A similar approach is followed, for instance, in German, Italian and Portuguese systems.

[83] On this and other recommendations for improving the system of interim protection see: Milovanović, P. Savona, pp. 216-218.

[84] In Portugal, for example, the court shall issue a decision on interim relief within five days, which, however, different from Serbian legal system, runs from the moment when the court receives the submissions of other parties, not from the moment when the request for interim relief is lodged with the administrative court.

[85] No time limit for rendering a decision is set forth, for instance, in German or Italian law. In French legal system, a strict time limit of 48 hours is provided only in case of *referé liberté*, while in other interim proceedings, the decision shall be rendered "in the shortest time possible" (Art. L 511-1 of the Code).

allowed to decide without having heard the other parties. The implementation of the principle of adversarial proceedings should be in such cases postponed and the parties should be granted the opportunity to be heard in the course of a procedure of review of the interim measure to be held within a short time.

## 7. Conclusion

With the adoption of the GAPA in 2016, the regulation of administrative procedure in the Serbian legal system made significant progresses in safeguarding the rights and legal interests of individuals and legal entities affected by the action of public authorities. Such achievements should be consolidated through a sound and consistent implementation of the GAPA, which should be carefully monitored also in the view of assessing whether adjustments are eventually needed to ameliorate the legal framework.

The system of administrative justice, instead, needs a thorough revision. The reform of the ADA is indeed necessary in order to harmonize its provisions with the GAPA and to enhance the rights of the parties in administrative disputes, in line with European standards. The reform of administrative justice system is as well urgent, bearing in mind that the Administrative Court, due to the shortcomings of the ADA and to a low number of judges, is not in the place to respond in an effective and efficient manner to the demand of justice of the citizens, which is constantly increasing[86]. The prompt implementation of the changes in the organization of the administrative justice system envisaged in the Judicial Development Strategy for the period 2020-2025, including the creation of a two-instance administrative judiciary, the introduction of forms of specialization within it according to the type of disputes and the provision of an adequate number of judges, together with the changes in procedural rules, which are needed to harmonize the ADA with the GAPA and to align the system with Council of Europe standards on fair trial, seems therefore an essential step for ensuring an efficient and effective judicial review of administrative acts and silence of public authorities.

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[86] According to the official statistics published by the Supreme Court of Cassation in the annual reports on the work on all courts for the years 2021 and 2022 the number of cases received by the Administrative Court nearly doubled from 2021 (38.927) to 2022 (65.534).

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# CONSTITUTIONAL ASSUMPTIONS OF APPEAL IN ADMINISTRATIVE DISPUTE****

*Abstract*

*The Constitution of the Republic of Serbia guarantees "that everyone has the right to appeal or other legal remedy against a decision deciding on his or her right, obligation or interest based on law." The current decision prescribed by the Law on Administrative Disputes provides for single a instance administrative dispute, with the possibility of the party and the competent public prosecutor to submit to the Supreme Court a request for review of the court decision or request repetition of the proceedings. Thus, the Law on Administrative Disputes did not leave a dissatisfied party without legal protection because it offers a request for review of a court decision and a retrial, with a wide range of reasons, which replaces the appeal. Although there is no two-stage procedure in the formal sense, such a solution does not clash with the Constitution because there exists "other legal remedy" for the protection of rights. The potential introduction of an appeal would require revising the existing extraordinary legal remedies in an administrative dispute, precisely and carefully prescribing the grounds for appeal so that this regular remedy is not rendered extraordinary in practice and in order to provide procedural and material efficiency.*

**Keywords:** Administrative Dispute, Appeal, Extraordinary Legal Remedies, Supreme Court.

## 1. Introduction

Administrative dispute, as a modality of administrative control, is an indispensable element in further upgrading and preserving a modern, efficient and responsible administration, which corresponds to the concept of a socially oriented welfare state.[1] The emergence of an administrative dispute as a form of administrative control is related to the existence of essential deficiencies of various forms

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[1] Predrag Dimitrijević, *Upravno pravo – opšti deo*, Medivest KT, Niš, 2022, p. 40.

of administrative control, especially those based on the hierarchical structure of administrative authority and due to the illegal and inappropriate exercise of discretionary powers, as well as the need to effectively ensure the exercise and protection of citizens' rights in relation to the administration.[2] The Constitution of the Republic of Serbia provides for the right to conduct an administrative dispute – specifically, it provides for the right to decide on the legality of final individual acts, which decide on a right, obligation and interest based on law, by a court in an administrative dispute, unless the law provides otherwise for judicial protection in certain cases.[3]

The initiation of administrative judicial protection by filing a lawsuit is an effort to obtain from the judicial authority reliable, objective and impartial legal protection against an unlawful final administrative act.[4] The main function of judicial control of the administration is to ensure, through the control of legality, the protection of the rights of citizens in relation to the administration. The basic idea related to the introduction of this type of administrative control is to entrust control to a state body that is independent of the political and administrative authorities to discuss disputes arising from the exercise of administrative activities.[5]

The current solution, prescribed by the Law on Administrative Disputes, provides for a "single-instance" administrative dispute, with the option for a party and the competent public prosecutor to submit a request to the Supreme Court for a review of the court decision or request repetition of the procedure. The issue of introducing a complaint causes numerous conflicting opinions and controversies among experts and the general public.[6]

## 2. International Regulation and European Principles

The right to an effective remedy is also provided for in the relevant international instruments. Article 8 of the Universal Declaration of Human Rights and Freedoms[7] reads: "Everyone has the right to an effective remedy before the competent national courts..." The International Covenant on Civil and Political Rights stipulates that "States Parties to the present Covenant undertake to ensure that every person whose rights and freedoms recognized by this Covenant have been violated may exercise his right of appeal..."[8]

[2] Slavoljub Popović, *O upravnom sporu*, Naučna knjiga, Beograd, 1995, p. 2; Stevan Lilić, *Upravno pravo, Upravno procesno pravo*, Pravni fakultet Univerzitet u Beogradu: Javno preduzeće "Službeni glasnik", Beograd, 2008, p. 677.
[3] Constitution of the Republic of Serbia, *Official Gazette of RS*, No. 98/2006, 115/2021, Art. 198.
[4] Nevenka Bačanin, *Upravno pravo*, Pravni fakultet Univerziteta u Kragujevcu, Kragujevac, 2000, p. 565.
[5] Anika Kovačević, *Parlamentarna kontrola državne uprave u Republici Srbiji*, doktorska disertacija, Pravni fakultet Univerzitet u Kragujevacu, Kragujevac, 2022, p. 97.
[6] Art. 7, Law on Administrative Disputes, *Official Gazette of RS,* No. 111/2009.
[7] Universal Declaration of Human Rights, *https://www.un.org/en/about-us/universal-declaration-of-human-rights*, 20. 1. 2024.
[8] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23, 1976, in accordance with Art. 49, *https://www.ohchr.org/sites/default/files/ccpr.pdf,* 2. 2. 2024.

There are two standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[9] The right to a fair trial and the right to an effective remedy. In principle, legal norms and principles offer an explanation of values and fundamental standards, which state authorities can and must use to obtain guidance for their interpretation of a particular legal text and a specific legal norm or to fill legal gaps in written law.[10] In the European legal area, the general principles of EU law are one of the sources of EU law and are applied in the practice of the European Court of Human Rights and are binding for all EU institutions, as well as all Member States. Although Serbia is not a member of the European Union, the Constitution stipulates that our country is based on belonging to European principles and values, as well as that international treaties and generally accepted rules of international law are part of the legal order of the Republic of Serbia.[11]

The right to a fair trial is enshrined in Article 6 paragraph 1 of the Convention. More precisely, it is a catalogue of special rights, namely: the right to a fair hearing, a public hearing, a hearing before an independent, impartial and legally established court, to a trial within a reasonable time and to a public verdict. In addition to the above, the Court has in practice, by interpreting the Convention, established that Article 6 also contains the following implicit rights: the right of access to a court (right of action), the right to be present in the proceedings, to an adversarial procedure, the equality of resources of the parties, the right to take evidence, and the right to a reasoned judgment.[12] Art. 6, st. Article 1(1) of the Convention was not originally intended to be applied in administrative (public) law, but it resulted from the case law of the Court.[13] This article of the Convention applies in proceedings in which civil rights and obligations and criminal charges are decided. The Court subsequently took the position that "civil rights and obligations" can also be decided in administrative proceedings, and thus in administrative court proceedings.[14]

The right to an effective remedy is a *lex generalis* in relation to the right to a fair trial.[15] The European Convention on Human Rights stipulates that everyone whose rights and freedoms provided for in the Convention are violated has the right to an effective remedy before national authorities. The right to an effective remedy within the meaning of Article 13 shall also apply in situations where none of the rights guaranteed by the Convention have been violated. It is sufficient that the basis of action for infringement can be substantiated.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms Rome, November 4, 1950. *https://www.echr.coe.int/documents/d/echr/Convention_ENG,* 2. 2. 2024.

[10] Jelena Vučković, "Ustavna načela", *Usklađivanje pravnog sistema Srbije sa standardima Evropske unije* (ed. Snežana Soković), Vol. 10, Kragujevac, 2022, p. 163.

[11] Arts. 1, 294, Constitution of the Republic of Serbia.

[12] V. Cucić, "Strazburški standardi u upravnom sporu", *Anali Pravnog fakulteta u Beogradu*, Vol. 57, No. 2, 2009, pp. 249-250.

[13] Recommendation Rec (2004)20, Comments on principles, para. 27, *https://rm.coe.int/09000016805db3f4,* 22. 1. 2024.

[14] V. Cucić, p. 250.

[15] Darko Simović, Marko Stanković, Vladan Petrov, *Ljudska prava*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2018, p. 316.

Also, the term "authority" contained in Article 13 does not necessarily refer to the judicial power.[16] However, in order to decide whether a certain legal remedy is "effective," the powers and procedural guarantees that a given authority can provide,or ensure are important, given that the right to an effective legal remedy includes substantive and procedural legal elements. The substantive legal element includes substantive legal rules by the application of which the competent authority prevents further violation of rights, while the procedural element is a legal remedy that is available to a person who believes that a right has been violated and on the grounds of which they can turn to a state authority or a public authority with a request to stop further violation of rights and eliminate the consequences of the violation and violation thereof.[17] If the "power" given is not judicial, the European Court of Justice will consider its independence and the procedural safeguards it offers to the complainant. Similarly, even if one remedy does not fully satisfy the requirements of Article 13 on its own, a set of more than one remedy may achieve such a purpose.[18]

## 3. Comparative Legal Presentation of an Appeal in an Administrative Dispute

In comparative law, both theoretically and practically in terms of resolving administrative disputes, two main models are usually distinguished: Anglo-Saxon and European-continental.[19] The basic criterion for classification is the type of courts that control the administration. According to the Anglo-Saxon model, administrative disputes are under the jurisdiction of the classical, ordinary judiciary - courts of general jurisdiction. This is true in English and American law, but also in the Netherlands, Hungary, Romania, Slovakia and other countries.[20] For the Anglo-Saxon model, ideologically, the most important thing was a strong, unified common law, which is why no special administrative law was developed, and because the interpretation of the principle of separation of powers speaks in favor of the solution that ordinary courts are competent to resolve administrative disputes.[21] There are also a number of transitional and mixed systems, often combined with constitutional jurisdiction. Recently, there have been specialized administrative control bodies (administrative tribunals), which essentially have the role of special administrative courts competent to resolve administrative disputes. The second model is accepted by a significant number of countries on European-continental soil and implies that control of the admin-

[16] Ivana Krstić, Tanasije Marinković, *Evropsko pravo ljudskih prava*, Savet Evrope, Beograd, 2016, p. 253.
[17] D. Simović, M. Stanković, V. Petrov, p. 317.
[18] I. Krstić, T. Marinković, p. 253.
[19] P. Dimitrijević (2022a), p. 463.
[20] Zoran Tomić, "Upravni spor i upravno sudovanje u savremenoj Srbiji", *Zbornik radova Pravnog fakulteta u Splitu*, Vol. 47, No. 1, 2010, p. 23.
[21] Bosiljka Britvić Vetma, "Ustroj i nadležnost upravnih sudova", *Zbornik Pravnog fakulteta u Sveučilišta u Rijeci*, Vol. 33, No. 1, 2012, p. 390.

istration is carried out by specialized courts, i.e. administrative courts or special independent bodies.[22]

In a large number of European countries, there are specialized administrative courts, i.e. courts that are functionally separated from the network of courts of general jurisdiction. Among these countries, we can find a variety of models of two-level and three-level administrative judicial protection. For example, in Finland, regional administrative courts decide in the first instance, while the High Administrative Court of Finland decides in the second and last instance.[23] It hears appeals against the decisions of administrative courts. Although in most cases it is possible to appeal a decision of an administrative court, similar to Sweden, there are certain administrative cases in which the Supreme Court itself decides on the consideration of the appeal, e.g. in cases related to insurance law. It is interesting to emphasize that here the administrative courts can only repeal, annul or confirm an administrative act, but not make a new decision on the rights and obligations of individuals. Although there is a right to appeal against the decision of the administrative court to the Supreme Administrative Court, this appeal has only a cassation effect.[24] The situation is similar in Poland, where the administrative courts decide in the first instance and the High Administrative Court in the second instance.[25] In Belgium, a single Administrative Court has been established for the entire national territory, which decides in the first instance, and the function of the High Administrative Court is performed by the Council of State. In Italy, regional administrative tribunals decide in the first instance, and an appeal against the tribunal's decision can be referred to the Council for Administrative Disputes of the Region of Sicily.[26]

A three-tier system of administrative litigation exists in France, where the administrative courts decide in the first instance, the administrative courts of appeal decide in the second instance, and the Council of State at the top of the administrative court structure. In the French legal system, administrative disputes are legally regulated by the Administrative Dispute (Judiciary) Law,[27] while the organization of courts is regulated by the Law on the Regulation of Administrative and Appellate Courts.[28] Appellate jurisdiction is divided between the appellate

[22] Ivan Koprić, "Europski standardi i modernizacija upravnog sudovanja u Hrvatskoj*", Europeizacija upravnog sudovanja u Hrvatskoj* (ed. Ivan Koprić), Institut za javnu upravu, Zagreb, 2014, p. 2; Zoran Tomić, *Opšte upravno pravo,* Beograd, 2009, p. 343.

[23] Dario Đerđa, "Pravci reforme institucionalnog ustroja upravnog sudstva u Republici Hrvatskoj"*, Zbornik radova Pravnog fakulteta u Splitu*, Vol. 45, No. 1, 2008, p. 85.

[24] *Ibidem.*

[25] Art. 1-4, Law on the System of Administrative Courts, *Journal of Laws*, No. 153, 2002, *https://legislationline.org/sites/default/files/documents/6f/Poland_law_system_administrative_courts_2002_am2019_en.pdf*, 15. 1. 2024.

[26] Dario Đerđa, Ante Galić, "Žalba u upravnom sporu", *Zbornik radova Pravnog fakulteta u Splitu*, Vol. 51, No. 2, 2014, p. 343.

[27] Code de Justice Administrative (Administrative Justice Code), *https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070933/*, 15. 1. 2024.

[28] *Code des tribunaux administratifs et des cours régional de administratives d'appel* (Code of administrative tribunals and administrative courts of appeal), *https://www.legifrance.gouv.fr/loda/id/LEGISCTA000006167269,* 15. 1. 2024.

courts and the Council of State. The specificity of the appeal in French administrative court proceedings is reflected in the fact that the appeal, as a rule, does not delay the execution of the act challenged by it, unless the court of appeal, under the conditions provided for by law, grants the postponement of enforcement.[29] In addition to appeal, French law recognizes another devolutive remedy in administrative disputes - the cassation appeal. In a cassation dispute, the plaintiff can only be a person who was a party (or represented) in a dispute of last instance. It can be used to challenge decisions of: a) administrative courts of appeal; b) first-instance administrative courts and specialized administrative courts that have been issued in cases in which an appeal was not (or was) allowed.[30]

There is a three-tier administrative court in Germany. Each country has one or more administrative courts, the decisions of which can be appealed to the higher administrative court of each state. If federal law is enforced, the appeal is lodged with the Federal Administrative Court.[31] The right to appeal, although provided for by law, is not presumed, but the exercise of this right is conditioned upon prior authorization, which is issued at the request of a party by the court whose decision is challenged by the appeal or by a higher (appellate) court.[32] It is interesting to mention that in some cases, higher administrative courts appear as the first instance, and then the appeal is filed with the Federal Administrative Court, which can also be the first instance in some cases.

In some European countries, the jurisdiction of administrative courts is within the framework of the courts of general jurisdiction, and partly within the administrative court, as a court of special jurisdiction. Thus, for example. In Bulgaria, administrative disputes are heard in the first instance by a court of general jurisdiction and in the second instance by a special administrative court.[33] In Slovenia, the first instance is decided by the administrative court, as the court of special jurisdiction, while the second instance is decided by the Supreme Court, as the highest court of general jurisdiction. In 1997, a special Administrative Court of Slovenia was established, with its seat in Ljubljana, which has special departments in Maribor, Celje and Nova Gorica.[34] The possibility of appealing against the decision of this court is limited, and the appeal is lodged with the Supreme Court of the Republic of Slovenia with a special department for administrative disputes.

[29] Administrative Justice Code, R. 811- 14, 15, 16, 17.

[30] Administrative Justice Code, R. 821- 1, 821-2.

[31] *Verwaltungsgerichtsordnung, Bundesgesetzblatt,* 21. 1. 1960, in version published on 19.3.1991. (Federal Law Gazette I p. 686) last ed. 30.12.2022, Art. 40, 46, 47, 48, 50, *https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27bgbl160s0017.pdf%20%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl122057.pdf%27%5D__1707143726358,* 1. 2. 2024.

[32] Art. 124, Verwaltungsgerichtsordnung, Bundesgesetzblatt.

[33] Law of the Judicial System, *State Gazette*, no. 59/1994, following the amendments in SG No. 20/9.03.2012, Arts. 67, 58, *https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2012-August-27-29/Responses_NVs_2012/20120419_Bulgaria_English_8.pdf*, 2. 2. 2024.

[34] Administrative Dispute Act, *Official Gazette of the Republic of Slovenia*, No. 105/06, 107/09 – odl. US, 62/10, 98/11 – odl. US, 109/12, 10/17 – ZPP-E in 49/23, Art. 9.

In Croatia, the administrative dispute is, in principle, two-tiered. In accordance with the provisions of the Law on Administrative Dispute, an appeal may be lodged against the verdict and the decision[35] of the administrative courts of first instance. The following grounds for appeal are prescribed, based on which the first-instance verdict may be challenged: 1) substantial violation of the rules of procedure that exists if the administrative court did not apply or incorrectly applied the provisions of this Law in the course of the proceedings, and this affected the adoption of a lawful and proper verdict; 2) an erroneous or incomplete determination of the facts resulting from an erroneous determination or failure to establish a "decisive fact" by the administrative court or an erroneous conclusion was drawn about the facts, and 3) an error in the application of substantive law, which exists when the administrative court has not applied or has not correctly applied a provision of substantive law.[36] The law explicitly specifies that an appeal may not be lodged: against a verdict whereby an individual decision and case was returned for retrial for the first time, then against a verdict whereby the court ordered the adoption of an individual decision, which was not rendered within the prescribed time limit and against a part of the verdict referred to in Art. 89 para. 4 of this Act, i.e. if the settlement has been reached in part of the claim.[37] From the presented grounds of appeal, especially in the case of the reason relating to significant violations of the rules of procedure, the aspiration of the legislator to make the dispute more effective and to protect the rights and interests of the parties is evident. In addition to the exhaustively listed grounds for appeal, cases where an appeal cannot be filed (negative enumeration method) are expressly envisaged.

This is the result of the 2014 U.S. Constitution. According to the original legal solution from 2010, which originally introduced the appeal, an appeal was allowed only against reformation judgments, i.e. only in cases where the administrative court itself decided on the right, obligation or legal interest of the party, or significantly differently than it was resolved in the administrative procedure.[38] The changes to the Law on Administrative Disputes have had a significant impact on the quality and level of protection of the rights and interests of the parties. The standardization of the breadth and flexibility of the reasons for admissibility of lodging an appeal are directly correlated with the effectiveness of the appeal as a legal remedy, and in terms of the range of grounds for appeal, the Croatian Administrative Court Appeal makes Croatia one of the European countries with the most broadly standardized grounds.[39] However, such a widely "permeable filter" can, on the other hand, lead to an excessive burden on the competent courts, which would

[35] An appeal against a decision is allowed only in cases provided for by the Law, while an appeal against a decision of the High Administrative Court is not allowed, Art. 67.

[36] Art. 66, The Administrative Disputes Act, Republic of Croatia*, Official Gazette*, No. 20/10, 143/12, 152/14, 94/16, 29/17, 110/21.

[37] Arts. 66a, 89, The Administrative Disputes Act, Republic of Croatia.

[38] Inga Vezmar Barlek, "Drugostupanjski upravni spor", *Europeizacija upravnog sudovanja u Hrvatskoj* (ed. Ivan Koprić), Institut za javnu upravu, Zagreb, 2014, p. 181.

[39] Nevena Milenković, *Pravna sredstva u upravnom sporu*, doktorska disertacija, Pravni fakultet Univerzitet u Nišu, 2020, p. 237.

affect the quality of the review of first-instance judgments by the second-instance court and jeopardize the legal certainty of the parties. The possibility provided for in Article 78 can be added to this, namely a request for an extraordinary review of the legality of a final verdict, which would open the door to a three-stage administrative dispute. Such solutions are in favor of the effectiveness of legal remedies, but potentially at the expense of efficiency of the procedure.

In the appeal procedure, the administrative court has certain powers, by examining exclusively the procedural prerequisites, i.e. by determining the suitability of the appeal for substantive decision making, the analysis of the legal powers of the courts participating in the appeal procedure shows that the center of decision making is in the hands of the High Administrative Court.[40] Therefore, the divided jurisdiction exists in the assessment of its suitability for a substantive solution.[41] However, the High Administrative Court has exclusive jurisdiction in the substantive matter - the examination of the merits of the appeal, i.e. it examines the judgment in the part challenged by the appeal and within the limits of the stated grounds of appeal.[42]

A two-stage administrative dispute is also found in North Macedonia. According to the 2019 Act,[43] an appeal is allowed in principle, with the prescribing of cases, i.e. the types of judgments against which it is not allowed. These are disputes of limited jurisdiction: in the first, whereby this court annulled or declared null and void an individual act and returned the case for reconsideration to the public administration body, and in the second, in which it ordered the public body to make a decision that was absent within the prescribed time limit due to the "silence of the administration."[44] In either case, the court of first instance did not engage in a substantive resolution of the administrative matter. Article 70 prescribes the grounds for filing a complaint. These are: significant violations of the provisions of the procedure, erroneous or incomplete determination of the facts and incorrect application of substantive law, i.e. all forms of illegality that may occur in the first instance procedure. An appeal is also allowed against the decision, unless otherwise provided by law.

Similarly to Croatia, the jurisdiction with regard to the assessment of suitability for substantive decision making is divided between the first-instance - Administrative Court, and the second-instance - Higher Administrative Court, noting the even greater number of powers of the second-instance court with regard to the aforementioned examinations.[45] The court examines the verdict only in the part that is challenged by the appeal and within the limits of the grounds for appeal, with the fact that it pays attention to the grounds of nullity ex officio.[46] The

[40] Art. 71, The Administrative Disputes Act, Republic of Croatia.
[41] Art. 72, The Administrative Disputes Act, Republic of Croatia.
[42] Art. 73, The Administrative Disputes Act, Republic of Croatia.
[43] The Administrative Disputes Act, *Official Gazette of the RSM*, No. 96/2019.
[44] *Ibidem*, Art. 69.
[45] *Ibidem*, Art.78.
[46] *Ibidem*, Art. 79.

second-instance court will proceed in cassation – it will quash the first-instance verdict and return the case to the first-instance court for redecision, when there is a significant violation of the rules of procedure. It cannot be reversed at the hearing because it is a verdict that has not been overturned. In addition to the substantive and cassation powers, the second-instance court also has the power to modify the first-instance verdict. The Court of Appeal shall modify the verdict if it finds that the Administrative Court has correctly established the position of the Administrative Court, but has incorrectly applied the substantive law or has drawn an erroneous conclusion from the established facts about the existence of some facts that are decisive for the verdict or has incorrectly assessed documents or other evidence, and based the decision solely on that evidence.[47]

Therefore, in the administrative dispute of North Macedonia, the appeal is allowed in principle, with the above limitations and the grounds of appeal presented, which certainly affect the increase in the effectiveness of the appeal and the purpose of this legal remedy. On the other hand, the jurisdiction of the second-instance court has been broadly established, which can potentially reduce efficiency, and it is a challenge to find a balance and an appropriate proportion between the exercise of the rights and interests of the citizens, the protection of their legal certainty and the proper and lawful conduct of the Administrative Court and the Higher Administrative Court.

## 4. Administrative Dispute in the Republic of Serbia

Analyzing the issue and prerequisites for the introduction of an appeal as a regular legal remedy in an administrative dispute, we start from the provision of the Constitution, which prescribes the right to equal protection of rights and remedies as one of the human rights and freedoms, so that "everyone has the right to appeal or other legal remedy against a decision deciding on his right, obligation or interest based on the law."[48]

The Law on Administrative Disputes does not contain an appeal as a legal remedy in administrative disputes, which has existed with greater or lesser success in Serbia in all laws dedicated to administrative disputes since 1921.[49] The issue seems to be topical even today, given that the Constitution of the Republic of Serbia, in the part in which it regulates human and minority rights and freedoms, regulates the right to appeal as one of the basic human rights, whereby an individual exercises the right to equal legal protection and the right to a legal remedy in proceedings before public authorities, which decide on the rights and obligations and law-based interests of each individual, and the omission of an appeal from administrative disputes has been the subject of numerous polemics

[47] *Ibidem*, Art. 80.

[48] The Constitution of the Republic of Serbia, Art. 36.

[49] Predrag Dimitrijević, Jelena Vučković, "Upravno-sudska žalba u ustavno-pravnoj tradiciji na prostoru Srbije i *de lege ferenda*", *Srpska politička misao*, Vol. 72, No. 2, 2001, p. 264.

and constructive discussions since the adoption of the Law on Administrative Disputes in 2009.

The ability of an individual to protect his or her rights in the event of their violation by public authorities is a true indicator of the democratic capacities of a state. Also, permanent control of the management is necessary for the good functioning of the administration, the elimination of errors and the raising of responsibility.[50]

The law explicitly emphasizes that no appeal may be lodged against a verdict rendered in an administrative dispute.[51] Also, compared to earlier laws, the requirement for the protection of legality as an extraordinary legal remedy has been omitted. The essential reason for the absence of the two remedies mentioned above is that neither the appeal (as conceived) nor the request for the protection of legality have proved to be effective and available remedies.[52]

The law provided for an objection, as a new regular legal remedy, of a remonstrative character (it is decided by the Administrative Court, which issued the decision that is challenged by the objection) and of limited scope (only the decisions of a single judge on the dismissal of the lawsuit and suspension of the proceedings can be challenged).[53]

The presented EU standards are also relevant for the organization of administrative justice, which, according to them, should be two-tiered. However, the question may arise as to whether the two-stage administrative dispute involves only an appeal or perhaps some other legal remedy. It moves to the field of achieving efficient and effective administrative judicial protection in the event of a two-stage administrative dispute, which would mean a four-stage procedure for the party. Therefore, would a complaint be the only possible effective remedy and would an appeal provide effective judicial protection?[54]

The legislator did not leave the dissatisfied party without legal protection, since it provided for a request for a review of the court decision and repetition of the procedure.[55] There is no disagreement with the constitutional provision on the existence of a legal remedy as a necessary condition for the protection of the rights and interests of parties. When the Law on Administrative Disputes was adopted, the basic idea was to ensure the efficiency of administrative justice through an "extraordinary" review of a court decision, which achieves approximately the same legal protection as an appeal.[56]

[50] Anika Jakovljević, "Kontrola uprave od strane građana", *Zbornik radova doktorskih studija prava* (eds. Vojislav Đurđić, Miroslav Lazić), Pravni fakultet Univerziteta u Nišu, 2016, pp. 155-156.
[51] Art. 7, Law on Administrative Disputes.
[52] Marko Davinić, "Pravna sredstva u upravnom sporu", *150 godina upravnog spora u Srbiji 1869 – 2019* (ed. Vuk Cucić), Beograd, 2019, p. 265.
[53] Law on Administrative Disputes, Art. 26.
[54] Ružica Kijevčanin, "Delotvornost ustavne žalbe", *Usklađivanje pravnog sistema Srbije sa standardima Evropske unije* (ed. Snežana Soković), Vol. 8, Kragujevac, 2020, p. 199.
[55] Art. 49, Law on Administrative Disputes.
[56] P. Dimitrijević, J. Vučković, p. 265.

Appropriate strategic documents also need to be analyzed. According to the Judicial Development Strategy for the period 2019-2024,[57] special attention should be paid to improving the work of the Administrative Court. Statistical reports indicate that the Administrative Court is the busiest court in the Republic of Serbia, with the number of cases before this court constantly increasing due to the continuous expansion of jurisdiction. In order to more efficiently exercise the rights of citizens before administrative bodies, it is necessary to conduct analyses and take appropriate measures in the field of status, competences, organization and capacities of the administrative judiciary and the manner of regulating administrative disputes. The Judicial Development Strategy for the period 2020-2025[58] points out that the Administrative Court is the most burdened court and that the number of cases before this court is constantly increasing, and that in order to more efficiently exercise the rights of citizens before administrative bodies, it is necessary to conduct analyses and take appropriate measures. A functional analysis of the administrative judiciary of the Republic of Serbia offers two models of two-tier, i.e. multi-level judiciary.[59] According to the first model, the establishment of the Administrative Court of Appeal implies the establishment of four first-instance courts with territorial jurisdiction of the existing departments of the Administrative Court, which territorially coincides with the jurisdiction of the appellate courts in Belgrade, Niš, Kragujevac and Novi Sad, and the establishment of a second-instance administrative court of republic rank, while retaining the jurisdiction of the Supreme Court for extraordinary remedies. Bearing in mind that one of the reasons for the reform of the administrative judiciary is the potential introduction of appeals, specialization in administrative areas and strengthening the capacity of the administrative judiciary by selecting a potential/sufficient number of judges, this model meets the set requirements in the broadest way. The advantage of this model is reflected in the ability to profile and develop future administrative judges through work on administrative cases from the beginning of their careers, as well as the possibility of forming personnel within the administrative court from internship. As for the second-instance court of republic rank – by setting an adequate filter for appeal, i.e. adequate grounds for appeal, this court would focus on more important administrative cases with the role of providing guidelines for harmonization of case law, which would enable standardization in the interpretation of law, in order to improve legal certainty. Of course, given the breadth of the administrative area, it is necessary to carry outseparate specialization through this model.

The question is how to formulate the complaints. Administrative complaints differ in European countries. This principle of "open doors," in the sense that any first-instance judgment of an administrative court can be challenged by appeal, contributes to a more thorough review of the work of the administration.

[57] Ministarstvo pravde Republike Srbije, *Nacionalna strategija za razvoj pravosuđa (2019 - 2024)*, p. 26, *https://www.mpravde.gov.rs/sekcija/703/reforma.php,* 5. 2. 2024.

[58] Judicial Development Strategy for the period 2020-2025, *Official Gazette of RS*, No. 101/2020, 18/2022.

[59] GIZ, Ministry of Justice of the Republic of Serbia, Administrative Court, Judicial Academy, *Functional analysis of the Administrative Court of the Republic of Serbia*, Beograd, 2023.

However, in order not to slow down the administrative judiciary, the legislator introduces various models of "filters" when regulating the admissibility of appeals, which are "not good" for the parties because they deny them the right to a wide use of the appeal, but they are for the administrative judiciary because they contribute to its efficiency, which also contributes to the administrative courts.[60] In Sweden and Finland,[61] a special permit is required to appeal the first-instance judgment of an administrative court.

The second model involves the establishment of an administrative litigation division within the Supreme Court. It envisages the establishment of first-instance administrative courts, or one first-instance administrative court of republic rank with departments would remain, while the role of the second-instance administrative court would be taken over by a department in the Supreme Court. This model would allow for a two-stage approach – the introduction of an appeal as a regular legal remedy, but not specialization to the extent that the first model provides.[62]

The first model implies a greater reform requirement, but allows for a higher level of judicial protection, more comprehensive specialization, as well as the formation of specialized administrative judicial staff. The second model would be implemented more quickly, but would represent a return to the system of administrative justice protection that existed until 2009, and whose inefficiency led to the reform in 2010.

Bearing in mind the presented international and European documents and standards, as well as domestic planning and strategic acts, there is a tendency to introduce an appeal into the system of administrative judicial protection in Serbia. The introduction of a complaint can have both positive and negative aspects. As a regular legal remedy, the appeal is important for the implementation of European standards, control of the work of first-instance administrative courts in terms of legality and protection of the rights and legal interests of the parties. We emphasize that the existing legal solution, which does not allow appeal, is not in conflict with the constitutional provision that provides for the right to appeal, i.e. other legal remedy. The two-tier approach is ensured, we can say, by a request for a review of a final court decision, which can be submitted to the Supreme Court by a party and a public prosecutor.[63] A request may be made: (1) when provided for by law; 2) in cases where the court has ruled in full jurisdiction; 3) in cases where an appeal was excluded in the administrative procedure. A request may be filed due to a violation of the law, other regulation or a general act or a violation of the rules of procedure that could have had an impact on the resolution of the matter. Taking into account the presented comparative legal solutions of the grounds

[60] Predrag Dimitrijević, "Neka pitanja drugostepenosti upravnog sudovanja", *Pravna riječ*, Vol. XIX, No. 66, 2022, p. 101.
[61] D. Đerđa, A. Galić, p. 351.
[62] GIZ, Ministry of Justice of the Republic of Serbia, Administrative Court, Judicial Academy.
[63] Art. 49, Law on Administrative Disputes.

for appeal, this extraordinary remedy covers almost all grounds for appeal. It should be recalled that one of the main arguments for "single-instance" administrative justice, i.e. the exclusion of administrative court appeals, was precisely the efficiency of administrative justice, because the appeal procedure would further prolong the administrative dispute, which already lasts too long and would create a four-instance system in decision-making in administrative matters.[64] Given the existence of extraordinary legal remedies, the procedure could also get a fifth instance. One should bear in mind that the Supreme Court is not a specialized court for cases on administrative matters, and that the lack of a second instance in an administrative dispute may lead to delays and inefficiency in resolving administrative matters.

Finally, there is the possibility of filing a constitutional complaint, as a powerful mechanism for the immediate protection of human and minority rights.[65] A constitutional complaint is filed in accordance with the prescribed conditions, with the fact that the Constitutional Court does not decide on the subject of the court dispute, assessing the facts and the application of legal norms - it examines the court decision from the constitutional aspect, assessing whether it threatens or denies constitutional human or minority rights and freedoms. It leaves this to a higher judicial instance, i.e. the highest, Supreme Court.[66]

## 5. Conclusion

The potential introduction of an appeal by the Serbian administrative judicial system of protection is a legally delicate and important issue, which imposes the need to establish a balance between the subjective protection of the rights and interests of parties and the effectiveness of administrative court proceedings and the efficiency of administrative judicial protection. In accordance with the existing legal solution, an entire level of protection of the rights of legal entities has been eliminated and the degree of probability of sanctioning illegality in an administrative dispute has been reduced. However, it must be borne in mind that the administrative dispute comes after the administrative procedure and there are reasons for its "single tier" in order to effectively protect the party before the court. At the same time, it should not be forgotten that the protection of the rights of parties loses its meaning if the dispute lasts for a long time. In order to file a complaint, there are constitutional prerequisites, given that the Constitution

[64] P. Dimitrijević (2022б), p. 105.

[65] Jelena Vučković, "An appeal to the Constitutional Court and a constitutional appeal", *Facta Universitatis Series: Law and Politics*, Vol. 8, No. 1, 2010, p. 84.

[66] Ružica Kijevčanin, *Ustavno sudstvo*, master rad, Pravni fakultet Univerzitet u Kragujevcu, 2018, p. 47; A constitutional complaint may be lodged against individual acts or actions of state bodies or organizations vested with public authority, which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have been exhausted or have not been provided. Art. 170 of the Constitution of the Republic of Serbia.

provides "... the existence of a right to appeal or other legal remedy," but when prescribing the admissibility of an appeal, the legislator's precision would be necessary. Also, it is necessary to look at the legal normative, organizational, personnel and financial interventions and changes that would be inevitable, regardless of which model of organization of administrative and judicial proceedings we would choose. Finally, when introducing an appeal, it is necessary to look at the sociopolitical context, continuity, as well as traditional solutions of administrative and judicial protection in our law.

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# USTAVNE PRETPOSTAVKE ŽALBE U UPRAVNOM SPORU

*Sažetak*

Ustavom Republike Srbije zajamčeno je "da svako ima pravo na žalbu ili drugo pravno sredstvo protiv odluke kojom se odlučuje o njegovom pravu, obavezi ili na zakonom zasnovanom interesu". Sadašnje rešenje propisano Zakonom o upravnim sporovima, predviđa jednostepenost upravnog spora, sa mogućnošću stranke i nadležnog javnog tužioca da podnesu Vrhovnom sudu zahtev za preispitivanje sudske odluke ili traže ponavljanje postupka. Dakle, Zakon o upravnim sporovima nije ostavio nezadovoljnu stranku bez pravne zaštite jer nudi zahtev za preispitivanje sudske odluke i ponavljanje postupka, sa širokim opusom razloga, koji zamenjuje žalbu. Iako ne postoji dvostepenost u formalnom smislu, ovakvo rešenje nije u koliziji sa Ustavom jer postoji "drugo pravno sredstvo" za zaštitu prava. Eventualno uvođenje žalbe zahtevalo bi revidiranje postojećih vanrednih pravnih sredstava u upravnom sporu, precizno i pažljivo propisivanje žalbenh razloga kako se ovo redovno pravno sredstvo ne bi učinilo vanrednim u praksi i kako bi se pružila procesna i materijalna efikasnost.

**Ključne reči:** Ustav, upravni spor, žalba, vanredna pravna sredstva, Vrhovni sud.

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# DECISION MAKING WITHIN A REASONABLE TIME IN ADMINISTRATIVE PROCEDURE AND DISPUTE – THE CASE OF SERBIA****

*Abstract*

*The objective of this paper is to analyze the concept of a reasonable time in administrative procedure and dispute and assess how this principle is applied in practice in Serbia. The concept of decision making within a reasonable time is analyzed from the point of view of the European Court of Human Rights and the provisions of the EU Charter of Fundamental Rights and the European Code of Good Administrative Behavior. Based on the available statistical data obtained from the Serbian Administrative Court, the authors conclude that the principle of decision making within a reasonable time is largely observed in the work of the Administrative Court, but not before the Serbian administrative authorities. In order to improve the current trends, the authors, inter alia, recommend that competent authorities introduce a comprehensive methodology for monitoring the implementation of the Law on General Administrative Procedure, which would provide grounds for proposing evidence-based recommendations for an efficient and effective administrative decision-making process.*

**Keywords:** Decision Making Within a Reasonable Time, Administrative Procedure, Administrative Dispute, Serbia.

## 1. Introduction

Decision making within a reasonable time in administrative procedure is a relatively new concept in administrative theory and practice. Until recently, administrative law scholars successfully investigated the observance of time limits for adopting administrative decisions by analyzing the adverse consequences of

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administrative silence.[1] It was only once the European Court of Human Rights (hereinafter: ECtHR) started to develop its jurisprudence on the right to a trial within a reasonable time *vis-a-vis* administrative disputes (judicial review of administrative decisions), linking them to preceding administrative proceedings, that this concept gained more attention. The concept of administrative decision making within a reasonable time was further pushed with the adoption of the European Union Charter of Fundamental Rights (hereinafter: Charter), which proclaims that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by bodies and agencies of the European Union (hereinafter: EU).[2]

Following these developments, the said concept started attracting more genuine academic attention. One of the key arguments found in academic literature is that it is important to ensure that all procedures conducted by government powers, whether judicial or executive, are conducted within a reasonable time, as this is one of the fundamental principles of good administration and good governance.[3] Furthermore, some authors who investigate the right to an administrative decision to be passed within a reasonable time see this right as a corollary of the right to a trial within a reasonable time guaranteed by Article 6 of the European Convention on Human Rights (hereinafter: ECHR).[4]

Over the past few years, the right to decision making in administrative procedure within a reasonable time has started attracting the attention of Serbian academics, primarily through the analysis of the provisions of the existing domestic legal framework (e.g. Law on General Administrative Procedure; Law on Administrative Dispute; Law on Protection of the Right to Trial within a Reasonable Time, etc).[5] What is, however, missing, is an analysis of whether administrative authorities, both at the central and local Government level, respect this right in practice.

The objective of this paper is to contribute to the ongoing academic discussion on the principle of decision making within a reasonable time in administrative procedure and to assess how this principle is applied in Serbian legislation and practice. After the theoretical section on the concept of the right to an

[1] Predrag Dimitrijević, *Odgovornost uprave za nečinjenje: sa posebnim osvrtom na "ćutanje" uprave*, Pravni fakultet, Istočno Sarajevo, 2005; Dušanka Marjanović, "Procesni uslovi za podnošenje tužbe zbog ćutanja uprave", *Izbor sudske prakse*, No. 10, 2018, pp. 13-21.

[2] Article 41 paragraph 1 of the Charter. See more Aleksandra Rabrenović, Tijana Malezić Rapajić, "Reforma javne uprave u Srbiji u kontekstu evropskih integracija", *65 godina od Rimskih ugovora: Evropska unija i perspektive evropskih integracija Srbije* (eds. Jelena Ćeranić Perišić, Vladimir Đurić, Aleksandra Višekruna), Institut za uporedno pravo, 2022, pp. 127-130.

[3] Tina Sever, "Procedural safeguards under the European convention on human rights in public (administrative) law matters", *DANUBE: Law, Economics and Social Issues Review*, Vol. 9, No. 2, 2018, p. 98.

[4] Koenraad Lenaerts, Jan Vanhamme, "Procedural Rights of Private Parties in the Community Administrative Process", *Common Market Law Review*, 1997, p. 567.

[5] Nataša Mrvić Petrović, Zdravko Petrović, "Pravo na naknadu štete zbog nerazumnog trajanja upravnog postupka", *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, 2022, pp. 143-214: Stefan Andonović, "Pravo na odlučivanje u razumom roku u upravnom postupku u Republici Srbiji", *Sveske za javno pravo*, Vol. 10, No. 35-36, 2019, pp. 73-81.

administrative procedure within a reasonable time, the authors shall examine the statistical data on the caseload of the Serbian Administrative Court and analyze whether special administrative procedures, such as issuance of construction and exploitation permits, are of reasonable length and in accordance with the stipulated statutory deadlines.

## 2. Concept of Decision Making Within a Reasonable Time in Administrative Proceedings Based on the Case Law of the European Court of Human Rights

The concept of decision making within a reasonable time in the field of administrative proceedings and disputes has been present in the ECtHR case law for more than four decades and is recognized by various CoE acts and documents.[6] The ECtHR exercises the power to review the procedures and the decisions of the executive branch, along with those of the judicial branch. In doing so, it requires the conduct of administrative procedures within a reasonable time.[7] This stance of the ECtHR has been outlined in a number of cases of the ECtHR.[8] Taking into account that the ECHR is a living instrument, the ECtHR applies a dynamic interpretation of the term "a reasonable time in administrative proceedings" and understands it as an autonomous concept, not dependent on national legal systems.[9]

Two main lines of reasoning have been developed in academic literature regarding the legal basis of the application of the reasonable time principle in administrative procedure before the ECtHR. The first group of authors argues that decision making within a reasonable time in the field of administrative law process constitutes an institute which is derived from the right to a fair trial and the right to an effective remedy, as guaranteed by Articles 6 and 13 of the ECHR.[10] The second group of authors claims that such an institute originates from a much broader set of the ECHR's provisions.[11] Supporters of the second line of thought argue that a wider set of the ECHR's provisions have to be taken into account when evaluating whether the requirement to conduct administrative procedures

[6] See Benthem v. the Netherlands, App. No. 8848/80, Judgment of October 23, 1985, para. 36. As referred to in: Maria Filatova, *Reasonable Time of Proceedings: Compilation of Case-law of the European Court of Human Rights*, Council of Europe, 2021, p. 12.

[7] T. Sever, p. 100.

[8] Regner v. Czech Republik [GC], App. No. 35289/11, Judgment of November 26, 2015, para. 99-105; Stokalo and Others v. Croatia, App. No. 15233/05, Judgment of October 16, 2008.

[9] See more on autonomous concepts in Vesna Ćorić, Ana Knežević Bojović, "Autonomous Concepts and Status Quo Method: Quest for Coherent Protection of Human Rights before European Supranational Courts", *Strani pravni zivot*, Vol. 64, No. 4, 2020, pp. 27-40.

[10] Špela Zagorc, "Decision-Making within a Reasonable Time in Administrative Procedures", *HKJU – CCPA*, Vol. 15, No. 4, 2015, pp. 774-777; Ivana Roagna, *The right to trial within a reasonable time under Article 6 ECHR: A practical handbook*, Council of Europe, 2018.

[11] *The Administration and You: A Handbook, Principles of administrative law concerning relations between individuals and public authorities*, Council of Europe, 2018, pp. 34-35.

within a reasonable time has been met, including Articles 2 and 8 of the ECHR and Article 1 of Protocol No. 1 to the ECHR.[12]

Furthermore, it is important to stress that the ECtHR perceives the principle of reasonable time length in both administrative and judicial review procedure.[13] The ECtHR takes the position that the rules from paragraph 1 of Article 6 of the ECHR on a fair trial are also applied to proceedings before administrative bodies, given that the decision whether the proceedings lasted a reasonable time can only be made when the total duration of the dispute is assessed, which, possibly, arises already during the administrative procedure, and does not refer only to the administrative dispute.[14] Such ECtHR approach should encourage states to pay more attention to eliminating all possible delays at each stage of administrative procedure or judicial review/administrative dispute.

Finally, the ECtHR has explicitly pointed out that, when evaluating whether the principle of decision making within a reasonable time is respected, one needs to take into account not only the effectiveness of administrative authorities in the decision-making process, but also the parties' activity in that procedure. If a party wants this right to be recognized, he/she is obliged to show diligence in respecting and executing the procedural requirements that are relevant, to refrain from any tactical delays, as well as to use the opportunities provided by domestic law to shorten the procedure.[15]

## 3. Decision Making Within a Reasonable Time in Administrative Proceedings in the European Union

The right to good administration, which includes the right to a reasonable time for the adoption of an administrative decision, has been expressly regulated by Article 41 of the Charter. Notions such as good, sound, and proper administration have been present in the jurisprudence of the EU courts since the 1950s,[16] even before being incorporated in the Charter as one of the fundamental rights.[17]

[12] See for instance, Beyeler v. Italy [GC], App. No. 33202/96, Judgment of January 5, 2000; Dubetska and Others v. Ukraine, App. No. 30499/03, Judgment of February 10, 2011; Moskal v. Poland, App. No. 10373/05, Judgment of September 15, 2009; as referred to in: *The Administration and You: A Handbook, Principles of administrative law concerning relations between individuals and public authorities*, pp. 34-35.

[13] Ana Knežević Bojović, Vesna Ćorić, *Analiza efekata zakona o zaštiti prava na suđenje u razumnom roku*, Council of Europe, Belgrade, 2022, p. 8.

[14] N. M. Petrović, Z. Petrović, p. 145.

[15] Paragraph 35 of the Judgment of the European Court of Human Rights of July 7, 1989, in the case of Union Alimentaria Sanders S. A. v. Spain, App. No. 11681/85.

[16] The Joined Cases 1-57 and 14-57 Société des usines à tubes de la Sarre contre Haute Autorité de la Communauté européenne du charbon et de l'acier, ECLI:EU:C:1957:13; For other cases see: Herwig CD Hofmann, Cristian Mihaescu, "The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case", *European Constitutional Law Review*, Vol. 9, No. 1, 2013, p. 83.

[17] Zorica Vukašinović Radojičić, Aleksandra Rabrenović, "Theoretical Understandings of the Concept of a 'Public Servant': Towards a Common Definition", NBP, Journal of Criminalistics and Law, Vol. 25, No. 1, 2020, p. 54.

Some authors point out that this move was also prompted by an overarching need to reform and improve administration at the EU level.[18] The wording of the entire Article 41 of the Charter shows that good administration as a fundamental right is in fact prescribed in a relatively narrow sense, as a subjective right which can be invoked in single-case administrative decision making.[19]

When it comes specifically to the concept of reasonable time, or "reasonable period" in administrative decision making, there has been some doubt as to whether it is a general principle *per se* or a component of the principle of good administration. In that context, it is worth examining the Opinion of Advocate General (AG) Wathelet in the Marchiani v. Parliament case.[20] In his opinion, AG stated that the reasonable period principle is undoubtedly "linked intrinsically to the principle of legal certainty and the right to good administration" but is also a general principle of EU law.[21] In continuation, AG asserted that a breach of the principle of reasonable period constitutes an infringement of an essential procedural requirement or, at the very least, an infringement of the Treaties.

The CJEU has not set a generally applicable reasonable period for decision making in administrative proceedings, as there is a multitude of administrative proceedings and a number of time limits for the adoption of administrative decisions prescribed in various pieces of EU legislation. However, the European Code of Good Administrative Behavior, a set of guidelines designed to facilitate a "citizen-focused European administrative culture"[22] does spell out a definite timeline. More specifically, Article 17 of this Code prescribes that EU officials are to ensure that the administrative decision on every complaint or request is passed within a reasonable time, without delay, and in any case no later than two months from the date such complaint or request were received. The Code allows for a departure from the two-month period in case of the complexity of the matter raised. If that is the case, an official must inform the person who made the request or complaint of the delay, and is still obliged to decide within the shortest possible time.

The implications of the concept of good administration in EU law for accession countries should not be underestimated. The increasingly demanding accession process includes regular assessments of the state of affairs with regard to, *inter alia*, the functioning of public administration,[23] including decision making within a reasonable period of time in administrative proceedings.[24]

[18] Klara Kanska, "Towards Administrative Human Rights in the EU - Impact of the Charter of Fundamental Rights", *European Law Journal*, Vol. 10, No. 3, 2004, p. 298.
[19] HCH. Hofmann, C. Mihaescu, p. 87.
[20] Jean-Charles Marchiani v. European Parliament, Case C-566/14 P, Opinion of Advocate General Wathelet delivered on January 19, 2016.
[21] *Ibidem*, para. 31.
[22] Emily O' Reilly, *Foreword to the European Code of Good Administrative Behaviour*, available at: *https://www.ombudsman.europa.eu/pdf/en/3510*, 23. 8. 2024.
[23] Zorica Vukašinović Radojičić, Aleksandra Rabrenović, "Alignment of the Serbian Civil Service Legislation with the EU accession requirements", *EU and Comparative Law Issues and Challenges Series (ECLIC),* 2018, 2, p. 185.
[24] SIGMA/OECD, *Principles of Public Administration*, OECD Publishing, 2023, p. 32.

## 4. The Principle of Reasonable Time in Administrative Proceedings and Administrative Dispute in Serbia – a Gap Between the Legal Framework and Reality?

The principle of "a reasonable time" in Serbia is guaranteed by the Law on General Administrative Procedure primarily through the principle of economy and effectiveness of the administrative procedure.[25] This right is further elaborated through Article 145 of the Law, which prescribes that an administrative authority is bound to issue a decision within 30 days of initiation of the procedure, in case when it decides "directly" (without a hearing).[26] In case when an authority has to hold a hearing, i.e. does not decide directly, a deadline for deciding upon a party's request is 60 days.[27] This is in line with the European Code of Good Administrative Behavior which, as pointed out earlier, determines that administrative decisions upon every complaint or request should be passed within a reasonable time, without delay, and in any case no later than two months from the date such complaint or request were received.

If a first instance authority, however, does not decide within the reasonable time/deadline set out by the law, a party has the right to initiate an appeals procedure[28] before a second instance authority, as if his/her request has been rejected. An appeals procedure before the second instance authority can be initiated after a statutory deadline has expired and, at the latest, within one year after the expiration of the deadline.[29]

Another reason for the extensive length of administrative proceedings may be triggered by a situation where a second instance authority does not substantively decide upon a party's request, but returns it to a first instance authority to make a new decision. Although the Law on General Administrative Procedure prescribes this to be an exception rather than a rule,[30] the statistical data on administrative practices of Serbian ministries show that such a "ping-pong exercise" between the first and second instance authorities has been extensively used in practice.[31]

In case when a second instance authority (or the first instance authority, in case no appeal is permitted in the first instance procedure) does not respond

[25] Art. 9 of the Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, No. 18/2016, 95/2018 – authentic interpretation and 2/2023 – Decision of the Constitutional Court.

[26] Art. 145, para. 2 of the Law on General Administrative Procedure.

[27] Art. 145, para. 3 of the Law on General Administrative Procedure.

[28] Art. 151, para. 3 of the Law on General Administrative Procedure.

[29] This one-year deadline was introduced by Art. 153, para. 2 of the Law on General Administrative Procedure in 2016, aiming to ensure legal certainty and prevent the situation where a party initiates an appeals procedure after an extensive period of time. See: Vuk Cucić, "Fino podešavanje Zakon o opštem upravnom postupku", *Anali Pravnog fakulteta u Beogradu*, Vol. 66, No. 2, 2018, p. 151.

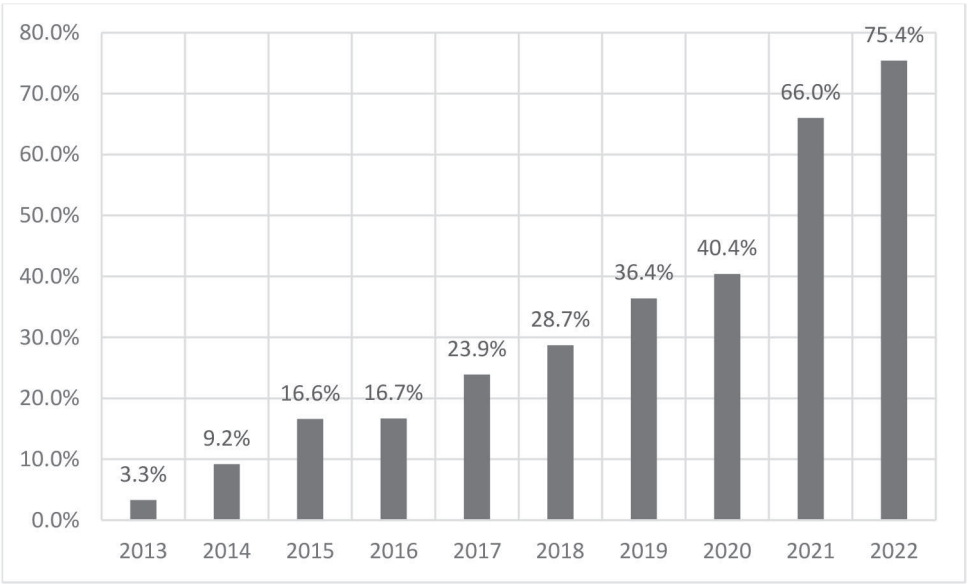
[30] Art. 171 and 172 of the Law on General Administrative Procedure.

[31] In the course of preparation of the draft Law on General Administrative Procedure (adopted in 2016), the competent ministry gathered the data from five Serbian ministries deciding in second instance administrative proceedings, which showed that in only 15.5% of cases second instance authorities decided upon a case substantively, while in 84.5% of cases the case was returned to the first instance authority. See: V. Cucić, p. 154.

to a party's request, there is a situation of so-called "silence of administration,"[32] which represents a breach of the principle of a reasonable time for proceedings. As it is very difficult to collect data on the duration of general administrative proceedings in practice, as no such comprehensive official statistics are available, we have examined the available statistics of the Administrative Court of Serbia to determine the number of cases which have been initiated due to the unreasonable length of procedure, i.e. "silence of administration" in Serbia.

The data obtained from the Administrative Court show a worrying trend of a significant increase in the number of cases related to "silence of administration" over the past 10 years. While in 2013 the percentage of "administration silence" cases in the overall number of cases of the Administrative Court was only 3.3 percent, in 2022, this percentage was 75.4 percent, which is an alarming trend. This means that in 2022 three quarters of all cases before the Administrative Court were those initiated on the basis of a breach of the reasonable time principle.

**Graph 1.** Share of "silence of administration" cases - disrespect for the reasonable time principle, in the overall number of cases of the Administrative Court of Serbia, 2013-2022




**Source:** Data of the Administrative Court of Serbia, obtained by the request for free access to information of public importance

Another open dataset on issuance of construction and exploitation permits, as special administrative procedures, provides additional valuable insights. In 2022, the average length by which all administrative authorities resolved submitted requests

[32] Art. 19 of the Law on Administrative Disputes, *Official Gazette of the Republic of Serbia*, No. 111/2009.

for the issuance of a building permit was 10 days, i.e., five days more than the legally prescribed deadline.[33] More than half of requests in cities are resolved within two to 18 days, while at the municipal level more than 90% of requests are resolved within 30 days.[34] These data show that reasonable time set by the statutory deadlines of special administrative procedures largely was not met. Still, in the vast majority of cases, the authorities were able to solve cases within 30 days, which corresponds to a reasonable time for decision making which is set out in the Law on Administrative Procedure.

Initiation of an administrative dispute before the Administrative Court can further prolong the length of decision making in administrative matters. For this reason, it is useful to pay additional attention to how the right to a trial within a reasonable time is observed before the Administrative Court.[35] The right to a trial within a reasonable time is enshrined in the Serbian Constitution and regulated in more detail by the Law on Protection of the Right to Trial within a Reasonable Time adopted in 2015.[36] Article 4 of the Law on Protection of the Right to Trial within a Reasonable Time takes into account the stance of the ECtHR which stipulates that when deciding on the legal means that protect the right to a trial within a reasonable time, all the circumstances of the subject of the trial are taken into account, as well as the entire duration of the entire previous proceedings.

The data on the number of cases initiated with respect to unreasonable length of administrative dispute before the Administrative Court for the period 2016-2022 show that the overall share of cases initiated under this title is rather low, ranging from 1% in 2016 when the right to a trial within a reasonable time was introduced, to 1.7% in 2019, with a downward trend of only 0.8% in 2022. A more detailed outline is presented in graph 2 below. These data demonstrate that the Administrative Court itself does not have a substantive number of cases related to the breach of the reasonable time principle, in spite of the fact that the judges of the Administrative Court are overburdened with a number of cases they deal with on a daily basis.[37]

[33] NALED, Annual Report of NALED's Association for Property and Investments on Issuing Construction Permits in Serbia in 2022, p. 2, available at: *https://naled.rs/htdocs/Files/12117/Godisnji-izvestaj-o-izdavanju-dozvola-u-vezi-sa-gradnjom-za-2022-godinu.pdf,* 1. 3. 2023.

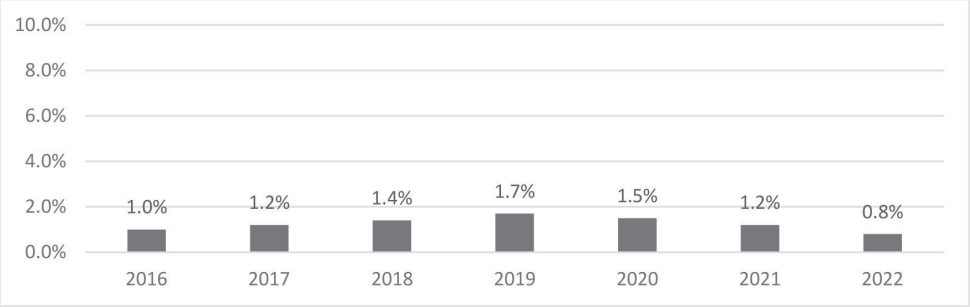
[34] *Ibidem*.

[35] Monika Milošević, Ana Knežević Bojović, "Trial within Reasonable Time in EU Acquis and Serbian Law", *EU and comparative law issues and challenges series (ECLIC), Procedural Aspects of EU Law* (eds. Dunja Duić, Tunjica Petrašević), No. 1, Osijek, 2017, pp. 447-470.

[36] Law on Protection of the Right to a Trial within a Reasonable Time, *Official Gazette of the Republic of Serbia*, Nos. 40/2015 and 92/2023. See: Vesna Ćorić, Ana Knežević Bojović, "Amendments to the Law on the Protection of the Right to Trial within a Reasonable Time – The Role of the Constitutional Court", *Sećanje na dr Jovana Ćirića – Putevi prava* (eds. Jelena Ćeranić Perišić, Vladimir Čolović), Beograd, 2023, pp. 63-83.

[37] On June 30, 2022, the average caseload of judges of the Administrative Court was 1,581.53 cases. See: *Report of the Administrative Court for the period from January 1 to June 30, 2022*, Administrative Court of the Republic of Serbia, 2023; Mihajlo Rabrenović, "Upravno pravo na prekretnici i pravna priroda upravnih aktivnosti: Osvrt na neke osobenosti nadzora nad delatnoscu osiguranja u Srbiji", *Evropska revija za pravo osiguranja*, No. 2, 2022.

**Graph 2.** Share of cases initiated for the procedure for the protection of the right within a reasonable time before the Administrative Court 2016-2022




**Source:** Administrative Court of Serbia 2016-2022

The key problem, however, seems to lie "somewhere in between" the Administrative Court and administrative authorities. During the administrative dispute procedure, the Administrative Court fairly rarely uses its powers to make a substantive decision upon an administrative matter,[38] due to a high workload and lack of capacity of its staff to handle such a significant caseload. Instead, it most often uses its cassation powers - it cancels the individual decision and, if necessary, returns the case to an administrative authority for a new decision-making process,[39] which poses additional risks for excessive duration of the procedure and breach of the principle of decision making within a reasonable time.

## 5. Conclusion

The right to decision making within a reasonable time in administrative procedure has started to attract considerable attention in recent years, both in the case law of the ECtHR and CJEU and in academic discussion. In Serbia, as in many other European countries, the right to a reasonable time in the decision-making process in administrative proceedings is stipulated primarily as a statutory deadline set out by the Law on General Administrative Procedure and legislation regulating special administrative procedures. The problem, however, as we could see from the available statistics of the Administrative Court, is that in many cases this right is not observed in practice.

The questions which naturally arise are what are the reasons for such a high increase in the cases in which administrative authorities obviously did not respect the principle of decision making within a reasonable time? Are the deadlines for decision making set out in the Law on Administrative Procedure appropriate, or should they be extended in order to take into account the current reality? Or does

[38] *Ibidem*, p. 151; Vuk Cucić, *Upravni spor pune jurisdikcije - modeli i vrste*, Pravni fakultet Univerziteta u Beogradu, 2016.

[39] N. Mrvić Petrović, Z. Petrović, p. 151.

the problem perhaps lie with the relatively short deadlines set out in so-called special administrative procedures established by special legislation? Is there a problem with the administrative capacity of administrative authorities who are deciding in administrative matters?

The findings of this research show that the deadlines for decision making in administrative procedure established by the Law on General Administrative Procedure (30 or 60 days) do not appear to be short or excessive. Most authorities deciding in administrative matters in the special procedures analyzed (construction or exploitation permits) are able to make their decisions within these general deadlines. Therefore, we do not see a need for amending the Law on General Administrative Procedure in this respect. However, in order to understand the depth of the identified problems further, we would need to have additional quantitative and qualitative data on general implementation of the Law on General Administrative Procedure in all authorities deciding upon the Law on General Administrative Procedure. Therefore, the development and implementation of this methodology seem to be a must for future progress in this field.

The second conclusion is that statutory deadlines stipulated by the special administrative procedures analyzed (for construction and exploitation permits) appear to be rather short (up to five days), as the majority of local administrative authorities are not able to observe them. There also appears to be a lack of adequate supervision over the implementation process of issuing these permits and a lack of adequate sanctions and accountability of local authorities in cases where the deadlines are not met.[40]

Third, in order to reduce the overall length of administrative proceedings, the competent authorities should examine the possibility of amending Article 173 paragraph 3 of the Law on General Administrative Procedure to exclude the possibility provided to a second instance authority to return the case to the first instance authority and oblige it instead to substantively decide in the second instance proceedings. In cases where the second instance authority is not able to determine all the facts of the case, it could ask a first instance body for assistance and then decide substantively.[41] In a similar vein, the Administrative Court needs to be encouraged to decide on the substance of the case in a dispute of full jurisdiction more frequently, not only in the interest of more effective protection of the interests of the parties, but also in the interest of the state that bears the burden of responsibility for damages due to the violation of the right to a trial within a reasonable time.[42] In that sense, it is recommended that the Law on Administrative Disputes be amended in order to, similarly to criminal or civil proceedings, limit the number of possible cassation decisions. This would, however, require significant prior

[40] State Audit Institution of Serbia, *Report on Efficiency of the Process of Issuing Construction and Exploitation Permits, Presentation*, December 20, 2023, available at: *https://www.dri.rs/storage/newaudits/2023-4-SV%20Efikasnost%20izdavanja%20dozvola.pdf*, 24. 8. 2024.

[41] This option was envisaged in one of the versions of the draft Law on General Administrative Procedure prepared during 2014-2015. See: V. Cucić, 2018, p. 155.

[42] N. Mrvić Petrović, Z. Petrović, p. 151.

strengthening of the capacity of the Administrative Court, both in terms of the number of judges and their specialization in particular administrative matters.

Finally, it is encouraging that the Serbian Supreme Court has recently adopted the stance of the ECtHR that if a party requests the protection of the right to trial within a reasonable time in an administrative dispute pointing to the long duration of the procedure as a whole, the duration of the administrative proceedings that preceded the filing of the lawsuit must not be ignored.[43] This shows that a comprehensive principle of decision making within a reasonable time is slowly but surely finding its way into the Serbian judiciary, which sheds a ray of light for a more effective implementation of this principle in both administrative proceedings and judicial review in the future.

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[43] Supreme Court of Cassation of Serbia, Case AA v. Administrative Court, No. 127/2020.

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# PROTECTION OF THE RIGHT TO DECISION-MAKING WITHIN A REASONABLE TIME IN AN ADMINISTRATIVE PROCEDURE****

*Abstract*

*The article analyzes issues related to the realization of the universal human right to a fair trial in proceedings before administrative bodies. Taking the European judiciary into consideration, one can conclude that the right to a fair trial owes its popularity to the aspect related to a reasonable deadline for decision-making. We find a similar situation in the practice of the European Court of Human Rights (ECHR), which bases the majority of its judgments on the violation of a reasonable deadline in decision-making. The duration of the procedures before the state authorities is considered to be a significant issue regarding the efficiency of decision-making. It is justified to believe that the decision which that individual improperly long waited for, cannot be considered a fair satisfaction of the individual's interests. The current Law on Administrative Procedure acknowledges, to a certain extent, the need to complete proceedings before state authorities within a reasonable time. In support of this is the institute of appeals for the failure to issue a timely decision, within a legally set period. The aforementioned institute opens up a significant issue of protecting individual rights. It is, in the language of legal practitioners, called "silence of the administration". In the article, the authors analyze the practical results of the state authorities, which resulted directly from the procedures, due to the so-called silence of the administration. Pointing out inconsistencies in individual cases has a beneficial effect on the processes of further improvement of practice and application of law in the sensitive area of human rights protection.*

**Keywords:** Human Rights, Administrative Procedure, Right to a Fair Trial, Silence of the Administration, State Authorities, Appeal.

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## 1. Introduction

Administration represents a very specific activity, which implements policy, laws and other acts of the legislative and executive authorities by their concrete application to individual cases. Therefore, the administration must be efficient and fast.[1] Efficiency, as a quality related to administration, gained particular importance at the beginning of the 21st century. Acknowledging the position that the slowness of the bureaucracy can be an obstacle to the realization of the legal order, there is a need to take significant steps on a global level, aiming to modernize the administration. In support of this claim is, among other things, the development of the discipline known as "Administrative Science", which has facts related to administration as its subject of study. It tries to explore what administration is, what it should be and what it will be.[2]

The issue of administrative efficiency is closely related to the issue of protection of human and minority rights. Mechanisms for the protection of this sensitive legal area must be clearly and effectively established in the most explicit area such as administration. In legal theory, but also in practice, a disputed question arose for a long time: *Is it feasible to protect the right to a trial within a reasonable time in administrative procedures?* Owing largely to the ECHR, the answer to this question is positive. The ECHR, with its progressive interpretation of the provisions of the European Convention,[3] have included the administrative procedure under the umbrella of legal protection of the right to a fair trial (within a reasonable period).

Today, as one of the most significant problems in the scope of administrative efficiency, as well as the protection of the right to make decisions within a reasonable time, the issue of "silence of the administration" arises. The silence of the administration is a very negative phenomenon, which implies the most direct form of violation of the guaranteed human right to decision-making within a reasonable time. The consequences caused by the stated phenomenon can be particularly intense in the administrative procedure when it comes to the rights of citizens of an existential character.

Therefore, in this article, the authors pay special attention to the issues of the silence of the administration, its consequences, but also legal mechanisms and mechanisms intended to suppress this phenomenon. Responding to the problem, the national legislator offers a special legal remedy known as an appeal against the failure to issue a decision within the mandatory time limit, that is, an appeal against the silence of the administration.

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[1] Miroljub Simić, Srđan Đorđević, Dejan Matić, *Uvod u pravo*, Pravni fakultet Univerziteta u Kragujevcu: Institut za pravne i društvene neuke, Kragujevac, 2011, p. 144.

[2] Charles Debbasch, *Science administrative*, Paris, 1971, p. 7.

[3] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950.

## 2. Administrative Procedure Within a Reasonable Time

Efficiency in decision-making is a procedural-legal standard and a universal guarantee, that finds its justification in the principle of legal certainty, and that is one of the most important general legal principles. Legal certainty is, in itself, an established normative value, but also a means for achieving other values. It is a part of justice and an element of the rule of law and therefore represents a universal value.[4] The aforementioned value is firmly woven into the very essence of the universal right to a fair trial.

The right to a fair trial is characterized by extreme complexity, given that this human right generates, in its essence, a greater number of individual (rights) elements. One of the most important elements of the treated right is certainly the right to a trial within a reasonable time. The ratio of *a reasonable time* is reflected in the need to protect an individual from uncertainty. At the same time, *a reasonable time* ensures that justice is administrated without an unnecessary delay that can affect its effectiveness and credibility.[5]

The scope of the right to a fair trial has been treated differently over time, but in the last few decades, significant efforts have been made globally to expand its application to different types of proceedings. Thus, for example, at the very beginning, social insurance was not considered to come under the regime of civil rights, but over time this position has changed.[6] The practice of the ECHR also speaks of the importance of the studied right. Statistically speaking, the ECHR has the majority of its judgments based exactly on the violation of a reasonable deadline in decision-making. On such a standing point it is possible to open up a valid analysis of the current Law on Administrative Procedure. Relying on particular legal solutions, but also on practical results of the administrative bodies, we will try to answer some important questions related to the protection of the right to a fair trial, i.e. for decision-making in a reasonable time in an administrative procedure.

## 3. Protection of the Right to Decision-Making Within a Reasonable Period and the Problem of the Silence of the Administration

The silence of the administration can be defined as the failure of the competent administrative body to make and deliver a decision to the party within the legally prescribed time limit. The described failure of the competent authority entails numerous harmful consequences, both for the party in the proceedings and for the credibility of the administrative bodies. Today, there is almost no dispute that this phenomenon represents a kind of antipode to the demand for efficiency

[4] M. Simić, S. Đorđević, D. Matić, p. 358.
[5] ECHR: Vernillo v. France, Brief no. 11889/85, Verdict of 20 February 1991.
[6] Srđan Đorđević, Milan Palević, *Zaštita ljudskih prava*, Pravni fakultet Univerziteta u Kragujevcu: Institut za pravne i društvene nauke, Kragujevac, 2017, pp. 202-209.

in decision-making. The reasons why the silence of the administration in practice can be very different, starting from the insufficient expertise of the officials in the administration and sloppy handling of cases, all the way to very hidden motives that can indicate certain abuses of authority. However, one thing is certain - when the management is silent, the reasonable deadline runs fast.

The social consequences of the silence of the administration can sometimes take on significant proportions. The intensity of this problem will be particularly emphasized when the rights of the parties, which have an existential character for them, are decided in the proceedings. Legal theory and practice are unanimous in the view that the mechanisms for protecting the interests of the parties for the resolution of cases within a reasonable period must be constantly improved. According to what has been pointed out, the effectiveness of the appeal for the silence of the administration should also be re-examined.

An appeal of the failure to issue a decision within the legally prescribed time, which is often called an 'appeal of the silence of the administration' by legal practitioners, is a special legal remedy designed to protect the right to decision-making in a reasonable time. The appeal of the silence of the administration is neither a legal nor a theoretical concept, but a construction created in legal practice, and due to the need to separate this special legal remedy from a regular appeal against a first-instance decision.

The competent first-instance authority is obliged to issue a decision within the stipulated period (the general period is 30 days or 60 days).[7] With the expiration of the legal deadline for issuing a decision, the so-called silence of the administration begins. According to the decision of the previous law, for such situations, there was an assumption that the request of the party was actually rejected. However, such a decision could cause additional complications about the right of the parties to appeal against the decision. The new Law on General Administrative Procedure abandons the previous solution, and responding to the problem of the silence of the administration, it offers the institute of appeals due to the silence of the administration. It should also be noted that the assumption, as a response to the omission, was not completely abandoned. In certain special administrative procedures, the silence of the administration becomes a positive decision of the administrative body through legal fiction. For example, the Law on the Registration Procedure at the Agency for Business Registers stipulates that if the registrar does not decide on the application within the stipulated period ('silence' of the administration), the application will be deemed to have been adopted, on which a decision is made.[8] The same situation is foreseen in other special laws.[9]

[7] Dragan Milkov, *Upravno pravo II – upravna delatnost*, Cenar za istraživačku delatnost, Pravni fakultet Univerziteta u Novom Sadu, 2017, p. 245.

[8] Law on the Procedure of Registration with the Serbian Business Registers Agency, *Official Gazette of the Republic of Serbia*, No. 99/2011, 83/2014, 31/2019 and 105/2021, Art. 19.

[9] Stefan Andonović, *Pravo na odlučivanje u razumnom roku u upravnom postupku u Republici Srbiji*, Fondacija Centar za javno pravo, Beograd, 2019, p. 9.

Article 173 of the Law on General Administrative Procedure stipulates that if the competent first-instance authority does not issue a decision to the party within the legally prescribed time limit, the party has the right to appeal to the second-instance authority for the failure of the decision within the legally prescribed time limit. Using this legal remedy the procedure for an appeal due to the silence of the administration begins. The procedure has its peculiarities compared to a regular procedure for an appeal against a first-instance decision.

The procedure before the second-instance authority begins with the determination of the reasons why the first-instance authority failed to issue a decision to the party within the legally prescribed period. In order to determine the circumstances of the omission properly, the second-instance authority will require information from the first-instance authority why they did not issue a decision in a timely manner. The law does not prescribe a deadline in which the first-instance authority is obliged to respond to the request of the second-instance authority, that is, to state the reasons for the omission. A reasonable assumption would lead to the conclusion that the first-instance authority is obliged to act on the highlighted request without delay, given that the second-instance authority has only 60 days at its disposal to decide on the submitted appeal.

Analysis of the situation in practice leads to interesting observations. Thus, it is not a rare case that the first-instance authority fails to respond to the request of the second-instance authority, that is, to state the reasons for the omission. Due to the absence of a deadline, the second-instance authority may receive a statement from the first-instance authority, but they do not have enough time to resolve the complaint within the prescribed period. This opens up the problem of 'double silence of the administration', but also the responsibility of competent authorities for negligent attitude towards the rights of the parties in the proceedings. Practical results that the authors were able to reach during the research undoubtedly indicate that the legislator remained incomplete in this part.[10][11] Filling legal gaps in strictly formal procedures such as administrative procedures is not prohibited, but it is dangerous, especially if the rights and interests of the parties are fundamentally neglected, to protect state officials from liability that would arise due to unjustified omission. Therefore, we believe that this is why the legal text could be enriched in the future with the wording that *the first-instance authority is obliged to declare the reasons for the omission without delay, and no later than within 7 days of receiving the request*. The proposed seven-day period could in a certain sense be connected with the wording of the Law on Administrative Disputes '*and it shall not be passed within a further period of seven days upon a subsequent request of the party submitted to the second-instance authority*'.[12] With

[10] Decision of the Ministry of Finance of the Republic of Serbia, Sector for the second-instance tax and customs procedure – Department for the second-instance tax procedure, Kragujevac, No: 47-03-01377/2020-39.
[11] Decision of the Ministry of Finance of the Republic of Serbia, Sector for the second-instance tax and customs procedure – Department for the second-instance tax procedure, Kragujevac, No: 47-03-01376/2020-39.
[12] Law on Administrative Disputes, *Official Gazette of the Republic of Serbia*, No. 111/2009.

this, the time of the so-called 'urgent notice', which, without particularly justifying arguments, leaves a subsequent seven-day deadline for the second-instance authority to decide on the appeal, logically justified as the time the second-instance authority had to wait for the first-instance authority to declare the reasons for the omission.

The further course of the appeal due to the silence of the administration is conditioned by the answer to the previously asked question: *are the reasons for the omission of the first-instance authority justifying or not*? If the second-instance authority finds the reasons for the delay justificatory, they will extend the deadline for issuing the decision for as long as the reason lasted, and for 30 days at the latest.[13]

In this part, we should not avoid answering the challenges that the wording 'justifying reasons' brings with it. The legislator does not define justifying reasons, nor would it be possible, from the aspect of legal norms, to predict all the circumstances that may hinder the first-instance authority from deciding within the legal term. Circumstances related to the party can also be considered justifying reasons, so the answer to this question is particularly interesting for the research aimed at improving mechanisms for protecting the right to decision-making within a reasonable time. However, a somewhat more complex question refers to justifying the reasons of the competent administrative body. Justifying reasons include those related to the complexity of the case, that is, the complexity of the factual and legal issues that need to be decided, as well as the lack of necessary evidence that needs to be obtained from the parties or other state authorities. In a certain sense, one can say that a justifying reason could also exist in situations where the approval of another competent authority is required for the decision of the first-instance authority.

The idea to prevent an arbitrary interpretation, and to classify as 'objective reason' the circumstances that are not such, leads us to the need to declare what should by no means be considered an objective reason. Thus, for example, the objective reason cannot be the absence of the acting official from the workplace or the overloading of the acting body with the number of cases. Given that the above-mentioned reasons are often mentioned in certain decisions of courts and state authorities, it is necessary to refer to them briefly. Regarding the problem related to the overloading of the state body with the number of cases, the Supreme Court of Serbia expressed its opinion by formulating a legal position related to the assessment of a reasonable deadline in decision-making. Thus, according to the position of the Supreme Court, when assessing the length of the procedure that does not meet the requirement of a reasonable period, the workload of the court or the specific judge with the number of cases is not taken into account.[14] We believe that the mentioned legal opinion should be accepted when answer-

[13] Law on Administrative Procedure, *Official Gazette of the Republic of Serbia*, No. 18/2016, 95/2018 – authentic interpretation and 2/2023 – decision of the Constitutional Court.

[14] Decision of the Supreme Court of Cassation (P4y 28/2014) of 2 October 2014.

ing the question: "Should the overloading of the competent administrative body with the number of cases be considered a justifying reason for missing the deadline?". The absence of state officials is not a justifying reason either, because that problem is a question of internal systematization and organization of work in a specific body. The head of a state body is obliged to organize a smooth process of performing work tasks under the jurisdiction of the state body, to provide an adequate replacement for the absent official.

If the second-instance body finds that there is no justifying reason why the decision was not issued within the deadline specified by law, it decides on the administrative matter itself or orders the first-instance body to issue a decision within a period of no longer than 15 days. If the first-instance authority does not issue a decision again within the deadline set by the second-instance authority, they decide on the administrative matter themselves.[15] As the law does not remark that the second-instance authority takes into account if the first-instance authority acted as ordered to issue a decision in a later period, it is assumed that the party is obliged to file a complaint again due to the silence of the administration, so that the second-instance authority will finally decide according to the request of the party. However, this question is justifiably followed by the following: *in what period is the second instance authority obliged to issue a decision*? In a hypothetical, worst-case scenario for the party, the 30-day deadline for issuing a decision can be extended to more than 180 days.[16]

In terms of the right to a decision in a reasonable time, it seems that the institute of appeal due to the silence of the administration is still not regulated in a way that would ensure the effectiveness of this legal remedy. If we take into account that law is a system based on logic, it follows that the processes regulated by law must also have a logical sequence. Consequently, we wonder what is the logic of the subsequent deadline (not longer than 15 days) in case of unjustified reasons for missing it. Does the first-instance body suffer any consequences due to the silence (the example: internal supervision and control), or is the epilogue of the appeal procedure visible only in the sense of "waiting parties"?

From the above, it can be concluded that the second-instance authority does not have effective mechanisms to force the first-instance authority to act, and in the end, they will take on the obligation to decide a case where the factual and evidential material is completely unknown to them. One gets the impression that the legislator, wanting to please both the bureaucracy and the citizens, decided to formulate a legal means of protection against the silence of the administration, whose effectiveness in the practical domain, due to the lack of concrete solutions, can easily be relativized. Viewed from the perspective of the right to decision-making in a reasonable time and international standards in the field of human rights protection, such a solution cannot be qualified as satisfactory.

[15] Law on Administrative Procedure.
[16] S. Andonović, p. 10.

### *3.1. On the Effectiveness of the Appeal Due to Dailure to Issue a Decision in the Legally Prescribed Time*

Complaints due to non-provision of a decision within the time prescribed by law initiate a very complex mechanism of protection of the rights of the parties in case of silence of the administrative authorities. In addition, this appeal produces additional implications. By frequent use of this legal means,[17] a clear signal is sent to the state organization that in the system of its hierarchical structure there is a part that does not work or lags. The complaint itself is often understood by the officials of the competent "silent" authority as a kind of complaint about their work, therefore it is not surprising that the results reached by the authors in the research do not speak in favour of an objective approach in the work of administrative bodies when deciding on that.

According to official information available on the portal of the Administrative Court of Serbia, the number of received cases with the "U-ću" mark (used for cases of silence of the administration lawsuit) amounts to 56,657 cases in the current year (2023).[18] The prominent number speaks in favour of the fact that it is a problem that is slowly gaining momentum and threatens to seriously burden the work of the Administrative Court. We believe that the problem could be systematically affected if we worked to increase the effectiveness and efficiency of the complaint institute due to the silence of the administration. To contribute to the set goal (efficiency), we point out three problematic moments that arise in the appeal decision-making process and represent an obstacle to its effectiveness.

In the first situation, time plays a significant role as a factor of importance for deciding on the reported appeal. Complaint due to the silence of the administration is a legal remedy that must be decided on the merits. Therefore, if it has been declared, the second-instance authority can reject, dismiss or adopt it, and this is where the same rules apply to it as for a regular appeal against a first-instance decision. The validity of the appeal due to the silence of the administration should be evaluated by the second-instance authorities according to the moment when the appeal was filed, trying to make a decisive statement: whether there are justifying reasons for the failure of the first-instance authority, i.e. whether at the time of filing the appeal, there is or is not a so-called silence of the administration.

However, in practice, we often encounter a different situation. Second-instance authorities, explaining their decisions, base their reasons for rejecting the appeal on the fact that in the meantime the first-instance authority has issued the requested decision and that there is no more silence from the administration. This approach of the first-instance authorities is wrong, both from the point of view of the Law on General Administrative Procedure and from the point of view of the right to a fair trial. By accepting this practice, the institute of complaints

[17] The Lawsuit due to the silence of the administration has the same importance.

[18] Administrative Court of Serbia – the data in the current year, *https://www.up.sud.rs/cirilica/podaci-u-tekucoj-godini*, 27. 11. 2023.

due to the silence of the administration would be completely meaningless and reduced to the level of urgency, i.e. requests for urgent or extraordinary resolution. Issuing a decision after an appeal has been filed must not have an impact on its merits, because an appeal due to the silence of the administration is an institution designed to protect the right to a fair trial (i.e. decision-making within a reasonable time), and the same must be adopted by the second-instance authority even in the case when the first-instance authority issued the requested decision subsequently. The fact is that the subsequent adoption of the decision ends the silence of the administration, but the fact that the silence of the administration did exist at the time of filing the appeal cannot be ignored.

The second case that we point to is somewhat similar to the previously described situation. In a certain number of cases, the procedure was suspended with the explanation that the first-instance authority had issued a decision in the meantime, so there was no longer any silence of the administration. This approach is unacceptable if we take into account the fact that the appeal procedure can be suspended only if the party abandons the stated appeal. When in the course of the second-instance administrative procedure, which is based on the appeal filed by the party, as the first-instance authority did not issue a decision within the deadline specified by law, and the first-instance authority subsequently issues a decision, the second-instance authority cannot suspend the proceedings but is obliged to decide on the appeal on its merits.[19]

The third situation refers to certain inconsistencies in the procedure following a reported complaint due to the silence of the administration. Thus, in a certain number of cases, we encounter a situation where in the explanation of the decision rejecting the appeal, there is no indication of what the second-instance authority considered to be "justifying" reasons for the omission. One gets the impression that the second-instance body did not consider the reasons of the first-instance body when deciding on the appeal, but based the decision to reject the appeal on other reasons.[20] In some cases, it can be seen that the second-instance authority did not state justifying reasons because the first-instance authority had not even communicated them, even though they were requested several times. Here we can ask the question: "How should the second-instance authority objectively act if the first-instance authority does not inform them of the reasons?". Is such a situation to be appreciated to the detriment of the first-instance authority, which would logically lead to the adoption of the appeal, or does such a circumstance paralyze the second-instance authority in deciding on the appeal? Here it should be pointed out that if we accept that the second-instance body cannot resolve the appeal without reasons being communicated, we come

[19] Judgment of the Administrative Court U. 20722/19 of 26. 11. 2020.

[20] See: Decision of the Ministry of Finance of the RS, Sector for second-instance tax and customs procedure – Department for second-instance tax procedure Kragujevac, No: 47-03-01377/2020-39 and Decision of the Ministry of Finance of the RS, Sector for second-instance tax and customs procedure – Department for second-instance tax procedure Kragujevac, No: 47-03-01376/2020-39.

to the problem of the so-called "*double silence of the administration*". Within the previous subheading, there was a mention of the circumstances that can be considered as justifying reasons. It is important to remind of the reasons since the practice examples show that it is not rare that state bodies cite the absence of an acting state official or the overload of the acting body with the number of cases as justifying reasons.[21]

Unfortunately, the highlighted examples are not isolated cases, so the authors believe that the issue of the silence of the administration must be approached with special care during future changes of legal solutions. However, we should not lose sight of those persons who directly apply the law, namely the officials of administrative bodies. The state is obliged to invest money in improving the administration personnel. The expertise of the personnel is the only valid guarantee that legal solutions will be consistently applied in practice.

## 4. Conclusion

The state administration represents a system of state bodies that, through their activities, ensure the smooth functioning of the legal order. Therefore work efficiency appears to be the most important quality of the management. As the rights, obligations and interests of the parties are decided in the administrative procedure, the issue of efficiency in work is also significant in terms of guaranteed human rights. A phenomenon such as the silence of the administration is a flagrant example of a violation of the principle of effectiveness and economy of the procedure, but also of the universal right to a decision within a reasonable time.

As a response to the treated problem, the Law on General Administrative Procedure offers the institution of appeals due to the silence of the administration. The formulation of the aforementioned legal instrument represents an important step forward concerning the previous law, but the application of this institute in practice indicated the existence of certain omissions and inconsistencies. The vagueness of the legislator opens up space for an arbitrary interpretation of the norms governing this legal remedy. As one implication in law logically leads to another, the problem of ineffectiveness of an appeal due to the silence of the administration was reflected in a large number of cases before the Administrative Court, initiated by the complaint due to the silence of the administration.

The institution of an appeal due to the silence of the administration must be analyzed and explained more thoroughly in a theoretical opus. One of the reasons for the ineffectiveness of this institute in practice is the fundamental misunderstanding of the goal for which it was introduced. Therefore, we believe that scientific workers must illuminate the path of practising lawyers with a careful theoretical and legal analysis of legal norms.

[21] Decision of the City Council of Kraljevo, No. 355-500/2023-I of 15. 9. 2023.

The remarks made during the analysis of the treated institute should by no means diminish its current importance. The idea of an appeal due to the silence of the administration is certainly a suitable answer to the problem of the silence of the administration, however, the authors justifiably believe that this legal remedy needs to be more thoroughly regulated. The provisions by which the aforementioned institute is regulated need to be refined with different wording and more acceptable solutions. Its final instance would not lead to an additional extension of the already exceeded deadline but to a definitive end of the procedure.

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# PART FIVE
# The Law on General Administrative Procedure and Special Administrative Procedures

Marko Davinić*

# HARMONIZATION PROCESS OF THE SPECIAL LAWS WITH THE GENERAL ADMINISTRATIVE PROCEDURE ACT

*Abstract*

*The author deals with the relationship of the General Administrative Procedure Act (GAPA) with special laws governing different administrative areas and the process of their harmonization. He emphasizes that many special laws not harmonized with the GAPA can make it difficult for citizens to exercise their rights. However, the goal should not be to reduce the number of special laws, keeping in mind the constant social development, but to harmonize them with the provisions of the GAPA and the protection standards that it provides. The author proposes legal changes that would ensure harmonization of current and future special laws with the GAPA. In the author's opinion, this would ensure more complete protection of citizens' rights and legal interests and strengthen the unity of legal order as one of the fundamental constitutional principles.*

**Keywords:** General Administrative Procedure, Special Administrative Procedures, Harmonization Process, Corresponding and Subsidiary Application of the Law.

## 1. Introduction

The General Administrative Procedure Act (hereinafter referred to as:' GAPA') is a general procedural law, given that it applies to all administrative matters unless otherwise specified by a special law. On the other hand, special administrative procedures are regulated by mixed laws, as they contain material, procedural, and organizational norms. Thus, for example, the Law on Tax Procedure and Tax Administration governs the rights and obligations of taxpayers (material norms), tax procedure (procedural norms), as well as the organization of the Tax Administration as an administrative body within the Ministry of Finance (organizational norms). The other laws that regulate special administrative procedures are of a similar, mixed character: the Asylum and Temporary Protection Act, which governs the asylum procedure; the Patent Act, which regulates the patent procedure; the Customs Act, which regulates the customs procedure; the Expropriation

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Act, which governs the expropriation procedure; the Law on Return of Confiscated Property and Compensation that regulates the procedure of returning confiscated property, etc. This means that there are no special procedural laws that regulate special administrative procedures, but these laws are of a mixed nature.[1]

Also, it is necessary to point out that special administrative procedures are only partially regulated by special laws. In other words, a special administrative procedure will never be fully regulated by a special law, but to the extent necessary, taking into account the specificity of a particular administrative area. Regarding all other issues, the subsidiary application of the rules of general administrative procedure is foreseen. Somewhere, the degree of regulation of a special procedure by a special law is very high (for example, in the case of the Law on Tax Procedure and Tax Administration or the Law on the Procedure for Registration in the Cadastre of Immovable Property and Utilities). In contrast, in many other laws, only minor deviations from the GAPA are regulated.

Mentioned deviations most often concern the prescription of shorter or longer deadlines for certain procedures' actions and the regulation of special legal remedies different from those provided by the GAPA.[2]

The current GAPA was adopted in 2016, and room for improvement has been observed during the implementation period. One of the central issues related to the application of the GAPA concerns its relationship with special laws governing different administrative areas. Namely, many special laws can make it difficult to exercise the rights of citizens if they are not harmonized with the general procedural law. This has been recognized in the European Commission's annual reports in the last few years.[3] Therefore, the process of harmonizing special laws with the GAPA is crucial for correctly determining the rights and duties of natural and legal persons in the administrative procedure. It is clear that GAPA cannot be a universal legal basis for all administrative situations. However, striving for balance and coordination between general and special procedures is necessary.[4]

The paper consists of three central parts. In the first, the chronology of the relationship between the GAPA and special laws is analyzed. In the second, the methodology of harmonizing special laws with the current GAPA is described. In the third, an overview of the views of domestic legal theorists on the method of harmonizing special laws with the GAPA is given. The research results and their interpretation are presented in the concluding remarks.

[1] See: Marko Davinić, *Zakon o opštem upravnom postupku; Zakon o upravnim sporovima*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2020, p. 18.

[2] See: Mladen Kosovac, Hakija Kozarčanin, *Komentar Zakona o opštem upravnom postupku*, Pravno ekonomski centar, Beograd, 1982, p. 22.

[3] See: *Serbia 2023 Report*, European Commission, Brussels, 8. 11. 2023, p. 20, *https://neighbourhood-enlargement.ec.europa.eu/document/download/9198cd1a-c8c9-4973-90ac-b6ba6bd72b53_en?filename=SWD_2023_695_Serbia.pdf*, 29. 11. 2023; All reports of the European Commission for the Republic of Serbia are available on the following page of the Ministry for European Integrations: *https://www.mei.gov.rs/eng/documents/eu-documents/annual-progress-reports-of-the-european-commission-for-serbia*, 29. 11. 2023.

[4] Stana Đukić, *Posebni upravni postupci u našem pravnom sistemu*, Službeni list SFRJ, Beograd, 1965, pp. 25-26.

## 2. Chronology of the Relationship Between the GAPA and Special Laws

**The first GAPA in our country was passed at the end of 1930.** At the beginning of its application, Professor Ivo Krbek pointed out the danger of passing many special regulations which would derogate from the provisions of the general law without clear justification. In this sense, he emphasized the following: "The legislator will have to take account of the GAPA in every single matter and pass only such special procedural provisions, which are truly and necessarily needed. The unnecessary and excessive adoption of special procedural provisions would completely spoil and make illusory the great advantage intended to be achieved by the codification of the GAPA. Special procedural regulations must not grow over the head of GAPA".[5]

The first GAPA contained several provisions concerning the relationship between general and special laws. Thus, it is emphasized in the initial provisions: "Public administration authorities not covered by Article 1, if there are no special regulations for their actions, will act in accordance (analogously) with the provisions of this Law, where necessary" (Article 2, paragraph 2). Although the primary goal of this provision was to emphasize that the GAPA applies to other subjects of public administration besides those expressly mentioned in the initial article, it also derives from it the rule on the priority of special regulations to the general law (principle of Roman law *lex specialis derogat legi generali* ). Also, this provision contains a rule on the appropriate application of the GAPA in situations where it is necessary, and there is no special regulation in that matter. The presentation so far suggests that the general law could be derogated not only by special laws but also by a special regulation of sub-legal force. Such a normative solution will be maintained in our country until the amendments to the GAPA in 1965, which will be discussed in more detail.

In addition to initial provisions, the relationship between general and special laws was also regulated in transitional and final provisions of the first GAPA. Thus, it was initially foreseen that on the day of entry into force of the GAPA, "all provisions of a general nature that refer to the general procedure regulated by this Law shall cease to be valid" (Art. 173, par. 1). This was a logical consequence of the fact that certain procedural provisions of a general nature, that is, which were not characteristic only for some administrative areas, were included in earlier regulations. These were provisions primarily found in the regulations on the organization of state administration, for example, in the Law on the Organization of Districts and Regions of the Kingdom of Serbia from 1905, but also in regulations of a procedural nature, such as the Law on Simplifying Administrative Procedures from the Hungarian Legal Area from 1901.[6]

[5] Ivo Krbek, *Zakon o opštem upravnom postupku*, Zakoni Kraljevine Jugoslavije, Knj. XIII, Obnova, Zagreb, 1931, pp. 9, 213.

[6] Jovan V. Stefanović, *Komentar zakona o opštem upravnom postupku: od 9. novembra 1930*, Geca Kon, Beograd, 1933, pp. 389-390; I. Krbek, p. 211; *Zbornik zakona i uredaba, Prva knjiga: Ustav, Ogranski zakoni i Opšti upravni zakoni,* Državna štamparija Kraljevine Jugoslavije, Beograd, 1913, p. 223.

On the other hand, the GAPA provided that special regulations that were previously adopted will continue to apply, except for those that contradict the provisions on delivery (Art. 173, paragraph 2). However, this did not mean unlimited application of such regulations. Namely, Article 175 provided for five years from the entry into force of the GAPA, within which the President of the Council of Ministers could "by using a decree with legal force abolish certain procedural provisions of the existing special administrative laws and decrees, bringing them into harmony with the principles and provisions of this Law." The goal of such a provision was reflected in the harmonization of special regulations with the GAPA, bearing in mind that they were adopted when there was no general law, so they had to contain a large number of procedural provisions. Many of them became unnecessary and redundant with the adoption of the GAPA, so a deadline was given to remove them from legal order. It is important to emphasize that this article of the GAPA only allows for the abolition of procedural provisions and not for changing them.[7]

After World War II, SFR Yugoslavia was the first socialist country to adopt the **GAPA in 1956**.[8] It regulated the issue of relationship between general and special laws in two articles. Thus, Article 2, entitled Special Procedure, provides: "1. When a special law for a specific administrative area prescribes a procedure that deviates from the provisions of this law, in that administrative area the provisions of that special law will be followed. 2. When this law expressly provides that other regulations can prescribe a special procedure, it shall be acted upon according to those regulations".

The legal provision, therefore, provided for the possibility of derogating from the GAPA not only by a special law but also by a legal regulation of lower legal force, with the limitation that the GAPA must provide for such an option.[9]

The first post-war GAPA explicitly provided for subsidiary application of this law to special laws. Thus, Article 3 of the GAPA, which had the title "Subsidiary application of the law," provided that "in administrative areas for which a special procedure is prescribed, the provisions of this law will be applied in matters not regulated by those special regulations." In other words, the rules of general administrative procedure were applied concerning all those issues that were not regulated by a special law. The extent to which these rules were applied depended on the extent of deviations of special laws to the GAPA. Finally, in the transitional and final provisions, a deadline of one year was provided for harmonization of federal and republican laws and by-laws with the GAPA, primarily in the sense of repealing or amending certain of their provisions.[10]

[7] I. Krbek, pp. 214-215.

[8] *Official Gazette of the FNRJ*, No. 52/56 of December 19, 1956.

[9] For example, the GAPA provided in Art. 17 par. 1. that municipal bodies are responsible for the decision in the first instance if the law or *other regulations based on the law* (underlined – M. D) do not determine the competence of different bodies. Thus, the GAPA left the possibility to be provided not only by law but also by-laws a different jurisdiction for decision-making in the first instance. *Cf.* Bogdan Majstorović, *Komentar Zakona o opštem upravnom postupku*, Nova Administracija, Beograd, 1957, p. 20.

[10] See in detail: Art. 298 of the GAPA from 1956.

**Amendments to the GAPA from 1965**[11] abolished the possibility that secondary legal acts can prescribe deviations from it.[12] In this sense, the new Art. 2 of the GAPA, which had the same title (Special procedure), read: "Certain issues of the procedure for a particular administrative area can be regulated by a special law differently than GAPA regulates them if this is necessary for the procedure in that administrative area." Also, this provision specifies that a special law cannot fully regulate a special procedure, only its individual issues. It is also noticeable that the amendments to the GAPA established the condition for deviating from it: that it is necessary for the procedure in that administrative area. With this, the legislator wanted to prevent unnecessary deviations from the general law, which are not justified by the specifics of particular administrative situation. Article 3 of the GAPA (Subsidiary application of the law) confirmed the approach that deviations from general provisions can only be prescribed by law. In this sense, it is prescribed: "In administrative areas for which a special procedure is prescribed by law, the provisions of that law shall be followed. GAPA's provisions deal with all issues that are not regulated by a separate law." Finally, in the transitional and final provisions (Art. 300), it is specified that upon the entry into force of the amendments to the GAPA from 1965, the provisions on special procedures provided for by the bylaws cease to be valid, if they are contrary to the provisions of the GAPA. In this way, however, the possibility is left that certain procedural issues, mainly of a technical nature, will continue to be regulated by secondary legislation, but only when they are not contrary to the provisions of the GAPA, or when the general law expressly provides for it.[13]

Amendments to the Law from 1977,[14] 1978,[15] and 1986[16] did not change mentioned provisions.

**The third GAPA (from 1997)**[17] contained only one article dedicated to the relationship between general and special laws, given that there was no longer an explicit provision on the subsidiary application of the GAPA, but such application was taken for granted. It is so in Art. 3. of the GAPA (which had no title) provided for the following: "Provisions of laws which, due to specific nature of administrative matters in some administrative areas, prescribe necessary deviations from the

[11] Law on Amendments to the GAPA, *Official Gazette of the SFRY*, No. 10/65 of March 10, 1965; The refined text of the Law was published in the *Official Gazette of the SFRY*, No. 18/65 of April 14, 1965.

[12] This was done in order to comply with Art. 156 of the Constitution of the SFRY from 1963, but also to reduce the number of special administrative procedures. See: Aleksandar Davinić, Vlado Lemberger, Stana Đukić, *Manual for implementing the GAPA*, Federal Institute for Public Administration, Belgrade, 1965, p. 51.

[13] For example, in the GAPA of that time, certain norms allowed for prescribing deviations also with secondary legislation. This is the case, for example, with Art. 21. which stipulates that the provisions on local jurisdiction from the GAPA will be applied "unless specified otherwise by special regulations." See in detail: Ljubomir Jevtić, Radomir Šramek, *Upravni postupak, opšti i posebni, i upravni spor*, Savremena Administracija, Beograd, 1967, pp. 8-11.

[14] Law on Amendments to the GAPA, *Official Gazette of the SFRY*, No. 4/77 of January 14, 1977.

[15] Law on Amendments to the GAPA, *Official Gazette of the SFRY*, No. 11/78 of March 3, 1978. The refined text of the Law was published in the *Official Gazette of the SFRY*, No. 32/78 of June 16, 1978.

[16] Law on Amendments to the GAPA, *Official Gazette of the SFRY*, No. 9/86 of February 28, 1986. The refined text of the Law was published in the *Official Gazette of the SFRY*, No. 47/86 of August 15, 1986.

[17] The GAPA, *Official Gazette of the FRY*, No. 33/97, 31/2001, RS 30/2010.

rules of general administrative procedure, must be in accordance with the basic principles established by this law." The norm above indicates that it was necessary to cumulatively fulfill three conditions in order for a deviation from the general administrative procedure to occur: that in certain administrative areas, due to the specific nature of the administrative matter, such deviations are necessary, that they are provided for by law (at the time it could have been a federal or republican law) and finally, that the provisions of the special law are in accordance with the basic principles of the GAPA.[18] While the first two conditions were stipulated by the GAPA from 1965 (and subsequent amendments), the last condition was a novelty introduced by the GAPA from 1997. The basic principles in every procedural law represent the most essential initial provisions, which give the scope and meaning of the entire law. Their practical value is also reflected in the fact that they provide clear guidelines in situations where certain issues are not sufficiently regulated (so-called legal gaps), as well as in the case of insufficiently clear legal norms regarding which there are different interpretations in practice. Finally, the principles represent a barrier to unjustified deviation from the norms of general administrative procedure.[19]

The current GAPA from 2016 contains two articles dedicated to this issue. Thus, in Article 3, entitled "General and special administrative procedure," the following is provided: "(1) This law applies to proceedings in all administrative matters. (2) Certain issues of administrative procedure can be regulated by a special law only if it is necessary for some administrative areas, if it is in accordance with the basic principles determined by this law, and does not reduce the level of protection of the rights and legal interests of the parties guaranteed by this law". The novelty in relation to the previous law is precisely the last condition, which protects the procedural position of the party and prevents the lowering of the level of protection of its rights and legal interests guaranteed by the GAPA.[20] Also, by stipulating that the GAPA is applied to the proceedings in all administrative matters, its primacy to special laws has been highlighted, i.e., the obligation to harmonize them with general law has been indirectly established.

The obligation above is explicitly prescribed by the transitional and final provisions (Article 214), and the deadline for harmonizing special laws is set for June 1, 2018. The same article of the GAPA provides for the formation of the government Coordination Body to assess the compliance of special laws

[18] Zoran R. Tomić, Vera Bačić, *Komentar Zakona o opštem upravnom postupku: sa sudskom praksom i registrom pojmova*, Službeni list SRJ, Beograd, 1997, pp. 41-42.

[19] The theory states: "So far, experience has clearly shown that the principles of this law (...), despite the breadth and depth of special regulation in certain administrative areas, have always served as a safe basis for determining the measure in the regulation of a special administrative procedure." Zoran I. Jelić, Branislav D. Fatić, *Priručnik za primenu Zakona o opštem upravnom postupku*, Ekonomika, Beograd, 1997, p. 9.

[20] For example, in the case of prescribing a shorter deadline for an appeal by a special law, the level of protection of the rights and legal interests of the parties guaranteed by the GAPA is not reduced, given that Art. 153, par. 1 stipulates: "The appeal shall be submitted within 15 days of notification parties on the decision if the law does not prescribe otherwise". Therefore, the GAPA left the possibility that a special law, depending on the specifics of a particular administrative area, prescribes a different (shorter or longer) appeal deadline.

with the provisions of the GAPA. The Ministry of State Administration and Local Self-Government performed professional and administrative tasks for the needs of the Coordination Body during the harmonization procedure.

As pointed out in the explanation of the proposed law, "the essence will be in the expression of all the specificities of special areas, but only those specificities. In this way, the 'burden of proof' about the need for a different regulation of certain issues would be transferred to the proponents of special laws, and greater unity of the administrative procedure system would be ensured."[21]

## 3. Methodology of Harmonization of Special Laws with the Current GAPA

Following the provision above of the GAPA, the Government of the Republic of Serbia established the Coordinating Body for Harmonization of Special Laws with the Law on General Administrative Procedure in October 2016.[22] It determined the list of laws that need to be harmonized with the GAPA (total of 265), and those recognized as priorities for harmonization are specially marked.[23]

In July 2017, the Coordinating Body established a matrix for assessing the compliance of special laws with the GAPA. The matrix was sent to all ministries, which were obliged to fill it out within 30 days from its publication, for three to five laws from their scope assessed as a priority for the harmonization process. After the expiration of specified deadline, the responses of the ministries were considered by the members of the Coordination Body and the members of the Working Group that provided support for its work.[24]

The matrix was created with the aim that the harmonization process takes place in a way that would ensure essential alignment with basic principles of the GAPA and maintain the level of protection of the parties' rights guaranteed by this law, but at the same time expressing the necessary specificities of particular administrative areas. Also, based on an in-depth analysis of the meaning and

[21] Explanation of the Bill on General Administrative Procedure, p. 105, *http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/266-16.pdf*, 14. 11. 2023.

[22] See the Decision on the Formation of the Coordinating Body for Harmonization of Special Laws with the GAPA, *Official Gazette of the RS*, No. 82 of October 7, 2016; At the end of 2017, a new Decision on the establishment of the Coordinating Body for harmonization of special laws with the GAPA was adopted, *Official Gazette of the RS*, No. 119 of December 29, 2017. With the adoption of the new decision, the previous one ceased to be valid. Both decisions are available at: *http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/odluka/2017/119/5/reg*, 14. 11. 2023.

[23] This number is significantly higher, given that in addition to mentioned list, the laws that the Administrative Court applies in its work, as well as the laws that are in the process of being harmonized with the Law on Inspection Supervision, are listed. The list of all laws is available at: *http://mduls.gov.rs/obavestenja/utvrdjena-matrica-za-usaglasavanje-posebnih-zakona-sa-zakonom-o-opstem-upravnom-postupku/*, 14. 11. 2023.

[24] See: Established matrix for harmonizing special laws with the GAPA, *https://mduls.gov.rs/obavestenja/utvrdjena-matrica-za-usaglasavanje-posebnih-zakona-sa-zakonom-o-opstem-uprannom-postupku/*, 17. 11. 2023.

effects of the norms of special laws, the goal was to relieve the legal system of unnecessary provisions, that is, to reformulate them to improve the party's position.[25]

The matrix was very detailed and precisely arranged. In it, the competent authority was first asked whether the law, from its scope, regulates the procedure differently than the GAPA. In the case of a positive answer, the authority had to reply whether a deviation from the GAPA is necessary (that is, what are the critical consequences that would arise if the provisions of the GAPA were applied instead of the provisions of a special law), whether the deviation is in accordance with the principles of the GAPA, as well as whether it reduces the level of protection of rights and legal interests guaranteed by the GAPA.[26]

The matrix was divided into two main parts. The first part referred to issues of administrative procedure that a separate law cannot regulate, i.e., that cannot be regulated in a different way from the provisions of the GAPA (this includes the basic principles of the GAPA and all provisions that foresee a certain degree of protection of the rights of the parties, except when the GAPA allows deviation from its provisions). The second part referred to issues of administrative procedure that a separate law can regulate, that can be regulated in a different way than the provisions of the GAPA.[27]

The matrix's primary value is that it did not insist on rigid uniformity but demanded that the authorities explain in detail any deviation from the provisions of the GAPA. This applied both to laws that were already in force and to those that were being drafted.

In the Conclusions from June 2018, the Coordination Body took the position that special laws should contain one provision that generally refers to the subsidiary application of the GAPA instead of several provisions referring to the GAPA. It was proposed that this provision should read: "The provisions of the law regulating general administrative procedure shall be applied to matters of procedure that are not otherwise regulated by special law." [28]

In the same act, it is specified that procedural issues cannot be regulated by secondary legal acts, considering the GAPA provision that certain administrative procedure issues can be regulated by a special law (therefore, not by an act of lower legal force).[29] In the Conclusions, it was also pointed out that concerning special laws, only subsidiary application of the GAPA is possible, and not its appropriate application. It is explained as follows: "Appropriate application is

[25] *Ibidem*, p. 4.
[26] *Ibidem*, p. 2.
[27] See in detail: *Ibidem*, pp. 5-47.
[28] Conclusions of the Coordinating Body for Harmonization of Special Laws with the GAPA, *http://mduls.gov.rs/reforma-javne-uprave/reforma-upravnog-postupka/uskladjivanje-posebnih-zakona-sa-ezupom/*, 16. 11. 2023.
[29] When provided for by a separate law, by-laws can prescribe only the appearance and content of the forms, the way of communication between authorities, and the functional competence, i.e., distribution of work within the authority responsible for conducting administrative proceedings. *Ibidem*.

out of question because it implies the application of the provisions of the GAPA to something that by its legal nature is not an administrative procedure. As special laws regulate special administrative procedures, only subsidiary application comes into play".[30]

Given that the GAPA stipulated the obligation to harmonize special laws by June 1, 2018, the Coordination Body published the Notice on the Application of Article 214 of the GAPA on the website of the Ministry of State Administration and Local Self-Government, in which the following positions were taken:

1. The process of harmonizing special laws with the GAPA continues after June 1, 2018.

2. Until the completion of the harmonization process, special laws will be applied.

3. The Coordinating Body will continue to work on assessing the compliance of the provisions of special laws with the GAPA, determining the obligation and scope of harmonization of special laws.[31]

In explaining the positions above, it was pointed out, among other things, that the deadline for harmonizing special laws with the GAPA is instructional. This implies that the obligation to harmonize, which is a permanent process, does not end with its expiration. It refers both to current but non-harmonized special laws and to all future laws that will regulate issues of administrative procedure in a special way.[32]

This interpretation of the provisions of the GAPA is insufficiently argued, especially the position of the Coordination Body that the deadline for harmonizing special laws with the GAPA is instructional. Namely, it is a legal deadline, which, by its very nature, is non-extendable unless the possibility of extension is provided for by the law itself, which was not the case here. That is why we believe that for justified reasons (a deadline established by the GAPA is too short), the amendment of mentioned legal provision should have been made in the regular procedure and not its arbitrary interpretation by the Coordination Body.

However, if we leave this issue aside, the Coordinating Body and the Working Group for Support have done a lot in a relatively short period to establish an efficient system for harmonizing special laws with the GAPA. Therefore, it is unclear why the bodies mentioned above stopped working on the harmonization process without any formal decision or public announcement. All of the above supports the position that renewing and strengthening their activity is necessary, especially considering the successfully applied methodology and the good initial results they have shown in their work.

[30] *Ibidem.*

[31] Notice on the application of Article 214 of the GAPA, *https://mduls.gov.rs/wp-content/uploads/Obavestenje-Koordinačnio-tela-o-primeni-cl214-ZUP.pdf*, 18. 11. 2023.

[32] *Ibidem.*

## 4. Legal Theories on the Way of Harmonizing Special Laws with the Current GAPA

In our legal theory, several authors dealt with this issue in their scientific works. Lilić indicates an essential difference between the principle of analogy (appropriate application) and the principle of subsidiarity (mandatory application). The first principle is characterized by optionality, while the second is characterized by obligation. He adds that the principle of appropriate application is very effective when it is necessary to resolve the relations between laws regulating the same legal situation. Also, the principle of appropriate application does not lead to transforming the procedure provided by a special law into a special administrative procedure, unlike the principle of subsidiarity.[33] In addition to the above, the same author also proposes adopting a so-called omnibus law, which would contain all changes in special laws to harmonize them with the GAPA.[34]

Our position is that the appropriate application of the GAPA concerning special laws is not the optimal solution. Namely, a large number of such laws, as well as the unlimited freedom of authorities in interpreting this legal standard, and therefore the provisions of the GAPA, would lead to legal uncertainty and, consequently, to violation of the constitutional principle of the unity of legal order. We also believe that passing an omnibus law does not represent a sustainable and practical solution. Namely, the number of special administrative areas is so large that the question of the length of the omnibus law should be raised, which should include all the necessary changes. Also, the parties in special administrative proceedings would have to consult not only special laws and GAPA (about its subsidiary application) but also the omnibus law in the part that regulates a particular special procedure. This would greatly complicate the exercise of their rights and would violate the principles of procedural transparency and legal certainty.

Milovanović points out that in our legal system, there is no possibility of establishing a hierarchical relationship between laws, where some laws would have stronger legal force than others due to their importance and the systemic character of the issues they regulate.[35] This issue is particularly significant in areas with as many as three different levels of regulation: special, general, and "more general" (for example, in terms of the administrative contract, it would be the Railway Law, the GAPA, and the Law on Obligations). The usual order of application in such situations is that the provisions of the special law take precedence. However, in our legal system, this is not always the case. In this sense, Milovanović cites the example of the Law on Tax Procedure and Tax Administration (LTPTA), which

[33] Stevan Lilić, "Some controversial issues of the application of the new GAPA, The vicious circle of general and special administrative procedure (and how to get out of it)", *Contemporary Administration*, No. 4-5, 2019, pp. 71-72.
[34] *Ibidem*, pp. 76-77.
[35] Dobrosav Milovanović, "Odnos opšt(ij)eg i posebn(ij)ih upravnoprocesnih zakona", *Polis*, No. 11, 2016, p. 42.

contains an unusual solution, according to which "if another law regulates an issue in the area regulated by this law differently, the provisions of this law shall be applied."[36] This means that the LTPTA gave primacy to all its provisions to special laws, not just its principles. In Milovanović's opinion, this violated the principle of *lex specialis derogat legi generali* and the constitutional provision on the unity of legal order.[37] Conversely, concerning more "general" laws, the LTPTA foresees the usual solution on their subsidiary application.[38]

Milovanović also emphasizes that the new GAPA significantly narrows the space for unjustified exceptions and deviations through special laws. In this sense, he believes it is crucial to introduce into the legislative process the obligation to explain why deviation from the GAPA is necessary. [39] We consider this attitude logical and necessary in the harmonization process.

Lončar emphasizes the bad experience of untimely harmonizing all laws with current Constitution despite an established deadline. By analogy, he indicates that only prescribing the obligation to harmonize special laws with the GAPA, without prescribing a legal sanction for exceeding the deadline, can make this vital process difficult and meaningless.[40] In this regard, he points out: "It seems that a much more effective solution could be the prescription of mandatory prior consent of the ministry responsible for state administration always when drafting all special laws that contain any provision on special administrative procedures. This would prevent the possibility of such a law entering the legislative procedure if it is not fully harmonized with the GAPA".[41]

A similar solution is foreseen in the Croatian legal system. Thus, the Conclusion of the Government of the Republic of Croatia from 2016 determined the obligation of state administration bodies to submit to the Ministry of Administration, along with the draft laws which contain provisions regulating certain issues of administrative procedure, a Statement on the compliance of the draft law, as well as a Review of compliance of the mentioned provisions with the GAPA. If these documents do not accompany the draft law, such a draft cannot be forwarded to further legislative proceedings but must be returned to the line ministry for revision.[42] In the explanation of the Conclusion, it was pointed out that the

[36] Art. 3, par. 1. of the Law on Tax Procedure and Tax Administration.

[37] D. Milovanović, p. 46.

[38] "If this law does not prescribe otherwise, the tax procedure is conducted according to the principles and in accordance with the provisions of the law regulating the general administrative procedure, and in accordance with the provisions of the law regulating inspection supervision". Art. 3 par. 2 of the Law on Tax Procedure and Tax Administration.

[39] D. Milovanović, pp. 43-44.

[40] Zoran J. Lončar, "Posebni upravni postupci", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 5, No. 4, 2016, p. 1247.

[41] *Ibidem*, pp. 1247-1248.

[42] Art. 1 - 2. of the Conclusion of the Government of the Republic of Croatia, *https://vlada.gov.hr/UserDocsImages/2016/Sjednice/2016/24%20sjednica%20Vlade/24%20-%2017.pdf*, 29. 12. 2023; Its adoption is foreseen in *The Public Administration Development Strategy for the period from 2015 to 2020*, Croatian Parliament, 2015, pp. 23-24: See also: *National plan for the development of public administration for the period from 2022 to 2027*, Ministry of Justice and Administration of the Government of the Republic of Croatia, 2022, pp. 22-23.

Ministry of Administration had previously given opinions on draft laws but that this did not reduce the number of special laws, considering that the GAPA does not contain a mechanism that would sanction unreasonable deviations from the general law and guarantee that the opinion and suggestions of the competent ministries are to be adopted. That is why the Conclusion established a mechanism for controlling compliance of the draft law with the GAPA.[43]

We consider this solution justified and desirable also in our legal system, especially considering that the harmonization process has been completely suspended over the past few years. Of course, this would solve only part of the "problem" that refers to laws that have yet to be passed, while the obligation for further harmonization with the GAPA would have to apply to already existing, non-harmonized laws.

Prica, in his works, starts by describing the difference between the appropriate and subsidiary application of the law. He points out that "appropriate application means the application of the general law in accordance with the nature of the legal relationship between the rules of legal procedure and the matter of legal regulation, while subsidiary application would imply the application of the general law in its entirety in all matters not regulated by a special law."[44] He emphasizes that the appropriate application of the GAPA implies the legal referral of the special law to the general one. In contrast, the subsidiary application of the GAPA means the legal subordination of the special law to the general one.[45] While we agree with the first statement, we believe that subsidiary application does not mean the legal subordination of one law to another. Namely, in our legal system, all laws have equal legal force, and the norming of subsidiary application of the general law only means that its provisions will be applied in all those situations that are not regulated by special laws. Therefore, it is a question of the technique of referring to the provisions of the general law for reasons of legal economy rather than of placing the general law above the special law that refers to it.

The issue of the relationship between general and special laws must also be analyzed in the context of the constitutional provision on the unity of legal order of the Republic of Serbia (Art. 4 par. 1 and Art. 194 par. 1 of the Constitution of the Republic of Serbia), which has been interpreted and confirmed in numerous decisions of the Constitutional Court.[46] Many of them recognize the importance of the principle that the deviation of a special law from a general one must be justified and necessary, as well as in accordance with basic principles provided by the general law.[47]

[43] See in detail: Explanation of the Conclusion of the Government of the Republic of Croatia, *https://vlada.gov.hr/UserDocsImages/2016/Sjednice/2016/24%20sjednica%20Vlade/24%20-%2017.pdf*, 29. 12. 2023.

[44] Miloš Prica, "Supsidijarna i shodna primena Zakona o opštem upravnom postupku", *Zbornik radova Pravnog fakulteta u Nišu,* No. 91, 2021, p. 100.

[45] *Ibidem,* p. 99.

[46] More about them in: Miloš Prica, "Jedinstvo pravnog poretka kao ustavno načelo i zakonsko uređivanje oblasti pravnog poretka – ujedno izlaganje o unutrašnjem pravnom sistemu", *Zbornik radova Pravnog fakulteta u Nišu*, Vol. 57. No. 78, 2018, pp. 103-126.

[47] See, for example, The Decision of the Constitutional Court IUz-27/2011 of 3. 10. 2013.

Finally, Prica believes that in order to harmonize special laws with the GAPA, it is necessary to amend the general law by establishing the difference between the appropriate and subsidiary application of the GAPA and strengthening its direct application in administrative matters.[48] This issue is very important, especially considering the insufficient understanding of mentioned difference both in theory and in practice. The dilemma remains, however, whether general legal acts should define such a difference or whether it is a question whose resolution should be sought through the appropriate practice of administrative bodies and courts.

## 5. Concluding Remarks

The relationship between general and special laws is one of the central issues of applying the GAPA. Chronological analysis of legal texts in this area indicates that over time, the conditions for deviating from the rules of general administrative procedure became stricter as a response to a significant increase in the number of special administrative areas and special laws regulating those areas. Despite the activities undertaken, the number of special laws continues to increase. This process is a logical consequence of human society development and regulation of social areas that did not exist before. Therefore, the strategic goal should not be to reduce the number of special laws because such an endeavor is futile but to harmonize them with the provisions of the GAPA and the protection standards that it provides.

Also, to understand the relationship between general and special laws, it is necessary to distinguish between the concepts of appropriate and subsidiary application. This question is essential but also semantic. Namely, the word appropriate in our language means suitable and proper. In this regard, the appropriate application of the general law would mean its suitable and proper application in situations corresponding to the nature of a particular area. On the other hand, the word subsidiary means something auxiliary and secondary to the existing. Therefore, the subsidiary application of the general law would mean that its provisions are applied only if a special law does not regulate an issue.

We believe that the appropriate application of the GAPA concerning special laws is not the optimal solution in our legal system. Namely, a large number of such laws, as well as unlimited freedom of authorities in interpreting this legal standard, and therefore the provisions of the GAPA, would lead to legal uncertainty and consequently to violation of the constitutional principle of the unity of legal order, which was confirmed in numerous decisions of the Constitutional Court. We believe that the appropriate application of laws should be prescribed primarily when it comes to two systemic laws (for example, when the Law on Administrative

[48] M. Prica (2021), p. 114; Miloš Prica, "Odnos Zakona o opštem upravnom postupku i drugih zakona u pravnom poretku Republike Srbije", *Zbornik radova "Izazovi pravnom sistemu"* (eds. Stanka Stjepanović, Radomir V. Lukić, Dimitrije Ćeranić), Tom I, Istočno Sarajevo, 2021, p. 173.

Disputes provides for the appropriate application of the provisions of the Law on Civil Procedure) or when the law provides for the appropriate application of its own provisions (for example, GAPA does so in respect of several institutes), but not when it comes to the relationship between general and special laws.

Furthermore, we strongly advocate for the Coordinating Body for Harmonization of Special Laws with the GAPA to resume its work. This body, which was inexplicably interrupted without any formal decision or public announcement, made significant strides in a relatively short period of time. It established an effective system for harmonizing special laws with the GAPA, not by rigid uniformity, but by explaining deviations from the provisions of the GAPA. This approach was applied to both existing laws and those in the process of being drafted.

Considering the above, we believe that future amendments to the GAPA should include the following legal solutions. In Art. 3. (General and special administrative procedure), two new paragraphs should be added to the existing:

"par. 3: The necessity of a different regulation of certain issues must be explained explicitly in the draft law.

par. 4: The Ministry in charge of state administration gives prior consent to the draft law, which is why it examines explicitly the conditions regulated by Art. 3 par. 2. of this law."

A specific by-law could elaborate on such legal solutions, similar to what was done in the Croatian legal system.

Also, in Art. 214 par. 1 of the GAPA, the deadline for harmonization that expired long ago (June 1, 2018) should be deleted. The stated paragraph should, therefore, read: "(1) Special laws regulating certain issues of administrative procedure in certain administrative areas shall be harmonized with the provisions of this law (Article 3 of this law)." Namely, harmonization is a permanent process, which the Coordinating Body also pointed out in its acts, so it should not be restricted by any deadline.

Once implemented, the aforementioned legal changes would ensure the harmonization of the current and future special laws with the GAPA. This would not only ensure complete protection of citizens' rights and legal interests but also strengthen the unity of the legal order as one of the fundamental constitutional principles.

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# PROCES USKLAĐIVANJA POSEBNIH ZAKONA SA ZAKONOM O OPŠTEM UPRAVNOM POSTUPKU

*Sažetak*

*Autor se u radu bavi odnosom Zakona o opštem upravnom postupku sa posebnim zakonima koji uređuju različite upravne oblasti i načinom njihovog usklađivanja. On naglašava da veliki broj posebnih zakona mogu da otežaju ostvarivanje prava građana, ukoliko nisu usklađeni sa opštim procesnim zakonom. Ipak, cilj ne bi trebalo da bude smanjenje broja posebnih zakona, imajući u vidu stalni društveni razvoj, već njihovo usaglašavanje sa odredbama ZUP-a i standardima zaštite koje on predviđa. U radu su predložene zakonske izmene kojima bi se obezbedilo usklađivanje kako važećih, tako i budućih posebnih zakona sa ZUP-om. Time bi se, po mišljenju autora, obezbedila ne samo potpunija zaštita prava i pravnih interesa građana, već bi se osnažilo jedinstvo pravnog poretka, kao jedno od temeljnih ustavnih načela.*

**Ključne reči:** opšti upravni postupak, posebni upravni postupci, proces usklađivanja, shodna i supsidijarna primena zakona.

Tomislav Subaranović*
Aleksandra Tomić**

# EFFECTS OF THE LAW ON ADMINISTRATIVE PROCEDURE IN MINING OF THE REPUBLIC OF SERBIA

*Abstract*

*The exploitation of the mineral wealth ensures the energy security and independence of one country, as well as the growth of all economic activities, with particular reference to non-renewable mineral resources that should be used in a strictly controlled and sustainable manner. Mineral resources are a significant factor in Serbia's overall economic and social development. According to the data from the Statistical Office of the Republic of Serbia dating back to 2016, 2017 and 2018, the participation of mining in gross domestic product was over 2%. The conclusion on the impact of the legislative framework, following the amendment of the Law on Administrative Procedure in Serbia in this area, following the amendment of the law of 2021, was that the number of objects launched in the administrative procedure fell from 2020 to 2022, but the percentage of resolved objects in relation to the number of objects in progress was increasing. Administrative procedures in the field of mining concern exploitation, geology and mining, as well as groundwater, geothermal resources and engineering geology. Amendments to the Mining and Geological Survey Act of 2021 introduced electronic tracking of objects, from requisition to issuance of a solution, as well as e-government and e-commerce, thus facilitating the process of pursuing the objects in the Ministry of Mining and Energy of the Republic of Serbia and in the application of the soup itself. Short decision-making deadlines, extensive documentation and the impossibility of changing the solution if it is more than 5 years old are cited as obstacles to the efficient operation of the state administration and the application of the Administrative Procedure Law in mining. On the basis of all the data, it can be concluded that the strategic and legislative framework of the Law on Administrative Procedure directly influences the actual processes of the application of the law in mining. The improvement of legal solutions to the soup in mining brings multiple benefits for Serbia's economic development, especially when it comes to environmental protection.*

**Keywords:** Administrative Procedure Law, Law on Mining and Geological Research, Application of APL in Mining, Effect of APL in Serbia, Improvement of Legal Solutions.

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## 1. Introduction

The Law on General Administrative Procedure, often referred to as APL (serbian: *ZUP*) in practice and in public, was adopted in early 2016 and came into effect in mid-2017. This is considered to provide more efficient and high-quality services to citizens and at the same time is an important contribution to improving legal certainty and the environment. This law, which deals with the obligation of officials to exchange data and documents from official records among themselves in any way, has also made important contributions to improving legal certainty and the economic environment.

With the adoption of this legal solution, the government of the Republic of Serbia also provided a mechanism for electronic data exchange – the "eZUP" platform. The eZUP information system is a sophisticated tool for the electronic exchange of data among all public administration bodies, a major step in the automation of administrative procedures and a significant step towards the introduction of modern electronic administration in Serbia. In this way, the state is turning to the citizens through the faster and more efficient work of the governing bodies, both at central and local level. From 2017 up until today, the eZUP connects 18 databases of eight large institutions in Serbia: The Ministry's registry books, the Ministry's database, the Tax Administration, the PIO Fund, the National Employment Service, the Central Register of Compulsory Social Security, the Republic Geodetic Institute and the Ministry of Justice.

A powerful wind of change really left an impact on the administration's work, as per a presentation by the government of the Republic of Serbia in early 2016, was the adoption of this new Law on General Administrative Procedure. The reason for changing this key law for the work of the clerks was clear: "One of the basic goals of the government of the Republic of Serbia is to establish a modern, organized, efficient and effective state. The law on the general administrative procedure is a strong mechanism of the long-awaited implementing policy of transforming public administration into a service to citizens and the economy."

Kopaonian School of Natural Law, within the section "Administrative Legal Protection of freedom" which was organized at the Round Table dedicated to future reforms of the administrative judiciary. This platform has presented itself as a place where for years there has been an opportunity to present the results to the expert public. Work and problems related to the work of the Administrative Judiciary, as well as proposing in a reasoned and open discussion solutions that can contribute to the improvement of the overall model of the Administrative Judiciary or to the resolution of particular issues for the benefit of all citizens, legal entities and public interests, based on expert discussions, it has been concluded that the Administrative Judiciary is of unquestionable importance for the protection of the rights of citizens and legal entities. From the establishment of the specialized Administrative Court until recently, however, there was not enough

awareness of this in all relevant segments of the state. This is reflected, among other things, in the insufficient number of elected judges, given the numerous and varied cases in the various administrative areas.

The Strategy for the Development of the Judiciary of the Government of the Republic of Serbia, adopted in 2020, paid particular attention to the reform of the administrative judiciary. The strategy in this section foresees the development of a functional analysis that would consider the current regulations and practices and make proposals for future regulation. Following this, a working group would be established to draft amendments and supplements to existing laws and regulations governing the organization and functioning of the administrative court, including key procedural laws (Law on Administrative Disputes in Synergy with the Law on General Administrative Procedure) and laws governing the status of judges. In future reforms, the consultation process should start promptly and involve all relevant experts with theoretical and practical experience in this area, as well as all interested parties. Simultaneously with this broad platform of consultation, it is necessary to examine comparative experiences to ensure full application of the proposed solutions within the framework of the national legal system and practice in the Republic of Serbia.

In this paper, the issue that is being raised for constructive proposals in future administrative reform is the application of a mining soup. In practice, it has been observed, based on process management statistics, that there are many obstacles to limiting factors that directly affect work. Some obstacles to the efficient operation of the state administration and the application of the soup in mining, are short deadlines in decision making, extensive documentation and the impossibility of changing the solution if it is more than 5 years old.

## 2. Administrative Legislation and the Judiciary

The Law on General Administrative Procedure, often referred to as APL in practice and in the public domain, was adopted on 29 February 2016 and came into effect on 9 March 2016 and became fully effective on 1 June 2017.

A new concept of administrative procedure has been introduced in the rationale of the law itself, which has enabled:

- simplifying and speeding up administrative procedures,
- cost reduction for all participants in the proceedings,
- Modernization of the process mechanisms,
- Protection of the public and individual interests of citizens and legal persons in administrative matters.

The state of the administrative judiciary is often referred to by judges who daily encounter the organizational model established in 2010, with a Unified Special Jurisdiction Court based in Belgrade having three divisions (Nis, Kragujevac

and Novi Sad). Because of the exceptional importance of the administrative judiciary and the key assumptions for its quality work, reform, as a process in this area, is not new. A public discussion on the draft Administrative Disputes Act highlighted possible problems that arise with the quality of decisions and the efficiency of the Administrative Court's decisions. The potential for an administrative dispute was then recognized. To comply with European legislation and the European Charter of Human Rights, there was a proposal to eliminate the option of judicial protection against administrative acts and to increase the potential for more frequent organization of oral hearings in administrative disputes. A suggestion was made that the suspensive effect of the lawsuit should no longer be determined by the administration, but by the Administrative Court. These circumstances, combined with the relatively small number of administrative judges foreseen for the establishment phase of this specialized court, indicated the risk of slowing down the administrative dispute and, consequently not adhering to the rules of the trial within a reasonable time. This also posed the potential for a reduction in the quality of decisions due to overloaded judges and a lack of space for their specialization. As early as 2013, all these assumptions were confirmed.

Since then, the Administrative Court has thoroughly identified the problems hindering its more efficient functioning.

Over the past ten years, the court has made its findings and conclusions transparent to the public through numerous reports and proposals, addressing them to relevant institutions.. Regarding the issue, the following has first been confirmed:

- An insufficient number of judges is foreseen at the time of its establishment, particularly considering the significant number of inherited cases and

- There is a large influx of new cases that increases each year due to the extension of the jurisdiction of the Administrative Court. In 2010 alone, the Administrative Court inherited 18,000 cases from the Supreme Court and 30 district courts, and received another 16,000 cases from 35 judges and the president of the Administrative Court. The total number of cases received (over 34,000) suggests that the Administrative Court should have started its work in 2010 with at least 90 judges. There are also a large number of urgent and especially urgent items, as well as a large complexity and variety of items by administrative area. The jurisdiction over the protection of electoral law, which is most visible during elections, requires a lot of time and attention, which is why this material is particularly delicate, has only prolonged the development of applications in other areas. The work of the Administrative Court since 2015 has also burdened the payment of large fees in connection with the 91 decisions on requests for violation of the right to trial within a reasonable time. There have been many reasons why there has been a significant outflow of judges since the establishment of the Administrative Court. The act of systematization envisioned the existence of 55 judges, although the number was never filled. Since two years ago, 52 judges have been performing their functions, and the need is much greater.

The Administrative Court should work with at least 120 to 150 judges, bearing in mind the following:

– The number of inherited and acquired objects, e.g., which in 2021 reached its maximum number since it is up to 16. 12. 2021 in that year alone received 34,605 new items;

– In terms of the extension of jurisdiction between 2014 and 2018, 88 new laws have been passed regulating the entirely new competences of the Administrative Court;

– The number of urgent and particularly urgent items represents 35-40% of the total number of items. If only these items were to be tried, the judges of the Administrative Court would not be able to stay up-to-date and rule on these items, which the law, time limits, or their nature designates as urgent or particularly urgent;

– Large differences exist between subjects (e.g., social monetary compensation, protection of competition, public procurement, and, of course, the protection of electoral law), and judges cannot specialize due to their insufficient number;

– During the implementation of the basis of judicial practice at the Supreme Court of Cassation, it was necessary to compile a record of all types of disputes, including their classification. The Administrative Court applies not only more than 350 substantive laws but also 2,700 grounds for dispute, in addition to procedural laws;

- In terms of elections, for example, in 2020, the Administrative Court handled cases involving a large number of elections at the republican and provincial levels and conducted a significant number of local elections;

– All the mentioned problems are exacerbated by the conditions created by the 19-year-olds. Given all the indicators mentioned above, it is evident that there is still a shortage of judges, with each handling 120 cases per month. Without the reform, this situation will lead to a reduction in the efficiency and effectiveness of the Administrative Court.

Many judges and prominent lawyers in this area believe that debates and round tables often fail to meet their objectives. The Administrative Court does not establish the facts, and the conclusions typically highlight the consequences of the lack of specialization and time constraints due to the overcrowding of judges in numerous cases. To address this, it is proposed that prerequisites for specialization be provided, allowing more time for subjects, especially those that do not require urgent procedures. The case law of the Administrative Court, in terms of decision availability, indicates that the site is not reviewed, and therefore court decisions are not accessible. To ensure legal certainty and the predictability of court decisions, the profession has proposed increasing the number of judges and IT experts. To ease bottlenecks in the work of the Administrative Court, projects have been commissioned under this plan, where retired judges have filled in the basis of court

practice. As a result, over 11,000 decisions of the Administrative Court have been entered into the basis of court practice in the last three years. In order to ensure maximum competence in the selection of decisions to be put on the base, retired judges who were just members of the judicial practice department were engaged in the selection of court decisions. The Administrative Court hereby wishes to increase the number of court decisions on the base. Case law allows parties to anticipate the outcome of a dispute before filing a lawsuit, and a dispute may last for more than two years. The increase in the number of judges and the ranking of court decisions by administrative area are expected to yield results in better application of the law.

## 3. The Act on Administrative Procedure in Mining

### *3.1. History of Legal Decisions on Mining and Geological Exploration*

The change in the treatment of mining and geological research from the internal affairs of sovereign states, whose basic importance was defense-security, to market activities in Serbia began with the enactment of the 2011 Law on Mining and Geological Research, which replaced the Law on Mining and the Law on Geological Research in 1995. Four years later, in 2015, a new Law on Mining and Geological Exploration was passed. This law was amended in 2018 and 2021, making it the 30th amendment (hereafter: The law). This was followed by a series of bylaws based on this law and other regulations necessary for the proper functioning of the business. The latest changes to the law aim to speed up investment in mining, rationalize and expedite administrative procedures, and enhance environmental protection. New obligations are foreseen for investors. In the event of a negative impact on water springs, they are required to suspend investigation work and inform the competent authority and local self-government. Additionally, if the ground is found, and the groundwater is not immediately used, they must preserve the well. After completion or suspension of geological surveys in the area, measures of protection must be taken to eliminate risks. A new provision of the law is also that the costs of remediating and rehabilitating degraded land are to be covered by the insolvency estate if a company holding a mining permit goes bankrupt. The strategy for managing the mineral and other geological resources of the Republic of Serbia until 2030 was completed in 2012, but was never adopted. The Mining and Geological Research Act regulates the performance of activities from a technical point of view (obtaining consent and approvals, evidentiary documents and other matters of importance for the performance of the activities) and all the issues it deals with have been resolved through a bipartisan procedure between the miner and the competent authority, which is strictly a ministerial ministry and, in the territory of AP Vojvodina, the departmental provincial secretariat. The most important issue for the public is the supervision of the miner in terms of environmental protection, but this issue has been resolved in the same, bipartisan way

– the miner is the only one in control of his own implementation of environmental protection measures of the competent authority also reports on this in an annual report, while the competent authority has the right to inspect the miner in each area of work, which means applying environmental protection measures. The only exceptions are incidents and accidents, where safety regulations and the involvement of other state authorities in dealing with their consequences are applied. The same rules as for mining apply to all other activities. While the performance of mining and geological activities is the same as any activity, in their legal position they differ significantly from market activities. The law stipulates that geological exploration and exploitation of mineral resources is in the public interest (Article 4, item 3). In addition, the Law on Public Enterprises prescribes that co-operation and energy are "activities of general interest" (Article 2), along with a number of other activities (nickel surveys in Serbia from 2011 to 2015). The passage of a new law in 2015 eliminated any municipal jurisdiction over geological exploration and mining.

### *3.2. Introduction of E-Mining*

In April 2021, before the opening of the chapters covering energy, trans-energy networks, transport and environmental protection, in the form of a cluster comprising four chapters in Serbia's negotiations with the EU, one of the packages of "green laws", by aligning with digitalisation, was amended.

If we take all the main reasons and objectives of this law then we achieve the following:

- Protection of security investments;
- providing added value to mining projects: Use of ore in Serbian industry;
- Development of mining activities with responsible behavior towards the ecological and social dimension of these activities - highest standard of protection of human health and the environment.

The most significant changes to E-Mining include the following:

- Electronic submission of all requests and exchange of accompanying documentation in accordance with the law governing electronic commerce. The regulation will define the electronic business of mining and geology with precision;
- Applicants, but also the state authority, will be provided with efficient, transparent and safe treatment.

For the area of environmental protection, the Republic of Serbia has climate neutral development targets until 2050. The current legal solution defines a provision relating to geological research in order to separate favorable geological formations and structures, as well as depleted deposits of mineral resources for CO2 storage. The above-mentioned provision is more precisely defined in the amendments and amendments to the law, in the sense that in terms of the conditions and

way of controlling and monitoring the concentration of gases with the greenhouse effect in the atmosphere, regulations from the field of environmental protection are applied, and in terms of the conditions and way of building the CO2 storage facility, regulations from the field of construction of buildings are applied.

According to the current law, geology and mining licenses are required to be issued in the field of geology and mining. From the entry into force of the 2015 law until 2021, there was no regulation regulating the procedure for issuing the license itself, and therefore the same did not exist, which brought into question the quality of the projects, the actual execution of the works, construction, etc., in the previous period. According to the plan, the establishment of the Chamber of Mines and Geology, which will have the authority to issue a license and the competence of the Chamber will be defined by a special regulation.

The Commission for the Verification of Resources and Reserves of Mineral Resources was provided for by law, but the establishment of a working group for the verification of resources and reserves of mineral raw materials, which has not had a pavilion in its previous work, would define more closely the mode of operation, the time of the sessions, the selection of the members of the working group and the revised ones and will be clearly defined by the rules, as well as the professional competences of the members who can participate.

The competencies of the Geological Survey of Serbia have been extended, creating a precondition for the state to support the development of the Geological Survey of Serbia in a greater capacity and in a responsible manner, while at the same time providing the necessary information, bases and others for the realization of all those strategic goals in the field of mining.

The smallest exploration area is defined, in addition to the existing largest area, it is defined as the minimum area on which geological surveys can be carried out. The aim is to reduce the possibility of applying for a research area that is not technically or economically justified.

Shortening the duration of investigative rights through investigation deadlines, which will be reduced from a maximum of eight years (3 + 3 + 2) to five years (3 + 2).

Long-term occupancy by persons who have not shown serious intent to invest in geological exploration and exploitation of mineral resources and geological resources during a certain period is prevented.

Security for the investor and for the state is reflected through:

- A bank guarantee;

The applicant for the research also delivers a bank guarantee for the good performance of the work within 30 days of receiving approval for the research.

- Increased powers of inspection;

The geological and mining inspector has the authority to file a criminal complaint, a report of a commercial offence and a request for the initiation of a criminal proceeding with the competent judicial authority, etc.

- Prevention of exploitation without authorisation;

A procedure has been defined for calculating the value of mineral raw materials that are exploited without approval.

Collection of building materials for buildings of special importance.

In implementing projects for the construction and reconstruction of line infrastructure facilities of particular importance to the Republic of Serbia, the authority responsible for the construction of these facilities informs the ministry of the taking of materials for construction, without the need to obtain permission for research and exploitation. The implementation of existing procedures for the exploration and exploitation of construction minerals for these purposes would significantly slow down investments and the realisation of projects.

Remediation and rehabilitation of degraded land.

In the event that the holder of the mining permit enters the process of liquidation or bankruptcy, the funds for the rehabilitation of the degraded land and the costs of remediation are covered by the bankruptcy and liquidation masses. Practice has shown that when an authorisation holder enters into liquidation or bankruptcy proceedings, the necessary funds are not provided for the rehabilitation of degraded land. The amount of these funds was determined by a mining project. With this change, the ministry has the opportunity to provide the resources necessary to protect the environment.

The Mining and Geological Research Amendment Act came into force on 30 April 2021. The law oversees the classification of mineral resources and reserves in accordance with the current version of the Pan-European Code for Reporting Mineral Resources and Reserves Research Results.

Amendments to the Law on Mining and Geological Exploration were adopted at a session held on 20 April 2021, where the National Assembly of the Republic of Serbia adopted the Law on Amendments and Additions to the Law on Mining and Geological Research ("the Law") as part of the reform of the mining sector A "green package" of energy transition laws. Until then, the Law on Mining and Geological Exploration had been in force ("Sl glasnik RS", no. 101 / 2015 and 95 / 2018 – other law) from 2015.

## 4. Effects of the Law on Administrative Procedure in Mining in the Republic of Serbia

Impact of the legislative framework in terms of the effects of the Law on Administrative Procedure in Serbia in this area, following the amendment and amendment of the law of 2021, we found that the number of objects launched in the administrative procedure fell from 2020 to 2022, but the percentage of resolved objects in relation to the number of objects in progress, increased. Administrative procedures in the field of mining concern exploitation, geology, geology and mining, as well as groundwater, geothermal resources and engineering geology.

Amendments to the Mining and Geological Survey Act of 2021 introduced electronic tracking of objects, from requisition to issuance of a solution, as well as e-government and e-commerce, thus facilitating the process of pursuing the objects in the Ministry of Mining and Energy of the Republic of Serbia and in the application of the soup itself.

We can look at the number of objects, tabular from this area, from the total number that has been solved. Based on a table from the Ministry of Mines and Energy quarterly report.

To the competent Committee of the Serbian Parliament, we can draw many conclusions that would be useful for drafting new legislative proposals as a platform for further reform of administrative law.

**Table 1.** APL subject review for the area by sector over a period of 3 years

**Exploitation**

| Year | Total subjects | Total solved |
|---|---|---|
| 2020 | 106 | 100 |
| 2021 | 95 | 52 |
| 2022 | 88 | 46 |

**Geology**

| Year | Total subjects | Total solved |
|---|---|---|
| 2020 | 342 | 319 |
| 2021 | 405 | 340 |
| 2022 | 153 | 118 |

**Underground water, geothermal resources and engineering geology**

| Year | Total subjects | Total solved |
|---|---|---|
| 2020 | 291 | 287 |
| 2021 | 180 | 174 |
| 2022 | 154 | 125 |

**Geology and mining sektor**

| Year | Total subjects | Total solved |
|---|---|---|
| 2020 | 739 | 706 |
| 2021 | 680 | 566 |
| 2022 | 395 | 289 |

Obstacles to the efficient operation of the state administration and the application of soup in the mining industry are said to be in line with the obstacles cited by the administrative court. These are the following:

- Short deadlines in decision-making,
- Extensive documentation and
- The impossibility of changing the solution if it is more than five years old.

When we talk about inspection supervision, which is closely linked to the ZUP, whose content and concept are established by law, then the work of the state administration, which is carried out by the state administration, the autonomous province authorities and the local self-government units, is strictly regulated, with the aim of ensuring the legality and safety of operations by preventive action or by imposing measures. As a entrusted work of the state administration, it is also carried out by the authorities of the autonomous provinces and the authorities of the local self-government units. The Ministry of Mines and Energy implements by-laws (8 regulations and 31 regulations) in its work. If in this chain of command, it takes a long time to process the Administrative Court, then there is a slowing down and stopping of the timely decision making, as well as the whole process of investing in projects in this area. With these facts, we can understand the importance of administrative procedures.

The exploitation of the mineral wealth ensures the energy security and independence of one country, as well as the growth of all economic activities, with particular reference to non-renewable mineral resources, which should be used in a strictly controlled and sustainable manner. Mineral resources are a significant factor in Serbia's overall economic and social development. According to data from the Statistical Office of the Republic of Serbia dating back to 2016, 2017 and 2018, the participation of mining in gross domestic product was over 2%. The EBRD did a Mining Sector Strategy from 2024-2028 and based on detailed analyses of the world situation, for each country individually, presented strategic challenges in the mining sector over the last five years, citing the following: Price and cost pressures, lack of research, climate change, increasing resource scarcity, community expectations, labour dynamics, and more policies. After detailed analysis, the priorities for the mining strategy 2024-2028 were defined as follows:

- Selectively support the research and production (primary and secondary) of metals and minerals relevant for the transition to green energy, the digital economy and wider economic development.
- support the decarbonisation of mining activities by promoting cleaner energy sources, innovation, digitisation, skills development and resource efficiency.
- support mining companies to improve their practices in environmental protection, society, inclusion and management.
- To assist governments in improving regulations and the business environment, in order to facilitate the implementation of best practices in the sector.

## 5. Conclusion

On the basis of all the data, it can be concluded that the strategic and legislative framework of the Law on Administrative Procedure directly influences the actual processes of the application of the law in mining. The improvement of legal solutions to the soup in mining brings multiple benefits for Serbia's economic development, especially when it comes to environmental protection.

The conclusion on the impact of the legislative framework on the effects of the Law on Administrative Procedure in Serbia in this area, following the amendment and amendment of the law of 2021, was that the number of objects launched in the administrative procedure fell from 2020 to 2022, but the percentage of resolved objects in relation to the number of objects in progress was increasing. Administrative procedures in the field of mining concern exploitation, geology, geology and mining, as well as groundwater, geothermal resources and engineering geology. Amendments to the Mining and Geological Survey Act of 2021 introduced electronic tracking of objects, from requisition to issuance of a solution, as well as e-government and e-commerce, thus facilitating the process of pursuing the objects in the Ministry of Mining and Energy of the Republic of Serbia and in the application of the soup itself. Short decision-making deadlines, extensive documentation and the impossibility of changing the solution if it is more than 5 years old are cited as obstacles to the efficient operation of the state administration and the application of soup in mining.

To set the priorities for the mining sector's future strategy at the global level, Serbia must follow the trends of this development, and one of the most important segments of the sector's development is the improvement of regulations and the business environment, in order to implement best practices in this sector. On the basis of all of the above, there is a need for continuous improvement of regulations in this area, as well as improvement of human capacities in the Administrative Court by sector, as well as the opening of a wider debate of all relevant subjects in society on this subject.

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# INCOMPATIBILITY OF THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE AND THE LAW GOVERNING THE SPECIAL ADMINISTRATIVE PROCEDURE CONDUCTED BEFORE THE CADASTRE

*Abstract*

*The Law on General Administrative Procedure (LGAP) prescribes the possibility of regulating certain issues of administrative procedure, if necessary, by special laws, in compliance with certain conditions. In relation to the law regulating the special administrative procedure conducted before the cadastre, adopted two years after LGAP's entry into force, it is to be expected that it meets the prescribed conditions. However, inconsistencies were observed in the interpretation of the provisions of the special law, , reflected in a different interpretation and prescription of the principle of legality, as well as inconsistencies in the provisions related to the validity period of the special law and the prescription of the retroactive effect of the special law for certain cases. The author's intention is to point out examples of non-compliance of a particular law with LGAP, to propose certain changes to the provisions of LGAP, which could influence the achievement of greater unity of the legal order and legal certainty in the future.*

**Keywords:** Administrative Procedure, Principles of Administrative Procedure, Cadastre, Validity of the Law, Supervision over the Implementation of the Law.

## 1. Introduction

The possibility of prescribing special administrative procedures in addition to the general one is not new in our law, and the relationship between these procedures has always been based on certain rules.[1] The legislator set themself the framework which the future legislator must navigate when prescribing special

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[1] Zoran Lončar, "Posebni upravni postupci", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 50, No. 4, 2016, p. 1234.

rules for special procedures,[2] and since all laws represent a legal order that must be unique, there is no possibility for certain laws to have greater legal force than other laws that govern related matters.[3]

The Law on General Administrative Procedure (hereinafter referred to as LGAP) was adopted in 2016, and other provisions of the Law are applied too as of June 1, 2017,[4] except for certain legal norms that began to be applied 90 days after the law's entry into force.[5] The law regulating the special procedure conducted before the cadastre[6] entered into legal force a year and a half after the beginning of implementation of LGAP, which should represent an optimal period for regulating a special administrative procedure and highlighting its specificities, while harmonizing with the modernization process and digitalization of state administration in our country. In addition, the enactment of the aforementioned law was preceded by almost 30 years of experience in keeping a single record of real estate and the actions of administrative authorities in that area, as well as a constant and continuous increase in procedural provisions in the regulations that regulated the field of single records of the real estate cadastre and rights thereto since its establishment.[7]

Accordingly, the necessity of passing a special law regulating the administrative procedure conducted before the cadastre is evident and not disputed. It is, however, a disputed fact that, in addition to the conditions prescribed by LGAP, which must be complied with when regulating all the special administrative procedures, and in addition to the establishment of a special coordinating body of the Government of the Republic of Serbia whose competence was the assessment of the conformity of special laws and LGAP, a law was passed whose norms are not fully harmonized with LGAP. Examples of such deviations, in addition to the fact that they cannot be brought under the specific nature of solving administrative matters in a specific administrative area, significantly affect the quality of exercising the rights of citizens and disrupt the unity of the legal order.

[2] Darko Golić, David Matić, "On certain specific features of tax procedure as a type of administrative procedure", *Pravo – teorija i praksa*, Vol. 39, No. 3, 2022, p. 3.

[3] Dobrosav Milovanović, "Odnos opšt(ij)eg i posebni(ji)h upravnoprocesnih zakona", *Polis – časopis za javnu politiku*, No. 11, 2016, p. 42.

[4] More about the concepts of publication of the law, its entry into legal force and determining the time of application of some or all provisions of the law in: Momčilo Grubač, "Jedno pogrešno shvatanje ustavnih odredaba o stupanju zakona na snagu", *Glasnik advokatske komore Vojvodine*, Vol. 81, No. 5, 2009, p. 162.

[5] The Law on General Administrative Procedure, *Official Gazette of RS*, No. 18/16, 95/18 – authentic interpretation, 2/23 – decision of Constitutional Court, Art. 217.

[6] Law on The Procedure for Registration in the Cadastre of Real Estate and Utilities, *Official Gazette of RS*, No. 41/18, 95/18, 31/19, and 15/20.

[7] Milica Torbica, "Obaveštavanje i dostavljanje u upravnom postupku u Republici Srbiji koji se vodi povodom upisa u katastar nepokretnosti i vodova," *Pravna riječ-časopis za pravnu teoriju i praksu*, No. 64, 2021, pp. 185-187.

## 2. Examples of Incompatibility of the Law Governing the Special Administrative Procedure Conducted Before the Cadastre With the Law on General Administrative Proceduree

The procedural rules of the procedure conducted before the cadastre, as a unique record of immovable properties and the rights to them, have found their place in the laws that regulated this area, since the time of replacement of the land register with this register. Therefore, the need for special regulation of certain, specific, actions of administrative bodies in this area has always existed, but until the adoption of the Law on the Special Procedure for Registration in the Cadastre of Real Estate and Utilities (hereinafter LSPRCREU),[8] the procedural provisions of this special administrative procedure were not covered by special procedural law.[9]

The rules of the special administrative procedure conducted before the cadastre are very complex, coordinated with the strategic goals of development of the administration, its modernization and digitalization. Digitization represents one of the more important tendencies in the development of public administration, the advantages of which consist in increasing efficiency, greater accessibility of its services to users, reducing costs and publicity of its work, all of which aims to revive the concept of "good administration," that is, public administration as a service to citizens.[10] The procedure before the cadastre is arranged so that it meets the requirements for efficiency, it is simplified and adapted to full digitalization. The existence of the principle of registration, officiality, reliance on cadastral data and the principle of definiteness underline the legislator's goal to achieve a high level of legal security, up-to-dateness of the register and enable unhindered legal transactions in real estate. Although the application of this law has an unambiguously affirmative effect on the entire economy of our country, it is necessary to point out certain inconsistencies with LGAP as the law by which the area of action of administrative bodies is primarily regulated.

### *2.1. The Principle of Legality*

The entire legal system rests on principles that indicate its real properties as well as desirable goals and values.[11] A legal principle should be compatible with

[8] Law on the Special Procedure for Registration in the Cadastre of Real Estate and Utilities, *Official Gazette of RS,* No. 41/18, 95/18, 31/19, and 15/20.

[9] In addition to the existence of a special law that regulates the procedure conducted before the cadastre, the actions of administrative bodies in certain administrative matters are partially prescribed by the provisions of laws that regulate some other administrative area that has a certain connection with cadastre records. Milica Torbica, "Specifičnosti upravnog postupka pretvaranja prava korišćenja u pravo svojine na građevinskom zemljištu", *Sudski postupak – pravda i pravičnost*, *Zbornik radova 35. susreta kopaoničke škole prirodnog prava Slobodan Perović* (ed. Jelena Perović Vujačić) , No. 1, Belgrade, 2022.

[10] Darko Golić, "E–uprava i matične knjige – novine u Zakonu o matičnim knjigama", *Kultura polisa*, Vol. 16, No. 39, 2019, p. 203.

[11] Generally speaking, this implies that lower legal norms must be formally (lower legal acts must be adopted by the competent authority, according to a predetermined procedure and form) and materially (content) connected

its own goal, which is to enable the fullest realization of the right, whereby the creator of the legal principle must take into account a number of circumstances and causal relationships on which the realization of that goal depends.[12] Certainly, tradition and previous experiences play a significant role, but it should always be borne in mind that the conditions in which legal principles achieve their goal change with the rapid development of society, so it is necessary to adapt them to social reality. In addition, legal principles are necessary to direct the development of social reality in a certain direction in order to achieve the goal of law.

Principles have a constitutive role in every legal institution, as well as in administrative proceedings. In domestic practice, traditionally, the basic principles on which all the rules of general and special administrative procedure rest are stated at the beginning of the law regulating that procedure.[13] Thus, the principle of legality is specifically provided for in LGAP and in LSPRCREU, but when interpreting the content and meaning of these two principles, certain inconsistencies are observed.

The principle of legality stipulated in LGAP prescribes that the authority acts on the grounds of the law, other regulations and general acts, as well as that when making a decision based on a free assessment, it does so within the limits of the authority given by law and in accordance with the purpose for which the authority was given.[14] Therefore, this principle emphasizes that the administrative body in its actions performs its activities on the grounds of general legal regulations (laws and other regulations), which represents to some extent a repetition and elaboration of the constitutional provision that regulates the legality of the work of the administration.[15]

The principle of legality stipulated in LSPRCREU implies that the Republic Geodetic Authority (hereinafter referred to as RGA), deciding on registration in the cadastre, checks whether the conditions for registration prescribed by this law and other regulations are met, unless the change is made on the basis of a court ruling, notarial or other document, in which case it does not check the legality of that change, given that the legality of the change is taken into account in the procedure of adoption, drafting, or confirmation (solemnization) of that document.[16] The principle of legality formulated in this way is exclusively aimed at keeping the register, as a record, and a similar solution existed in the law regulating the land registry procedure real estate registration system.[17] Therefore, with this legal solution,

and in accordance with higher legal norms, as well as that the content of the norms of the same rank should be non-contradictory. Gordana Vukadinović, "Načela pravnog sistema", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 48, No. 4, 2014, p. 25.

[12] Srđan Đorđević, Milica Torbica, Milica Župljanić, "Izvedenost pravnog načela", *Pravo teorija i praksa-časopis Saveza udruženja pravnika Vojvodine,* No. 10/12, 2012, p. 87.

[13] Dragan Milkov, Ratko Radošević, "Načelo predvidivosti u upravnom postupku", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 54, No. 1, 2020, p. 2.

[14] LGAP, Art. 5, paras. 1 and 2.

[15] Constitution, Art. 198, para. 1.

[16] LSPRCREU, Art. 3, para. 1, p. 6.

[17] Law on land registers of the Kingdom of Yugoslavia, *Official Gazette of the Kingdom of Yugoslavia,* No. 146/30 and 281/31, Art. 104, para. 2.

LSPRCREU in fact returns to the traditional rules of land registry law, with the fact that this kind of obligation in the land registry system of immovable property records was incorporated into the rules of procedure during registration and was not specifically prescribed as a principle. In LSPRCREU, despite the fact that this obligation of the cadastre is prescribed, similarly as in the earlier records on real estate (land registers), within the provisions on the actions of the cadastre when deciding on registration,[18] it is also singled out as a principle of keeping that register.[19]

However, the question arises of the justification of its separation as a principle, on the one hand, and its naming as a principle of legality, on the other. The justification of the separation as a principle is questionable precisely for the reason that its content, as we have already mentioned, is already woven, very clearly and precisely, into the provisions concerning the decision on registration in the cadastre. On the other hand, since it is exclusively a principle whose meaning is to emphasize the obligation of the authority to examine ex officio the fulfillment of the conditions prescribed by law for registration in the cadastre with the mentioned limitation regarding public documents, whose meaning is much narrower than the meaning of the principle of legality in general, it would be more appropriate to call it the principle of formality, if it must already exist. That would be logical, since this principle only emphasizes the certainty that the registration will be carried out if the other conditions stipulated by the law are met, and in any case if it is a public document.

### *2.2. Provisions Concerning the Validity of the Law*

In the part of transitional and executive provisions of LSPRCREU, the validity of the law, both LSSC and LSPRCREU, is prescribed in a rather complicated way.[20] The criteria that were used on that occasion are: the time of the request submitted by the parties, the time of making the decisions based on which the registration is made and the type of authority that made the decision. In relation to the procedure conducted for the registration of documents brought or solemnized by notaries public, the retroactive validity of LSPRCREU is prescribed,[21] which is not logical, since the interpretation of the previously valid law and LSPRCREU cannot see justified reasons for such a thing.

The norms of LSPRCREU, which define different treatment in relation to all public documents, including documents issued by notaries public, concern

[18] LSPRCREU, Art. 32, paras. 2 and 3, Art. 33, para. 7.

[19] One of the reasons for such a legal solution is the evident permanent search for adequate rules through numerous amendments and supplements to the law that previously regulated the registration procedure in the cadastre, embodied by the approximation or, on the other hand, distancing from the rules of land registry law. Radenka Cvetić, "Načela katastra nepokretnosti", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 43, No. 1, 2009, p. 127.

[20] LSPRCREU, Art. 57.

[21] LSPRCREU, Art. 57, para. 4.

the initiation and conduct of the procedure ex officio and the rights and obligations of the cadastre and the parties in that procedure. At the same time, special emphasis is placed on the previously mentioned limitation of the cadastre in checking the application of substantive law for the adoption and solemnization of such documents. Consequently, since the application of LSPRCREU is also prescribed to procedures initiated at the request of the parties for the registration of notarial documents, which have been adopted, certified or solemnized since the entry into force of the Law on Notaries Public in 2011,[22] it is objectively not possible to apply the norms on initiating and conducting proceedings ex officio to such procedures. The effect of the LSPRCREU in such cases has the greatest impact on the position of the party in the proceedings, which is certainly worse since LSPRCREU, unlike LSSC, completely excludes the possibility of informing the party about possible deficiencies in terms of the submitted request and attached documents.[23]

Also, LSPRCREU stipulates that, when registering documents that have not been certified by notaries public, regardless of the time of submission of the request for registration, a note is entered ex officio in the real estate cadastre highlighting this fact.[24] In practice, this implies that the record that the registration was made on the basis of a contract certified before 2014, i.e. a contract certified by the competent court at the time, will be registered in the encumbrances of the immovable property that is the subject of registration, even when the request for registration was submitted before the entry into force of LSPRCREU. Although it is foreseen that such an entry is deleted at the request of the party, and based on confirmation by the court whose signatures on the specific contract have been certified, i.e. ex officio after the expiration of three years from the entry,[25] such the legal solution certainly put the party in a worse position since it submitted the application for registration at a time when such a norm was not in legal force.

The entry of such a note in real estate encumbrances certainly represents a limitation in real rights for the right holder, which was imposed on them by a law that was not in force at the time the request was submitted, and with the prescribed retroactive effect, it is applied at the time of the first-instance decision based on the submitted request. Accordingly, in this case, the principle of assisting the party provided for by LGAP[26] was deviated from, which stipulates that the authority, ex officio, ensures that the ignorance and indolence of the party

[22] Law on Public Notaries, *Official Gazette of RS,* No. 31/11.

[23] The Law on State Survey and Cadastre, provision of Art. 126. para. 4 stipulates that the Service is not obliged to inform the party about deficiencies in regard to the submitted request and attached documents, but will reject the request by decision. This legal solution, i.e. the phrase "not obliged," still leaves the possibility, i.e. it is not prohibited, for the cadastre to inform the party about the need to complete the request and submit the missing documents in order to meet the party's request. LSPRCREU does not provide at all the possibility of informing the party about the need to arrange the request and supplement the missing documentation, but the request is rejected due to non-fulfillment of formal conditions, which is provided for in the provision of Art. 33 para. 3.

[24] LSPRCREU, Article 57, paragraph 5

[25] LSPRCREU, Article 15, paragraph 1. item 19, paragraphs 3 I 8 I Article 35, paragraph 3

[26] LGAP, Article 8

and other participants in the proceedings are not to the detriment of their rights, that, when the authority, with regard to the factual situation, learns or assesses that the party and other participants in the procedure have a basis for exercising some right or legal interest, warns them of this, as well as that, if during the procedure there is a change in regulations that are important for the procedure in an administrative matter, the authority shall inform the party thereof. Applied to a specific case, this principle would imply the necessity of informing the applicant in advance about the amendment of the law, which should have been foreseen as an activity of the competent Real Estate Cadastre Service as a first-instance body by the law regulating a special administrative procedure.

### *2.3. Supervision Over the Implementation of the Law Regulating the Special Administrative Procedure of Registration in the Cadastre of Real Estate and Utilitiess*

The RGA is a special organization formed within the administrative body, the Ministry of Construction, Transportation and Infrastructure.[27] A special organization in Serbian law[28] represents an integral part of the state apparatus established primarily for the performance of specific professional tasks. Its administrative activity is not its main activity. Accordingly, administrative activity is not the main activity of the RGA either, it was primarily established to perform a very large number of professional tasks in the fields of: geodesy, state survey, address register, compaction, geomatnetism, and aeronomy. Administrative tasks in the RGA are carried out, among others, during the establishment, renewal and maintenance of the real estate cadastre, as well as the establishment and maintenance of the land cadastre, by solving administrative matters and passing administrative acts by the first instance bodies: the Real Estate Cadastre Service and the Cadastre Department lines, as well as of the second-level body, the RGA.[29] Therefore, the tasks of registration in the cadastre, both of immovable property and rights to immovable property, represent administrative tasks that are carried out within the competence of the RGA.

According to the legal position of the RGA, the supervision of its work is carried out by the Ministry of Construction, Transportation and Infrastructure,[30] while the inspection supervision of implementation of the regulations regulating the general administrative procedure and special administrative procedures is carried out by the Administrative Inspectorate.[31] In both cases, it is about internal

[27] Law on Ministries, *Official Gazette of RS,* No. 128/20 and 116/22, Art. 33.

[28] Dragan Milkov, *Upravno pravo I*, Pravni fakultet u Novom Sadu, Centar za izdavačku delatnost, Novi Sad, 2020, p. 81.

[29] Milica Torbica, "Uticaj načela oficijelnosti na pravni položaj stranke u upravnom postupku upisa u katastar nepokretnosti u Republici Srbiji", *Pravo između stvaranja i tumačenja* (eds. Dimitrije Ćeranić, Svjetlana Ivanović, Radislav Lale, Samir Aličić), Vol. 1, East Sarajevo, 2023, p. 465.

[30] Law on Ministries, Art. 33.

[31] Law on Administrative Inspectorate, *Official Gazette of RS,* No. 87/11, Art. 3, para. 1.

supervision that is carried out by an administrative body over a special organization and consists of work supervision, inspection supervision through administrative inspection and other forms of supervision regulated by a special law.[32] In exercising supervision over the work of the RGA, the Ministry is authorized to request reports and data on work, determine the state of execution of work and warn of observed irregularities, issue instructions and propose to the Government to take the measures it is authorized to take.[33]

Supervision of work consists of supervision of the legality of work, which examines the implementation of laws and other general acts, and supervision of the expediency of work, which refers to the control of the effectiveness and economy of work and the expediency of the organization of work.[34] However, the supervision of the legality of the work of this special organization is already absent from the legal wording that refers to the competence of the Ministry to supervise the work of the RGA. Apropos, since the Ministry, in exercising supervision over the work of this special organization, is exclusively authorized to request reports and data on work, as well as to determine the state of execution of work and to warn of observed irregularities, it follows that it is authorized to exercise supervision over the expediency of the work of the RGA whereby the effectiveness and economy of work and the expediency of the organization of work are controlled.

Inspectional supervision over the application of regulations regulating general administrative procedures, as well as special administrative procedures, is entrusted to the Administrative Inspectorate, which ensures legality in the work of state authorities, authorities of autonomous provinces and local self-government units and holders of public authority, as well as the protection of public and private interests. The Administrative Inspectorate undertakes preventive measures in order to encourage the supervised bodies to efficiently and timely fulfill the established obligations.[35] Administrative inspection represents a special form of inspection supervision, which in relation to general inspection supervision has its own specificities, which was recognized by the adoption of a special law regulating this area of supervision.

LGAP stipulates that supervision over the implementation of that law is carried out by the ministry responsible for state administration affairs, as well as that inspection supervision over its implementation is carried out by the administrative inspectorate, except in matters related to the implementation of laws in the field of defense and of importance to defense and the Serbian Armed Forces.[36] With this legal formulation, a distinction has been made in relation to supervision on the one hand, and inspection supervision, on the other, while in both cas-

[32] Law on State Administration, *Official Gazette of RS,* No. 79/05, 101/07, 95/10, 99/14, 47/18 and 30/18 – state law, Art. 45.
[33] Law on State Administration, Art. 50, para. 2.
[34] Law on State Administration, Art. 4, paras. 1 and 2.
[35] Predrag Dimitrijević, *Upravno pravo opšti deo*, Medivest, Niš, 2019, p. 362.
[36] LGAP, Art. 209.

es it is about supervision over the implementation of the law. Also, in both cases it is an administrative body that supervises the implementation of LGAP, and since the provisions of LGAP are applied when dealing with administrative matters by state bodies and organizations, bodies and organizations of provincial autonomy and bodies and organizations of local self-government units, institutions, public companies, special bodies through which the regulatory function is exercised, and legal and natural persons entrusted with public powers, it is clear that it is internal supervision. More precisely, it is a type of supervision over the work, and it is about supervision over the legality of the work of all state administration bodies and holders of public authority in the performance of entrusted tasks of the state administration that apply LGAP, while examining the implementation of laws and other general acts.

Therefore, LGAP stipulates that the Ministry of Public Administration and Local Self-Government supervises the legality of the work of all bodies and organizations that apply this law when dealing with administrative matters. Indirectly, and since LSPRCREU foresees the subsidiary application of LGAP to all issues that are not specifically regulated by this law, and refer to the process of registration in the cadastre of real estate and utilities,[37] it implies the competence of the Ministry of Public Administration and Local Self-Government to supervise the legality of the work of the RGA when dealing with administrative matters. However, since no law explicitly provides for the exercise of this type of supervision over a special organization, it would be advisable in this sense to stipulate in LGAP that supervision over the implementation of that law and all special laws which deal with individual issues of administrative procedure are regulated by the ministry responsible for state administration and local self-government. This would completely round off the type of control of both the implementation of LGAP itself and all special laws, the content of which should not deviate from the basic principles determined by LGAP with the prohibition of reducing the level of protection of the rights and legal interests of the parties guaranteed by LGAP.

## 3. Conclusion

Through the quality of its provisions, LGAP offers a significant degree of protection of the parties' rights, both through the principles that indicate its real characteristics, desirable goals and values, and through the rules that regulate the legal position of the parties in the general administrative procedure. The comprehensive application of all legal solutions enables a significant degree of protection of the rights and legal interests of the parties in the procedure, which in terms of the number of rights of citizens that are realized by its procedural rules far exceeds all other legally regulated procedures. By predicting a special attitude toward special administrative procedures and by prescribing restrictions within which it is

[37] LSPRCREU, Art. 20.

necessary to standardize and harmonize such procedures with LGAP, the legislator intended to fully maintain the quality of protection of the rights and legal interests of the parties in all administrative procedures in which they are carried out.

The law regulating the special administrative procedure conducted before the cadastre entered into legal force one and a half years after the date of application of LGAP, and it can be concluded that its adoption was preceded by the procedure of harmonization with LGAP, as it is by regulation and provided for. However, examples of non-compliance of the special law are evident and in the paper we pointed out not only the deviations concerning the basic principles of LGAP, but also those that directly reduce the level of protection of the rights and legal interests of the parties guaranteed by LGAP.

It is difficult to explain how such deviations occurred, but when they have already been noticed, it is necessary to indicate a possible way to overcome them in the future. First of all, it is necessary to change certain provisions of LGAP, which would affect the organizational and functional activities of the Coordination Body of the Government, as well as the provisions concerning the supervision of implementation of LGAP, all aiming to achieve unity of the legal order and overcome legal uncertainty. The Coordination Body of the Government was established in accordance with the provisions of LGAP in order to assess the compliance of special laws with the provisions of LGAP, and since a deadline has been set for the harmonization of special laws with LGAP, this implies that after that period the Coordination Body of the Government body stopped working. However, it would be advisable to envisage the involvement of this working body during each drafting of a bill on amendments and supplements to special laws, since even through amendments to laws, the rules of LGAP can be deviated from even when the norms of the special law are primarily harmonized with LGAP.

Furthermore, since the conformity of special laws with LGAP can also be assessed through its application by administrative bodies and holders of public authority in the performance of state administration tasks, it would be advisable to prescribe the authority of the ministry responsible for state administration affairs to exercise supervision by LGAP itself over the implementation of the law on special administrative procedures, with the supervision over the implementation of LGAP provided so far. This would be particularly significant in relation to special organizations over which the administrative authorities have prescribed restrictive supervision of work, which concerns supervision over the expediency of work, i.e. control of the effectiveness and economy of work and the expediency of the organization of work, and not supervision over the legality of work. Since the ministry responsible for state administration and local self-government supervises the implementation of LGAP, with which all special laws regulating the actions of administrative bodies in specific administrative areas must be in accordance, it is fully justified that it also supervises the implementation of all laws regulat-

ing special administrative procedures. Also, in carrying out the supervision for which they are authorized, Administrative Inspectorates can make a significant contribution in pointing out to the Coordination Body of the Government the existence of provisions of special laws that are not in accordance with the norms of LGAP, which could be the basis for initiating amendments to special laws in which such non-compliance was observed.

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# PART SIX
# Other Current Issues

Vuk Cucić*

# FAULT IN THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE

*Abstract*

*The Law on General Administrative Procedure stipulates that certain reasons for reopening the procedure can be put forward by a party only if the party could not have presented them in the previous procedure without its fault. It also specifies that an authorized official in the authority conducting the procedure is responsible if certain procedural actions are not performed due to his/her fault. Is the meaning of term 'fault' the same or different in these two cases? At first glance, it seems that it is not the same, and this creates legal uncertainty and violates good nomotechnical practice, according to which a term used in a regulation should have the same meaning. This paper deals with indicated problem - the issue concerning the meaning of term 'fault' in these two provisions of the Law on General Administrative Procedure.*

**Keywords:** The Law on General Administrative Procedure; fault; Reopening the Procedure, Responsibility of an Authorized Official.

## 1. Introduction

Applicable Law on General Administrative Procedure[1] (hereinafter referred to as: LGAP) has entered into the sixth year of its implementation.[2] It is a systemic law, with almost a hundred years long tradition,[3] whose scope can barely be sensed, given the fact that the number of laws regulating special administrative areas is assessed to several hundreds.[4]

Having this in mind, on one side, as well as depth and width of changes in traditional postulates of the system of the general administrative procedure,

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[1] The Law on General Administrative Procedure, *Official Gazette of RS*, Nos. 18/2016, 95/2018 and 2/2023.

[2] With the exception of three articles, which refer to the authority's obligation to obtain data kept in official records, which began to be implemented in 2016, the LGAP started to be applied on June 1, 2017 (Art. 217 of the LGAP).

[3] The first law regulating the general administrative procedure in the territory of Serbia - the Law on General Administrative Procedure of the Kingdom of Yugoslavia, was enacted in 1930 and started to be applied in 1931, Predrag Dimitrijević, *Upravno pravo,* Medivest KT, Niš, 2022, p. 273.

[4] The coordination body of the Government of the Republic of Serbia, which was once engaged in the task of harmonizing special laws with the LGAP, identified, at first over 250, and then over 300 laws containing procedural provisions whose compliance with the LGAP should have been checked.

brought by applicable LGAP, on the other side, reactions of scientific and professional public were numerous. Criticism[5] and compliments[6], which somewhat goes without saying, were directed towards novelties of the LGAP. Even the author of these lines, who was a member of the group preparing the Draft of the Law on General Administrative Procedure, did not resist stating objections at the expense of this important regulation. In minor part the omissions had been observed in that work, while the majority part of the text represented the mourning over missed chances, opportunities that have not been taken in that long lasting procedure of adopting applicable LGAP.[7]

However, the things that were left out, and shall be the subject-matter of this paper are critics of 'antiquities' of LGAP, i.e. the criticism of insufficient reconsideration of certain norms inherited from previous versions of this regulation. Two such provisions are those that mention the term 'fault'. They are contained in the provisions of Art. 176, para. 2 ("Reasons from paragraph (1) items 1), 3), 5) and 7) of this article can be the reason for reopening the procedure at

[5] Dražen Miljić, Upravni ugovori prema Zakonu o opštem upravnom postupku", *Zbornik radova Pravnog fakulteta Univerziteta u Novom Sadu*, Vol. 51, No. 2, 2017; Ratko Radošević, "Pojam upravne stvari i novi Zakon o opštem upravnom postupku RS", *Pravna rječ*, No. 46, 2016; Dragan Milkov, Ratko Radošević, "Neke novine u Zakonu o opštem upravnom postupku – 'Upravno postupanje'", *Zbornik radova Pravnog fakulteta Univerziteta u Novom Sadu*, Vol. 50, No. 3, 2016; Predrag Dimitrijević, "Aporije Zakona o opštem upravnom postupku", *Pravni život*, No. 10, 2014; Dejan Vučetić, "Evropska upravno-procesna pravila i opšti upravni postupak RS", *Zbornik radova Pravnog fakulteta u Nišu*, No. 68, 2014; Dragan Milkov, "O potrebi usklađivanja srpskog upravnog postupka sa pravom Evropske unije", *Zbornik radova Pravnog fakulteta u Nišu,* Vol. 53, No. 68, 2014; Dragan Milkov, "Povodom Nacrta Zakona o opštem upravnom postupku – korak napred ili deset u stranu?", *Zbornik radova Pravnog fakulteta Univerziteta u Novom Sadu*, Vol. 47, No. 1, 2013; Zoran Lončar, "O Nacrtu Zakona o opštem upravnom postupku", *Pravna riječ*, No. 35, 2013; Predrag Dimitrijević, „Reforma upravnog postupka", *Vladavina prava i pravna država u regionu* (ed. Goran Marković), Istočno Sarajevo, 2013; Zoran Lončar, "Neka pitanja reforme upravno-procesnog zakonodavstva", *Pravni život.*, No. 10, Beograd, 2013; Stevan Lilić, "Kontroverze u vezi sa novom radnom verzijom Nacrta Zakona o opštem upravnom postupku Srbije (u kontekstu evropskih integracija)", *Perspektive implementacije evropskih standarda u upravnom sistemu Srbije* (ed. Stevan Lilić), Pravni fakultet Univerziteta u Beogradu, Beograd, 2013.

[6] Zoran Tomić, "Upravni ugovori", *Pravni život*, No. 10, 2017; Dobrosav Milovanović, "Vremensko važenje Zakona o opštem upravnom postupku", *Pravni život*, No. 10, 2017; Zoran Lončar, "Ovlašćeno službeno lice u upravnom postupku", *Pravni život*, No. 10, 2017; Dragan Vasiljević, "Oblici upravnog postupanja po novom Zakonu o opštem upravnom postupku RS", *Pravni život,* No. 10, 2017; Ljubodrag Pljakić, "Poništavanje i ukidanje rešenja u upravnom postupku", *Pravni život*, No. 10, 2017; Dragan Vasiljević, "Koncept vanrednih pravnih sredstava po novom Zakonu o opštem upravnom postupku", *Pravni život*, No. 10, 2016; Ljubodrag Pljakić, "Upravno postupanje u novom Zakonu o opštem upravnom postupku", *Pravni život*, No. 10, 2016; Zoran Lončar, "Posebni upravni postupci", *Zbornik radova Pravnog fakulteta Univerziteta u Novom Sadu,* Vol. 50, No. 4, 2016; Dobrosav Milovanović, Vuk Cucić, "Nova rešenja Nacrta Zakona o opštem upravnom postupku u kontekstu reforme javne uprave u Srbiji", *Pravni život*, No. 10, 2015; Dobrosav Milovanović, Vuk Cucić, "Unapređenje poslovnog okruženja u Srbiji u svetlu novih rešenja Nacrta zakona o opštem upravnom postupku", *Usklađivanje poslovnog prava Srbije sa pravom Evropske unije* (ed. Vuk Radović), Pravni fakultet Univerziteta u Beogradu, Beograd, 2015; Zoran Lončar, "Promena uloge službenog lica u upravnom postupku", *Pravna riječ*, No. 42, 2015; Dobrosav Milovanović, Dragan Vasiljević, "U susret novim zakonskim rešenjima u upravnom postupku RS", *Razvojne tendencije u upravnom zakonodavstvu*, Ohrid, 2011.

[7] Vuk Cucić, "Fino podešavanje Zakona o opštem upravnom postupku", *Anali Pravnog fakulteta u Beogradu*, Vol. 66, No. 2, 2018.

the request of a party only if the party could not present them in the earlier procedure without the fault of its own.") and 210, para. 1 ("An authorized official in the authority conducting the procedure is responsible if it is his/her fault that certain procedural actions are not performed") of the LGAP and essentially correspond to the provisions of Art. 240, para. 2 and Art. 286, para. 1 of his predecessor.[8]

The usual line of argument during preparation of the Draft, as well as during the later criticism of the current LGAP, was that one should not fix what is not broken, i.e. the provisions that in practice did not create problems should not be altered. Such an approach was erroneous on two accounts. On the one hand, it blunted the critical edge of the drafters. On the other hand, and far more important, it rested on unfounded premise that the challenges in the implementation of the LGAP must have necessarily been heard of and that new problems cannot arise. Neither is true. Namely, comprehensive, publicly available and easily searchable databases of decisions made on the basis of earlier versions of this regulation do not exist. Challenges to the application of the rules of general administrative procedure have a greater chance of being "heard of" in scientific and professional circles if they are the challenges of those who apply the LGAP, and/or, who control its implementation, therefore, if they create trouble for the administrative authorities and the court. If this is not the case, if it is a party's problem, and a relatively isolated one as well, a reasonable question arises as to the probability of its discovery. It is an incorrect assumption that the LGAP, in all its allotropic modifications, has been applied for a sufficiently long time, and that new cases cannot create problems in practice. This is illustrated by the following case, which is currently in the resolution process, and is related to the norms analyzed in this paper.

In the restitution procedure (i.e. the return of confiscated property and indemnification), the party claimed the return of property in one city on the territory of the Autonomous Province of Vojvodina. In the city archive, the party failed to find the evidence necessary to resolve the administrative matter in its favor. After the ruling became final (unappelable before higher administrative authority), the party found the necessary evidence in the Archives of Vojvodina. Pursuant to Art. 176, para 1, point 1 of LGAP ("if new facts become known or new evidence becomes available, which, alone or in connection with previously presented facts or evidence, could lead to a different decision"), the party filed a request for reopening the procedure. Art. 176, para. 2 of the LGAP stipulates that stated reason (as well as some others) can be the reason for reopening the procedure at the request of a party only if the party could not present them in the earlier procedure without the fault of its own. What does fault mean in this case? Is the party to blame for not checking the existence of evidence in the Archives of Vojvodina? Should the party have checked in another archive (e.g. The Archives of Serbia, or Yugoslavia)? Bearing in mind that the party in the given procedure is a legal layman (which is most often the case in practice), how is the concept of

[8] The Law on General Administrative Procedure, *Official Journal of FRY*, Nos. 33/1997 and 31/2001 and *Official Gazette of RS* , No. 30/2010.

fault from Art. 176, para. 2 of the LGAP affected by the principle of assisting the party from Art. 8 of the LGAP ("The authority *ex officio* makes sure that the ignorance of the party and other participants in the procedure does not harm their rights")? Was the authority obliged to instruct the party where the evidence that is commonly used in the return of confiscated property can potentially be found? Maybe the other provision that mentions fault - the provision of Art. 210, para. 1 of the LGAP should have been applied? According to that provision an authorized official in the authority conducting the procedure is responsible if certain procedural actions are not performed due to his/her fault. Was the Archive of Vojvodina erroneously circumvented in the first-instance procedure due to the fault of the party or the fault of the authorities? Finally, and most importantly, do these two identical terms - fault - have the same meaning? Does the same standard of fault apply to layman parties and authorized officials bound by the principle of truth, the principle of assisting the party and the principle of *iura novit curia*?[9]

What are the meanings of the term fault in these two provisions of the LGAP? Are they the same or different? The economic entities and citizens, as parties to the procedure, would benefit if the concept of fault in these provisions were clarified. This is especially true in the case that these concepts, and at first glance it seems so, have different meanings, because this creates legal uncertainty and violates good nomotechnical practice, according to which one term used in the regulation should have the same meaning.

The lines that follow deal with stated problem - the issue concerning the meaning of term 'fault' in these two provisions of the LGAP.

## 2. The Concept of Fault

The LGAP does not determine the types of fault. They are mentioned in the Law on Civil Servants. [10] Art. 121 of that law stipulates that a civil servant is

[9] It is important to emphasize that all procedures for the return of confiscated property and indemnification were initiated during the validity of the previous Law on General Administrative Procedure (in accordance with Article 42, Paragraph 1 in connection with Article 40 of the Law on Return of Confiscated Property and Indemnification (*Official Gazette of the RS*, Nos. 72/2011, 108/2013, 142/2014, 88/2015, 95/2018 and 153/2020), these procedures had to be initiated within two years from the date of the public call of the Agency for Restitution on the website of the Ministry responsible for financial affairs, i.e. no later than January 2014), when there was no obligation of the authority conducting the procedure to review, collect and process data on facts necessary for decision-making, which are kept in official records. Such an obligation of the authorities is prescribed in Art. 9, paragraph 3 and Art. 103 of the (currently applicable) LGAP, so this question would not even arise if the currently applicable LGAP was applied to this specific case, because then the authority would be obliged to obtain data from all relevant archives, including the Archive of Vojvodina, and based on them resolve the administrative matter. This does not mean that mentioned case cannot serve as an illustration of problems that the vague concept of 'fault' in this provision can create in practice, because similar cases are conceivable in the application of valid LGAP (for example, it could be about a private document as evidence or about any of the other reasons for reopening the procedure to which Article 176, paragraph 2 of the LGAP applies).

[10] The Law on Civil Servants, *Official Gazette of RS*, Nos. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014, 94/2017, 95/2018, 157/2020 and 142/2022.

responsible for the damage he/she causes to a state authority at work or in connection with his/her work intentionally or by gross negligence. Art. 124 of the same law stipulates that the Republic of Serbia shall be responsible for damage caused to a third party provided it was caused by illegal or improper action of a civil servant at work or in connection with his/her work, and that if the Republic of Serbia compensates the injured party for the damage caused by a civil servant intentionally or by gross negligence, it has the right to demand compensation of paid amount from the civil servant within six months from the date when the damages were paid.

The elements of these types of fault are not specified in this regulation either. This is still better than the LGAP, because it, at least, refers to concrete types of fault.

The situation in administrative-law literature is no better. There are no papers that deal with the issue concerning the types and elements of fault, which is an integral part of analyzed norms of the LGAP. The literature does not provide answers to numerous questions about the subjective and/or objective elements of fault. Is the fault based on awareness and will towards a certain act or omission to act, or on the duty of a certain subject to behave appropriately in a certain situation.[11]

Since administrative law regulations and literature are silent on the topic of fault in the LGAP, in order to understand the meaning of analyzed provisions of the LGAP, we will look at how the types of fault are classified and defined in criminal and civil law.

Fault in criminal law has four types - direct and indirect / oblique intent (Art. 25 of the Criminal Code[12]) and conscious and unconscious negligence (Art. 26 of the Criminal Code).

Direct intent (*dolus directus*) exists when the offender was aware of his/her crime and wanted to commit it. Indirect intent (*dolus eventualis*) exists when the

[11] Nikola Stjepanović, *Administrative Law in SFRY – General Part*, NIGP Privredni pregled, Belgrade,1978, p. 618; Slavoljub Popović, *Komentar Zakona o opštem upravnom postupku,* Savremena administracija, Beograd, 1983, p. 573; Dragan Milkov, *Upravno pravo II – Upravna delatnost,* Pravni fakultet Univerziteta u Novom Sadu, Novi Sad, 2012, pp. 236-243; Zoran Tomić, Vera Bačić, *Komentar Zakona o opštem upravnom postupku sa sudskom praksom i registrom pojmova,* Službeni glasnik RS, Beograd, 2016, p. 533, Zoran Tomić, *Opšte upravno pravo,* Pravni fakultet Univerziteta u Beogradu, Beograd, 2018, pp. 342-345; Dragan Vasiljević, Zorica Vukašinović Radojičić, *Upravno pravo, Kriminalističko-policijski univerzitet,* Beograd, 2019, p. 373; Predrag Dimitrijević, *Upravno pravo,* Medivest KT, Niš, 2022, p. 393.

A similar provision, which refers to the absence of the party's fault as a condition for reopening the procedure, existed in different versions of the law governing civil procedure, but even civil law theorists did not provide answers to the questions raised, see Gordana Stanković, *Građansko procesno pravo II,* Niš. 1987, p. 326-330; Borivoje Poznić, *Građansko procesno pravo,* Savremena administracija, Beograd, 1995, pp. 272-276; Siniša Triva, Mihajlo Dika, *Zakon o parničnom postupku – redakcijski prečišćeni tekst s interpretativnim i komentarskim bilješkama i stvarnim kazalom,* Narodne novine, Zagreb, 2008, p. 355.

In the literature, one might potentially find examples of consequences of fault of a particular subject. Thus, non-compliance with procedural deadlines and delay, i.e. inefficient conduct of the procedure, are cited as the most common consequences of failure to undertake certain procedural actions due to the fault of an authorized official in the authority conducting the procedure, Z. Tomic, V. Bačić, p. 678.

[12] *Official Gazette of RS*, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

offender was aware that he/she could commit the act and agreed to it. Indirect intent compared to direct intent has weaker intellectual (awareness of the possibility) and voluntary (consent) element.[13]

Conscious negligence (*luxuria*) exists when the offender was aware that he/she could commit the crime with his/her action, but nonchalantly thought that it would not happen or that he/she would be able to prevent it. Unconscious negligence (*negligentia*), on the other hand, occurs when the perpetrator was not aware that he/she could commit the crime by his/her action, even though according to the circumstances under which it was done and according to his/her personal characteristics, he/she was obliged to be and could have been aware of that possibility. Unconscious negligence differs from conscious negligence, and other forms of fault, by the lack of awareness and will to commit the crime. Fault, in that case, rests on duty and ability of the perpetrator to be aware of the occurrence of a punishable consequence.[14]

Differentiating some forms of fault in criminal law is not simple in practice, especially indirect intent and conscious negligence.[15]

Fault in civil law has three forms - intent, gross and ordinary recklessness.

Intent (*dolus*) in civil law coincides with intent in criminal law, and exists when the perpetrator was aware of his/her actions and wanted a harmful consequence, or was aware of the possibility of a harmful consequence, so he/she agreed to it.[16]

Gross (flagrant) recklessness (*culpa lata*) exists when the tortfeasor did not even show the attention that a completely average person would show in a given situation, while ordinary (light) recklessness (*culpa levis*) occurs when the tortfeasor did not show the attention of a careful, caring person under given circumstances.[17]

There are significant differences between fault in criminal law and fault in civil law, *inter alia*, in the purpose (punishment / indemnification of the injured party[18]) and the burden of proof (presumption of innocence in criminal law / presumed ordinary negligence in tortious civil liability[19]). For the purposes of our analysis, the most important difference between faults in these two branches of law is the difference in their nature. In criminal law, there is a subjective understanding of fault, where the voluntary element is important, i.e. the awareness and want-

[13] Ljubiša Jovanović, "Pojam i vrste umišljaja", *Zbornik radova Pravnog fakulteta u Nišu*, No. 16, 1976, p. 138.
[14] Ljubiša Jovanović, "Nehat kao oblik vinosti", *Zbornik radova Pravnog fakulteta u Nišu*, 1977, p. 143.
[15] Ivana Marković, "Eventualni umišljaj i razgraničenje sa svesnim nehatom", *Anali Pravnog fakulteta u Beogradu*, Vol. 71, No. 2, 2023, p. 295 *et seq*.
[16] Oliver Antić, *Obligaciono pravo,* Pravni fakultet Univerziteta u Beogradu, Službeni glasnik RS, Beograd, 2009, p. 468.
[17] *Ibidem*, p. 468-469.
[18] Jožef Salma, "Legal Characteristics of Civil-Legal Responsibility", *Proceedings of the Faculty of Law in Novi Sad,* Vol. 42, No. 1-2, 2008, p. 89.
[19] Đorđe Nikolić, "Legal Presumption of Fault in Serbian Law on Contracts and Torts", *Annals of the Faculty of Law in Belgrade*, Vol. 69, No. 2, 2021.

ing of a certain prohibited action and its consequences.[20] In civil law, with certain exceptions where liability requires intention and/or gross negligence (such as the previously mentioned example from the Law on Civil Servants), there is an objective doctrine of fault, which sees fault as a deviation from expected behavior in a given situation, which is defined by a certain legal standard (act with due diligence, a business like behavior or according to the rules of the profession).[21] This distinction is significant because, at first glance, it seems that depending on the provision and the characteristics of its addressees, fault could be understood differently in the analyzed provisions of the LGAP. In other words, in one of them fault would be understood subjectively, as awareness and will for the occurrence of a certain consequence, while in the other it would mean a deviation from the expected behavior.

### 3. Fault of the Party in Reopening the Procedure

Art. 176, para. 2 of the LGAP stipulates that certain reasons can be the cause for reopening the procedure at the request of a party only if the party could not present them in the previous procedure without the fault of its own. Specifically, we are talking about the following reasons: a) if new facts become known or the opportunity to present new evidence is acquired, which, alone or in connection with previously presented facts or presented evidence, could lead to a different decision; b) if the ruling was made by an unauthorized person, or the procedure was conducted or decided by an unauthorized person or a person who had to be exempted; c) if a person who could have legal standing in the procedure (*locus standi*) was not given the opportunity to participate in the procedure; and g) if the party or other participant in the procedure was not allowed to follow the course of the procedure through a translator or interpreter in accordance with Article 55 of the LGAP.

Which of previously described forms of fault in criminal and civil law should apply to the party in a given situation?

We believe we should start with a system of eliminating inappropriate types of fault. In this sense, one should start from basic principles of general administrative procedure, because they contain a presentation of values and basic standards that should be used when interpreting legal rules and filling-in legal gaps.[22] In this sense, it is necessary to start from the principle of assistance to the party, which, among other things, prescribes that the authority *ex officio* ensures that the ignorance of the party and other participants in the procedure are not to the detriment of their rights (Art. 8, para. 1 of the LGAP). Also, when the authority, taking into account the factual situation, learns or assesses that the party or

[20] J. Salma, "Legal Characteristics of Civil-Legal Responsibility", p. 91.J.
[21] *Ibidem*.
[22] Marko Šikić, Lana Ofak, "Nova načela upravnog postupka (s posebnim naglaskom narazmjernost, legitimna očekivanja i stečena prava)", *Zbornik Pravnog fakulteta u Rijeci*, No. 32, 2011, p. 128.

another participant in the procedure have grounds for exercising a right or legal interest, it is obliged to warn them about it (Article 8, Paragraph 2 of the LGAP). The principle of assisting the party has also been transposed into some specific provisions of the LGAP, such as the obligation of the authority to, *ex officio*, during the entire procedure, ensure that the party is represented in accordance with the law (Art. 47 of the LGAP), the prohibition of dismissal of incomplete request of the party, without prior calls for it to be completed and instructed on how it should be done (Art. 59 of the LGAP), the absence of party's obligation to provide specific reasons for the appeal (Art. 159 of the LGAP) and the existence of authority's obligation to determine the content and scope of the appeal request (Art. 168 of the LGAP).

The principle of assisting the party, as well as other basic principles of administrative procedure, affects the interpretation of all other norms of the LGAP, including the provisions of Art. 176, para. 2. From the foregoing it follows that it cannot be claimed that there is any duty of the party to be aware that a certain fact or certain evidence (depending on the reason for reopening) may have influence on the decision of the administrative matter, and/or that it could subsequently be a reason for reopening the procedure. This thesis is supported by the fact that it is the obligation of the authority, according to Art. 116, para. 2 of the LGAP, to establish which facts are decisive and which of them are disputed so as to require their determination in the evidence procedure. This further means that unconscious negligence would be an inappropriate form of fault within the meaning of Art. 176, para. 2 of the LGAP, because it is based on the duty and ability of a certain person to be aware of the occurrence of certain consequences, which in a given case would be awareness of the fact that a certain fact or evidence exists at the time when the original administrative procedure is being conducted and that they could, subsequently, be a reason for reopening the procedure.

For the same reason, it could be argued that there is no specific standard of conduct that the party should adhere to, and negligence, as a form of fault in civil law, would also be inappropriate to the concept of fault in reopening the administrative procedure.[23]

There are still forms of fault that would include the awareness and will of the party, namely intent (direct and indirect) and intention. Here, the party is

[23] A systemic interpretation would also lead to exclusion of ordinary negligence as a type of fault that would apply to the party in this situation. As it was said, Art. 121 of the Law on Civil Servants prescribes that a civil servant is responsible for damage he/she causes to a state authority at work or in connection with work intentionally or by gross negligence, while Art. 124 of the same law stipulates that the Republic of Serbia shall be responsible for damage incurred to a third party provided it was caused by illegal or improper action of a civil servant at work or in connection with his/her work, and that if the Republic of Serbia compensates the injured party for damage caused by the civil servant intentionally or by gross negligence, it has the right to demand compensation of paid amount from the civil servant within six months as of the date when the payment of damages was made. Therefore, civil servants are liable only in the case of causing damage intentionally or as a result of gross negligence, and not in the case that the damage was caused as a result of ordinary negligence. It would be illogical and inconsistent if the parties in administrative procedure, who in most cases are legal laymen, have a higher level of responsibility in relation to civil servants, who must be trained for the work they perform.

aware of the possible consequences of its actions and wants that consequence or at least agrees to it.

The literature points out that 'the party would have to be conscientious about the reasons for reopening the procedure. The contrary action of the party would represent an abuse of rights with the aim of sabotaging and delaying the procedure and could not be grounds for reopening the procedure'.[24]

Legal standard of party's conscientiousness would correspond to party's level of awareness described earlier. In the absence of conscientiousness, the party's awareness would include both the existence of a certain fact or evidence, as well as their legal significance, i.e., that they can lead to reopening the procedure. In order for the party to be unconscionable, awareness would have to exist at the time of conducting the original procedure, which would also include the possible second-degree procedure, until the decision becomes final. If the party were to become aware of the possibility of reopening the procedure only after the finality of the decision, that would not be considered as negligence.

In the case of conscientiousness, the voluntary element would not play an important role, because the party could not be considered conscientious in the presence of both its variants. Conscientiousness would not exist in the case of abuse or delay of the procedure, that is, in a situation where the party was aware there was a reason for reopening the procedure, and additionally wanted the procedure to be reopened after the finality of the decision. Party could also not be considered conscientious in the event that it did not aspire to abuse or delay, but simply held that it was not necessary to point out to the authority the existence of reasons that could subsequently lead to reopening the procedure. For example, it could be a wrong assessment of the party that it will be successful in the procedure even without indicating the relevant fact or evidence.

The absence of any form of fault is understood in a situation where the party was not able to present certain evidence in the previous procedure. For example, the party knew about the existence, but did not know where a certain document was located, and therefore could not present it to the authority for inspection. There is neither a conscious nor a voluntary element in that situation. Voluntary element does not exist, because the party can neither want nor accept a certain consequence, when it is not yet in a position to bring it about. There would not even be a conscious element, because even though the party is aware of the existence of certain evidence, it is not sure that it will really be able to obtain it, and that it may subsequently lead to reopening the procedure. This would apply even if the party, by subsequently presenting evidence, wanted to abuse the right or to delay the procedure, because there is no negligence if the party was not able to effectuate reopening of the procedure before the finality of the decision.

Based on the above, we believe that the provision of Art. 176, para. 2 of the LGAP could be amended by removing ambiguous, and considering all its

[24] Zoran Tomić, Dobrosav Milovanović, Vuk Cucić, *Praktikum za primenu Zakona o opštem upravnom postupku,* Ministarstvo državne uprave i lokalne samouprave, Beograd, 2017, p. 193.

meanings, inappropriate term 'fault' therefrom. Instead, the article could read as follows:

'Reasons from paragraph (1) item 1), 3), 5) and 7) of this Article can be the cause for reopening the procedure at the request of a party only if the party was not aware of them or could not present them in the previous procedure.'

## 4. Responsibility of an Authorized Official for Failure to Perform Procedural Actions

Art. 210, para. 1 of the LGAP stipulates that an authorized official in the authority conducting the procedure is responsible if certain procedural actions are not performed due to his/her fault.

Situation with this provision is completely different from the one pertaining to reopening the procedure. What makes it completely different is the person whose fault is at stake. Namely, provision of Art. 176, para. 2 of the LGAP refers to a party in an administrative procedure, which, as the probability dictates, will most often be a legal layman, who participates in a procedure managed by someone else. In contrast, the provision of Art. 210, para. 1 of the LGAP regulates the responsibility of the authorized official. Both the scope of his/her powers and the scope of his/her obligations make the authorized official the master of the procedure, and therefore responsible for everything that happens or does not happen in it.

The principle of *iura novit curia* applies to an authorized official, i.e., it is considered that an authorized official must know the law that is applied in the procedure, both procedurally and substantively. In addition, the authorized official is bound by the basic principles of administrative procedure in his/her work. On one hand, these are the principles that determine the standards of his/her work - the principle of legality and predictability (Art. 5 of the LGAP), truth and free assessment of evidence (Art. 10 of the LGAP), and independence (Art. 12 of the LGAP). On the other hand, the official is also bound by the principles that determine standards of his/her behavior towards the parties - the principle of assisting the party (Art. 8 of the LGAP), protecting the rights of the parties and realization of public interest (Art. 7 of the LGAP), proportionality (Art. 6 of the LGAP), the efficacy and cost-effectiveness of the procedure (Art. 9 of the LGAP) and party's right to make a statement (Art. 11 of the LGAP). All these principles require an authorized official to conduct the procedure flawlessly - legally, successfully (effectively), quickly and cost-effectively, while meeting the needs of the party to exercise their rights and interests based on the law in such a procedure. It is about the highest standards of behavior, about special attention, the attention of a good expert, who must act *lege artis*. In other words, the responsibility of an authorized official is tightened even in relation to ordinary carelessness, as a type

of fault, because a greater degree of attention is required from an authorized official than that shown by due diligence.

The power of the official leading the procedure is equivalent to such a responsibility. That official determines the entire course of the procedure - which facts are decisive (Art. 102, paragraph 1 of the LGAP), which will be proved (Art. 116, paragraph 2 of the LGAP), whether an oral hearing will be held (Art. 109 of the LGAP), what decision will be made. It also has numerous powers that prevent any obstruction of the procedure. An example of such powers is fining a witness who refuses to testify (Art. 127 of the LGAP), a person who refuses to submit a document (Art. 122, paragraph 6 of the LGAP) or the holder of things, the owner of premises and land who unjustifiably prohibits inspection (Article 133, paragraph 7 of the LGAP), as well as the authority of an official to hold an oral hearing in the absence of duly invited, but unjustifiably absent parties (Article 114 of the LGAP).

When the powers and duties of an authorized official are added up, the question arises as to what are the situations in which he/she could be released from responsibility for not performing certain procedural actions. It is difficult to imagine such a situation without *force majeure*, which would be an exculpatory circumstance even in the case of objective responsibility, i.e., responsibility without fault.[25]

Responsibility of an authorized official should be objectified, i.e., the authorized official should be responsible for failure to perform certain procedural actions regardless of fault. In civil law, one is objectively responsible for handling a dangerous thing or performing a dangerous activity.[26] Illegal and improper conduct in administrative procedure can be compared to a dangerous activity, because the consequences concerning the rights and legally based interests of interested parties can be serious.

Based on the above, we believe that an authorized official should be held accountable for failure to perform certain procedural actions, regardless of fault. Nomotechnically, this could be done by prescribing that an authorized official in the authority leading the procedure is responsible if certain procedural actions are not performed, that is, by omitting words "his/her fault" from the provisions of Art. 210, para. 1 of the LGAP.

## 5. Conclusion

LGAP stipulates that certain reasons for reopening the procedure can be pointed out by the party only if, without the fault of its own, the party could not present them in the earlier procedure (Art. 176, paragraph 2). It, also, stipulates that an authorized official in the body conducting the procedure is responsible if certain procedural actions are not performed due to his/her fault (Art. 210, paragraph 1).

[25] Jožef Salma, "Objektivna odgovornost u obligacionom pravu", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 38, No. 3, 2004, p. 30.
[26] *Ibidem*, pp. 26-27.

Considering that administrative law regulations and professional literature do not provide an answer to the question which type of fault these two provisions imply, inspiration for providing an answer was sought in criminal and civil law. Criminal law contains a subjective understanding of fault, and with a different combination of the elements of consciousness and will, there are four forms of fault - direct and indirect intent, and conscious and unconscious negligence. Civil law implies an objective understanding of fault, as a deviation from a certain standard of behavior. Civil law also recognizes objective responsibility when using a dangerous thing and performing a dangerous activity.

By systematically interpreting these two provisions of the LGAP and comparing them with forms of fault and responsibility in criminal and civil law, certain conclusions were reached.

The first conclusion is that the term fault is not the same in these two norms, which represents a bad nomotechnical practice.

The second conclusion is that the party in the administrative procedure, who is usually a legal layman, should not be liable for recklessness or unconscious negligence. It should be liable, that is, its request for reopening the procedure should be rejected, if the party had the intention, and/or if the party intentionally failed to point out the reason for reopening the procedure, the existence and legal significance of which the party was aware of during the original administrative procedure. In this sense, the provision of Art. 176, para. 2 of the LGAP should have omitted the concept of fault and prescribed that the reasons from paragraph (1) point. 1), 3), 5) and 7) of Article 176 of the LGAP can be the cause for reopening the procedure at the request of a party only if the party was not aware of them or could not present them in the previous procedure.

The third conclusion is that it is difficult to imagine an exculpatory, excusatory circumstance for an authorized official concerning failure to perform certain procedural actions, because this official is bound by the principle of truth, the principle of assisting the party and the principle of *iura novit curia* and has powers that allow him/her to manage the procedure without interference. Therefore, we believe that the responsibility of an authorized official from Art. 210, para. 1 of the LGAP should be objectified by omitting fault from given provision.

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# THE IMPORTANCE OF PROFESSIONAL TRAINING OF PUBLIC ADMINISTRATION EMPLOYEES FOR UNIFORM APPLICATION OF THE LAW ON GENERAL ADMINISTRATIVE PROCEDURE

*Abstract*

*The main idea of the author of this text is to point out the importance of permanent training for public administration employees who apply the Law on General Administrative Procedure (LGAP) in their work. Although six years have passed since the implementation of the new LGAP, pundits, as well as organizations of the non-governmental sector point to certain shortcomings in this Law, but also to the problems of citizens and businesses in connection with the inconsistent and varied approach in the application of certain legal concepts.*

*As the LGAP is a key regulation that ensures the improvement of the application of the general principles of good public administration, which derive from the recommendations and resolutions of the Committee of Ministers of the Council of Europe, the Charter of the European Union on Fundamental Rights, the Principles of Public Administration and the EU Directive on Services, it is a way out of the problem of uneven legal practices in the application of the LGAP recognized in the continuous process of education and professional development of employees in the public administration who apply the LGAP in their work.*

**Keywords:** Implementation of LGAP, Public Administration, Professional Development.

## 1. Introductory Notes

The Law on General Administrative Procedure ("*Official Gazette of the RS*", No. 18/2016, 95/2018 - authentic interpretation and 2/2023 - decision of the CC), within its scope introduced a number of novelties such as: letters of guarantee, administrative contracts and other forms of administrative activities that improve the procedure of administrative actions and the process of providing

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public services through new principles related to proportionality, protection of predictability, i.e. legitimate expectations of the parties, the right of the party to a legal remedy and the principle of access to information and data protection, as well as communication between authorities and parties in the procedure - rules on electronic communication and legal remedies - novelties in the actions of the second instance authority, as well as the impossibility of directly refuting conclusions and objections.

The current Law on General Administrative Procedure undoubtedly maintains the state's efforts to improve the application of general principles of good public administration, which derive from the recommendations and resolutions of the Committee of Ministers of the Council of Europe,[1] Charter of Fundamental Rights of the European Union (EU),[2] the Principles of Good Public Administration,[3] and the EU Services Directive.[4] In applying the classic concepts of good administrative behavior, after the adoption of the new LGAP, the Republic of Serbia was generally praised by SIGMA (see document: Implementation of the Law on General Administrative Procedure in the Western Balkans – SIGMA programming document no. 625, despite the fact that a smaller number of inconsistencies were identified.

As every introduction of a new systemic regulation into the legal system requires a process of adaptation in its application, if we exclude the efforts of individual authors (Prof. Zoran R. Tomić PhD, Prof. Dobrosav Milovanović PhD and Associate Professor Vuk Cucić, PhD), who prepared the Workbook for Application of the Law on General Administrative Procedure and the Manual for Passing the State Professional Examination (part Administrative Procedure), employees in the public administration who directly apply the LGAP were left to their own work experience in their profession and the professional capacities in the application of new legal concepts.

Bearing in mind the introductory remarks, the continuation of the work will show the approach of the National Academy for Public Administration, as the central institution of professional development of employees in public administration, in relation to the need for training in connection with a better understanding of new institutes of the Law on General Administrative Procedure and the uniform application thereof in practice. On the other hand, the relevant measurable results that have been achieved in this area in the past years will be shown.

[1] Including Council of Europe, *Resolution (77) 31 on the Protection of Individuals in Relation to the Acts of Administrative Authorities*, adopted by the Committee of Ministers on 28 September 1977; Council of Europe, *Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration*, adopted by the Committee of Ministers on 20 June 2007.

[2] European Union, *Charter of Fundamental Rights of the European Union*, 2012/C 326/02, 26 October 2012, Art. 41, which is directly applicable only to institutions and civil servants of the European Union, *https://evr-lex.evropa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT,* 18. 9. 2023.

[3] SIGMA, OECD, *The Principles of Public Administration*, 2017, *http://www.sigmaweb.org/publications/Nachelosof-Public-Administration-2017-editionENG.pdf,* 18. 9. 2023.

[4] *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market*, OJ L 376, 27. 12. 2006, p. 36-68, *https://evrlex.evropa.eu/legal-content/EN/TXT/?uri=celex-%3A32006L0123,* 18. 9. 2023.

## 2. Methodological, Organizational and Technical Approach to Training in Connection with Uniform Application of LGAP

As a central institution for professional development of employees in public administration, the National Academy for Public Administration bases its activities on two aspects. The first refers to preparation of the Proposal for the General Training Program, the Proposal for the Executive Training Program and the Proposal for the Vocational Training Program in state administration bodies; providing professional assistance in the preparation of special training programs, as well as other professional development programs entrusted to the Academy; providing administrative and technical support in the work of the Program Council and coordinating the work of program commissions; participation in the preparation of regulations from the purview of the Sector; development of methodology and standard instruments for determining the need for professional training in public administration; conducting an assessment of the needs for professional development of employees in the public administration; determination of standards for management of the quality of training of officials in the public administration; analytical and research activities; analysis of reports on trainings and the effects of trainings, as well as development of professional training systems and digitization of professional training. The second aspect refers to the tasks of preparation concerning implementation plan of the training program and necessary resources; organization and coordination of the training implementation process at the Academy headquarters and outside the headquarters; coordination of cooperation with persons in public administration bodies in charge of planning and implementation of professional development; preparation of periodic reports and data entry into the database; verification of training; administration of *online* courses; coordination of the implementation of electronic learning and the development of electronic learning and interactive teaching materials, participation in the preparation and implementation of training programs for lecturers and training providers and analysis of the effects of implemented training programs.

Bearing in mind the aforementioned tasks from the scope of work of the National Academy for Public Administration, in the context of education for the uniform application of the Law on General Administrative Procedure, emphasis was placed on several essential components of the doctrine of knowledge management through the following components: 1) identification of knowledge as a complex process that locates data on skills, knowledge and competencies possessed by employees in the public sector who implement the Law on General Administrative Procedure; 2) acquiring knowledge from existing resources available to the public sector and/or acquiring knowledge from external sources (*outsourcing*) by engaging experts in this field; 3) developing knowledge through procedures, supporting the individual skills of participants and stimulating the articulation of the so-called of "tacit knowledge" in order to create new knowledge by establishing a system of the so-called "knowledge incubator" and promoting the

system of the "learning organization"; 4) sharing and dissemination of knowledge through the interactive process of Academy lecturers and training participants; 5) storage and continuous updating of knowledge in the form of a document and finally and most importantly 6) the use of knowledge as a key motivating factor for Academy training participants by connecting training and personal, professional and career advancement.

Given that the function of professional development aims to bridge the differences between the existing and the desired state, the Academy has, for the purposes of uniform application of the Law on General Administrative Procedure, programmed specific trainings that are an integral part of the Training Program defined as the Introductory Training Program, the Continuous Training Program and the Sectoral Program training.

## 3. The Process and Procedures for the Preparation of Training for Uniform Application of the Law on General Administrative Procedure

Bearing in mind that the Law on General Administrative Procedure, by the nature of its provisions and application, is related to practice and countless real-life situations, the National Academy for Public Administration carefully approaches training related to the application of this Law. Thus, through many years of practice, since the beginning of the application of the new LGAP, a procedure for the implementation of training in this area has been established, which consists of three parts, namely: 1) the procedure for assessing the need for professional training in this area; 2) training programming procedure; 3) the training implementation procedure and finally 4) the training evaluation procedure based on the impressions of the participants. Furthermore, it should be noted at this point that all training for the implementation of the LGAP takes place under the supervision of the training coordinators who provide the necessary guidelines to the lecturers hired by the National Academy for Public Administration.

### *3.1. The Procedure for Determining Training Needs in the Field of Uniform Application of the Law on General Administrative Procedure*

The assessment of the need for professional development is based on the analysis of the strategic and legislative framework as well as the Government's Work Plan for 2020. A very important source is also the analysis of relevant documents: reports related to the determination of the needs for professional training created in the framework of various projects, reports of independent state authorities, as well as national-level authorities and inspections, but also the analysis of

the needs for professional training based on the evaluation sheets of implemented training in the previous year.

A specific segment in the whole process is the analysis of unified needs for professional development of officials at the level of state administration bodies and local self-government units through submitted reports of the authorities on the organizational needs for professional development of their employees.

As a key stage in the process of needs analysis is also the implementation of consultative meetings with relevant partners, primarily from state authorities whose scope includes issues of importance for the implementation of trainings, with which priority topics are defined. In parallel with this process, the work on the development of the training program, which represents the next phase of the cycle of professional development, was started.

In the previous period, the field of management of the legislative process and administrative acts was recognized as necessary by as many as 76% of state bodies, while all trainings from this thematic area were individually recognized as necessary by more than 150 respondents and of high priority. The most sought for training is that on general administrative procedure - basic training, and the preferred form of implementation is a seminar and lecture. As for additional training in this area, the respondents have cited the second instance procedure and administrative dispute - regulations and practice.

As for employees in local self-government units, LSGU competences for the work of civil servants, special functional competences in a specific field of work refer to the necessary general and methodological knowledge and skills within a specific field of work that a civil servant should apply in his work in order to perform his job effectively. Since administrative-legal affairs are performed in 1062 workplaces, as many as 1008 workplaces have defined knowledge in the field of general administrative procedure. The share of special administrative procedures (in 620 workplaces) is also significant, and these skills are more closely defined through relevant regulations from the scope of workplace and are the subject of consideration when developing special professional development programs. A slightly smaller number of workplaces (273 workplaces) have the obligation to follow the jurisprudence and positions of the Administrative Court, which implies the need for the re-organization of the exchange of experience with the judges of the Administrative Court as a form of professional development for employees in these workplaces. Thus, out of 1008 workplaces where the general administrative procedure is applied, the need for training was expressed in 35.96% of cases; rules for enforcement of the decision issued in the administrative procedure, out of 536 workplaces, the need for training was expressed in 19.2% of cases; for 620 workplaces where tasks related to a special administrative procedure are performed, the need is expressed in 22.12% of cases, and of the 273 workplaces that are related to administrative disputes, rules of procedure, enforcement of court decisions and jurisprudence

- positions of the Administrative Court the desire for additional training was expressed in 9.74% of cases.[5]

Also, in the area of managing the legislative process and administrative acts, in view of the role and importance of national minorities, there is a permanent need to improve the content of training on general administrative procedure in the area of exercising the linguistic rights of national minorities. On the other hand, the need to develop new training in connection with monitoring the implementation of the Law on General Administrative Procedure was identified.

All in all, in the field of application of regulations, the most requested training as the thematic area for which the greatest need was expressed in the conducted survey of organizational needs in local self-government units is General Administrative Procedure, which was mentioned as a need by almost 2,500 civil servants.

### *3.2. Procedure for Programming the Trainings for the Uniform Application of the Law on General Administrative Procedure*

In order for the trainings related to the uniform application of the Law on General Administrative Procedure to achieve their full effect, in the process of programming those trainings, a specific protocol is implemented, established on the most modern andragogic principles, which includes:

1) Determining the target group of trainees - candidates who are employed for the first time in a body of the state/autonomous province/local self-government unit, and trainees in those bodies, or in a continuous professional development program, all employees who directly apply the Law on General Administrative Procedure.
2) Determining the competencies to the development of which the training program contributes, based on general functional competencies related to the organization and work of the state bodies of the Republic of Serbia of Serbia/autonomous province/local self-government unit in the Republic of Serbia.
3) Determining the goal of the program implementation - acquiring knowledge about procedural rules of administrative procedure that are needed for preparation for passing the state professional exam.
4) Expected effects in raising the level of knowledge and skills of the participants - upon completion of the seminar, the participant is able to list the key novelties introduced by the current Law on General Administrative Procedure; explain the concept of administrative procedure; enumerate the introductory provisions and basic principles of the administrative

[5] National Academy for Public Administration, *Report on the Assessment of Professional Training Needs for Public Administration Employees For 2021*, 2020, p. 48.

procedure; explain the use of language and script in the Law on General Administrative Procedure; explain the administrative procedure; compare the concept of an administrative matter and the concept of an administrative act; understand the relationship between general and special administrative procedures; explain the position of the party in the administrative procedure according to the Law; is able to explain who, according to the Law, is an interested party and its representation; list the elements of the administrative contract; explain the letter of guarantee; cite an example of an administrative action; summarize the area of public service provision; explain the single administrative place; set an example for communication between authorities and parties; summarize the importance of notification; specify the time limits; be familiar with the costs of procedure; summarize the process of starting the administrative procedure and the course of the procedure until the decision is issued; explain the decision; explain the conclusion; state the legal provisions regarding the appeal in the administrative procedure; identify certain problems in practice related to the actions of the first and second-instance authorities upon appeal; understand special cases of revoking and changing decisions; explain the enforcement of final administrative acts; explain the penal provisions; understand the process of implementing the Law and the interim and final provisions; list examples of administrative jurisprudence.

In principle, bearing in mind the mandatory application of the Law on General Administrative Procedure in all public authorities, the uniform application of the LGAP is contained in all levels of professional development of employees in public administration, from the Introductory Training Program for employees in state bodies, local self-government bodies and local self-government units, to continuous professional development programs.

### *3.3. Realization of Training for the Uniform Application of the Law on General Administrative Procedure*

In order for the participants of the trainings programmed and implemented by the National Academy for Public Administration to be better trained in the independent and uniform application of the LGAP, the training organized by the Academy contains the following thematic units: concept of administrative procedure; introductory provisions and basic principles of administrative procedure; use of languages and script in administrative procedure – official use of languages and scripts of national minorities in administrative procedure; administrative procedure: concept of administrative matter; concept of administrative act; general and special administrative procedures; a party in administrative procedure; interested party in the administrative procedure and its representation;

administrative contract; letter of guarantee; administrative actions; provision of public services; single administrative place; notification of authorities and parties; notifying the parties; time limits in the administrative procedure; administrative procedure costs; initiation of administrative procedure and the course of the administrative procedure until a decision is made; decision, conclusion and appeal in the administrative procedure; administrative procedure of the first and second instance bodies upon appeal - examples from practice and observed problems; special cases of revoking and changing decisions; enforcement of administrative acts; penal provisions from the Law on General Administrative Procedure; analysis and consideration of examples of administrative jurisprudence (preferably, with the use of practical examples.

The trainings implemented by the National Academy for Public Administration, which are related to the implementation of the Law on General Administrative Procedure, are organized in the form of seminars or online trainings, with the application of methods such as: interactive lectures, discussions and case studies and review of written and video material and case studies (examples from practice).

Regarding the implementation of subject trainings, the National Academy for Public Administration for trainings on the uniform application of the Law on General Administrative Procedure hires accredited implementers in the field of professional training in general administrative procedure and administrative litigation, who are registered in the Permanent List of Lecturers kept by the National Academy for Public Administration. In addition to practicing lawyers, the National Academy for Public Administration also has lecturers from the ranks of academic professors from this scientific field.

Trainings for the uniform application of the Law on General Administrative Procedure are designed to be adapted to legal practitioners employed in state bodies, bodies of autonomous provinces and local self-government units, but also in other legal entities that make up the public administration of the Republic of Serbia within the meaning of the provisions of Article 2 of the Law on the National Academy. Thus, the trainings carried out by the Academy are based on the teaching part - transfer of theoretical knowledge; discusses the application of the principles of administrative procedure in practice; analyzing real-life disputed situations; discussions of lecturers and participants on domestic and regional practice in the field of administrative contracts, letters of guarantee, administrative actions and provision of public services; comparing experience in communication between authorities and parties; discussions on the application of the Law on General Administrative procedure in the part concerning decisions and conclusions; analyzing the advantages and disadvantages of the legal regulation in practice in the part related to appeals; connecting experience when it comes to special cases of revoking and changing decisions and the enforcement of administrative acts.

In terms of methods and techniques applied in trainings in this field, which are organized and implemented by the National Academy of Public Administration, the most represented are: interactive lectures; group work; discussion; case study; review of materials and asking questions from participants.

Regarding the duration of the training for the uniform application of the LGAP, due to the large number of interested participants, it is limited to one or two teaching days, and the online training is not time limited.

### *3.4. Current Indicators on the Number of Trainings Carried out and the Number of Participants*

Since the beginning of the application of the new Law on General Administrative Procedure, 2,209 trainees attended training in this field, of which 1,401 trainees from state administration bodies; 20 participants from the authorities of the autonomous province; 766 trainees from local self-government units and 22 trainees from judicial bodies who are not holders of judicial or prosecutorial positions. By analyzing the indicators available on the LMS platform of the National Academy of Public Administration, the interest of the participants was much higher, but for various reasons a number of them did not attend the trainings. By comparing these parameters, it was found that the turnout exceeded 86.7% of the registered participants.

The indicators related to the training of participants for the uniform application of the LGAP show that the need for this type of professional training is present among all employees in the public administration, regardless of their work experience. Thus, according to the titles of the trainees, in relation to the total number of trainees, 4.98% of civil servants in office were represented; senior advisors 14.26%; independent advisers 27.42%; advisers 33.37%; junior advisers 13.76%; while 9.45% were present with the title of associate; 6.46% of junior associates, and 5.20% and 5.20% of junior clerks.

In relation to the management function in public administration bodies, of the total number of trainees, there were 21.99% of trainees in managerial positions, and 76.33% of trainees in non-executive positions.[6]

As the conceptual approach of the National Academy of Public Administration to training for the uniform application of the LGAP is set so that the training is constantly adapted to the actual needs of the participants, in cooperation with the training coordinators of the Academy and the lecturers, the expectations of the participants were met, which ranged from acquiring new knowledge; familiarization with e-Administration; by strengthening competencies for independent work at the workplace; by improving knowledge in this area; training to work on practical examples; acquiring knowledge and skills for a systematic approach

[6] National Academy for Public Administration, *Report of the National Academy of Public Administration*, September 15, 2023.

to the LGAP with related special laws to the renewal of already acquired knowledge to the need for participants to familiarize themselves with the jurisprudence in the application of the LGAP in other public authorities and resolving the most common dilemmas in the application certain provisions of the LGAP.

Finally, bearing in mind the intention of the National Academy for Public Administration to continuously and permanently continue with trainings for the uniform application of the LGAP, the indicators - assessments of the participants proper about the need for additional training in this area - are worth mentioning. Thus, as many as 58.03% of participants expressed the need for additional training, while 16.34% of participants considered that the knowledge and skills in the uniform application of the LGAP are sufficient for them to work independently. When asked about the need for additional training, for miscellaneous reasons, 32.14% of participants did not answer.

### *3.5. Evaluations of the Quality of Carried out Trainings for the Uniform Application of the Law on General Administration and the Satisfaction of Training Participants*

As the National Academy for Public Administration is the central institution for the professional development of employees in public administration, fully committed to satisfaction of its participants and self-assessment of the usefulness of the training programs programmed and implemented by the Academy, training evaluations are carried out permanently by the participants. Thus, the practice at the Academy is to provide the participants with an evaluation questionnaire at the end of each training course. Data from the evaluation questionnaires and the comments of the participants are the basis for improving the work of the lecturers, which is achieved through close cooperation between the training coordinators and the lecturers.

Bearing in mind this extremely important segment of the analysis of trainings for the uniform application of the Law on General Administrative Procedure, in the previous period as many as 72.98% of the participants declared that the trainings have fully met their expectations. 26.31% of the participants stated that the trainings have partially met their expectations, while only 5.11% of the participants stated that the trainings have not met their expectations. For various reasons, 8.75% of participants did not answer this question.

Given that the trainings in the field of uniform application of the LGAP are designed to achieve an expedient balance between the theoretical and practical work of the lecturer and the participants, data on the evaluation of the interactive segment of the training on this topic is interesting. Thus, 37.87% of the participants felt that they had enough opportunities to actively participate in the discussion, while only 16.49% of the participants felt that there was not enough room for discussion between the participants and the lecturer, as well as between

the participants themselves. For unknown reasons, 48.94% of participants did not make a statement on this issue. As the most common reasons for "passivity" during the training, i.e. not taking part in the discussion, the participants cited the following reasons: "I was more focused on the presentation"; "Due to obligations at work, left the lecture earlier"; "The other participants asked the same questions I had in mind before me, so I did not want to repeat them"; "The questions I would ask are from narrowly specialized fields, I didn't know if they would be interesting and applicable to everyone" or simply: "I had no additional questions, because I am completely satisfied with the lecture on the application of LGAP."

Bearing in mind that the goal of the training on the uniform application of the LGAP is set, among other things, to determine the realistic ratio of existing and newly acquired knowledge relevant for independent work of the trainees, the following indicators are also interesting. With a grade from 1 to 4, the participants graded the following segments: the self-assessment of the level of knowledge of the LGAP was graded on average with a score of 2.54, while the self-assessment of knowledge related to the application of this Law after the training was graded on average with a score of 3.53. The expected effect of the training on raising the level of competences and performing tasks in the public administration (applicability of acquired knowledge) was graded with an average score of 3.61.

Furthermore, the quality of the performer's presentation and the ability to convey the content (the performer's way of working) was evaluated with an average score of 3.87; the material used during the training was rated 3.86 on average; the efficiency of the training organization was evaluated with an average score of 3.74, and the productivity of the discussion during the training with a score of 3.76. In summary, the participants in the previous period evaluated the training courses on the uniform application of the LGAP with an average score of 3.77.

As it was pointed out earlier that the training on the uniform application of the LGAP are also realized in the form of webinars, the evaluations of the participants and the trainings in this environment are significant. Thus, 81.84% of the participants assessed that the form of the webinar corresponds to the given topic, while 17.37% of the participants considered that the form of the webinar does not fully correspond to the given topic. Bearing in mind the specificity of training environment in the form of webinars, 83.05% of the participants of these trainings thought that the training lasted an optimum time, while 14.6% of the participants complained that the training was too short. On the other hand, 9.70% of participants thought that the webinar training was too long.

At the end of the observation regarding the quality of trainings programmed and implemented by the National Academy for Public Administration in connection with the uniform application of the LGAP, it is worth pointing out that the Academy continues to improve the quality of its trainings. In this direction, the

process of quality standardization according to the SRPS ISO 9001:2015 standard and internal verification according to the SRPS ISO 19011:2018 standard was started.[7]

## 4. Concluding Considerations

Good governance and a functional public administration are key to building and maintaining trust in government as well as creating the necessary structural reforms that raise living standards in society. This is a familiar challenge for the governments of countries seeking to integrate into the European Union, as the accession process requires the implementation of fundamental reforms. The OECD and the European Commission have been joining forces for more than 20 years through the SIGMA initiative, which provides support for the strengthening of public administrations and the implementation of public administration and public management reforms.

A well-functioning public administration is a prerequisite for transparent and effective democratic governance. The European Commission has increased its focus on the public administration reform process, promoting legal values relevant to public administration such as: the rule of law; legality in material, procedural, organizational aspects; protection of human and citizen rights; legal responsibility of the administration for damage, disciplinary responsibility of administrative officers; legal security; the equality of all persons in administrative procedure; equal treatment in generic and similar administrative matters; concreteness in the procedure; impartiality and judicial control of the administration.

If we look at comparative legal practice of modern countries, we can see two groups of states: the first is made up of states that have not or have partially codified administrative law and the second group of states that have codified their administrative law legislation. Serbia, traditionally, belongs to the countries that have had codified administrative legislation for more than 90 years, which is a great advantage because it has been possible to uniformly regulate certain issues to ensure standardized administrative procedures in all administrative areas.

Bearing in mind that the issue of standardized administrative procedure has been systematically addressed, another practical problem remains, which for the purposes of this work, is defined as the uniform application of the Law on General Administrative Procedure.

As the content of this paper shows the role of the National Academy for Public Administration in the training process for the uniform application of the LGAP, it should be noted that the need for training in this area is constantly present and will be the subject of the Academy's activities in the coming years. Namely, the data obtained for the needs of the working version of the Report on the

[7] Quality standardization is implemented within the framework of the unified UNDP project "Civil Service Training for the 21st Century in the Republic of Serbia".

assessment of the needs for professional development of employees in the public administration for the year 2024 and beyond in the field of administrative and legal affairs, recognizes the need for advanced workshops and the exchange of experiences of officials assigned to the tasks of conducting administrative procedures and ruling on administrative matters and training for the uniform application of the LGAP in practice.

Participants of previously realized trainings attach special importance to the preparation of explanations in administrative procedure, conducting administrative procedure and opening discussions; extraordinary legal remedies under the LGAP, as well as the action of the first-instance authority on appeal. Furthermore, employees in public authorities in this field also recognize the need for training in connection with the enforcement procedure in the LGAP, as well as the need for familiarization with the practice of the Administrative Court. Thus, the need for further professional development in the field of administrative procedure was expressed by 36 bodies with the necessary implementation in the next year. The most interest was expressed in training specifically in the area of application of LGAP in practice (314).

In the working version of the cited document, it was recorded that out of 89 state administration bodies, 16,227 civil servants, i.e. 80% of employees, expressed the need for training.[8] Of that number, for the work in jobs related to administrative and legal affairs, the greatest need for 2024 was expressed for training in the field of: general administrative procedure (75) and administrative disputes, rules of procedure, enforcement of court judgments (20). The need for training in the field of practice and positions of the Administrative Court was also observed (14).

By analyzing the needs for professional training based on data obtained from the authorities of the autonomous province and local self-government units, in the working version of the cited document, the questionnaire was filled out by 56 local self-government units with a total of 7,396 employees and 1,078 managers of basic or special organizational units or narrower internal units. Further analysis of the obtained data revealed that 44 local self-government units expressed the need for further training in administrative procedures, i.e. uniform application of the LGAP (1,078 employees).

From the above indicators, it can be unequivocally concluded that training in the field of uniform application for the work in jobs related to administrative and legal affairs is necessary with at least two aspects: the first is the provision of assistance to employees at workplaces related to administrative and legal affairs, and the second can be considered an immediate prerequisite for transparent and effective democratic management in order to reform our public administration and public management. Finally, this will achieve perhaps the most significant

[8] The questionnaire of the National Academy for Public Administration was filled out by 63 state bodies, which expressed the needs of 12,187 civil servants and 1,674 managers of basic or specific narrow organizational units. The data was collected through the online platform LimeSurvey.

effect, which is the satisfaction of our citizens with the work of public administration and the functioning of the administrative apparatus as a whole.

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# DIGITALIZATION OF PUBLIC ADMINISTRATION DATA AND THE DEVELOPMENT OF E-GOVERNMENT IN SERVICE OF ENHANCING THE EFFICIENCY OF PUBLIC ADMINISTRATION BODIES DURING ADMINISTRATIVE PROCEDURES

*Abstract*

*The latest Law on Administrative Procedure was adopted in 2016, at a time when the development of digitization and e-government was just beginning, whereas the Law on Electronic Administration followed two years later, in 2018. Given that one of the priorities of the Government of the Republic of Serbia was the development of digitization within public administration, which has indeed been achieved, this paper will examine to what extent the efficiency of public administration bodies has been improved thanks to electronic data collection methods. Article 103 of the Law on Administrative Procedure envisages that "authorities shall obtain data from official records electronically where possible, in order to expedite procedures." Simultaneously, within the Regulation on Office Operations of state administrative bodies, there is a requirement to develop electronic operations, which is considered implicit. Therefore, this is regarded as the most significant aspect of public administration digitization, as it enables the storage of all archival data in electronic format, facilitates data exchange between authorities and users, as well as among authorities themselves. The development of e-government creates the possibility of much faster access to all necessary documents and certificates, including those collected by the authorities themselves. The most crucial prerequisite for the effective operation of e-government is certainly the legal framework, which needs to be precise and mutually aligned. In this regard, the Analysis of Regulations Influencing the Development of E-Government in the Republic of Serbia stands out as an important document, forming part of the process of developing the e-government development program for the period 2019-2021. This analysis, conducted under the auspices of prominent international donors and the Ministry of Public Administration and Local Self-Government, has identified the Law on Administrative Procedure among the regulations that particularly impact the development of e-government in the Republic of Serbia. This document provides an overview of proposals to*

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*enhance the current Law, focusing on defining and aligning concepts such as "official records" and "registry," systematically regulating certificate issuance, and clarifying the authorities' responsibility for data content and accuracy. The paper will analyze the development and implementation of e-government activities.*

**Keywords:** Law on Administrative Procedure, E-government, Data Digitization, Public Administration, Administrative Procedure, Work Efficiency, Analysis of Regulations Affecting the Development of E-Government in the Republic of Serbia.

## 1. Introduction

This paper presents an analysis of the digitization of data in public administration in the Republic of Serbia and the development of e-government in bodies of public administration and local self-government. It discusses the results achieved in this area and identifies shortcomings, highlighting the need for harmonization of regulations governing this matter with the Law on General Administrative Procedure of the Republic of Serbia. The necessity for harmonizing legal regulations in the field of digitization and administrative procedure is evident, given that the Law on General Administrative Procedure of the Republic of Serbia came into force in 2016, followed by the adoption of the Law on Electronic Document, Electronic Identification, and Trust Services in Electronic Business in 2017, and the Law on Electronic Administration in 2018. As public administration bodies and local self-government units are where citizens most commonly interact with state administration, and this correspondence primarily occurs within the framework of administrative procedures, there is a clear need to enhance the quality, efficiency, and cost-effectiveness of these procedures and processes.

The European Union insists on the development of e-government, which is why the Digital Agenda for the period 2020-2030 was recently adopted, highlighting "digital transformation of public services" as one of its key priorities. This enhances the transparency and openness of public administration towards the public.[1] In Serbia's EU accession process, there is no specific negotiating chapter on public administration reform. However, the European Union expects Serbia's public administration to adhere to the principles of the European Administrative Space, which represents a unified process of aligning systems and practices of EU member states. Serbia unequivocally has the task on its European path to harmonize its regulations and practices in this area with EU recommendations and principles, including reliability and legal certainty, openness and transparency of the administrative system, promoting citizen participation in public administra-

[1] See: Rakshya Bhattarai *et al.,* "The impact of the single digital gateway regulation from the citizens' perspective", *Procedia Computer Science,* Vol. 164, 2019, pp. 159-167.

tion, accountability of administrative bodies, and effectiveness in public administration operations. The precondition for successful implementation of electronic communication in administrative procedures lies in harmonizing and aligning legal regulations. Therefore, it is significant to analyze the results achieved so far and planned activities in line with recommendations from prominent international donors, proposed in collaboration with the Ministry of Public Administration and Local Self-Government.

## 2. Development of E-government

In the 1960s and 1970s, the use of information and communication technologies was seen as a solution to some of the problems of bureaucracy. However, it was not until the late 1990s, with the development of the Internet, that the application of IT in administration for customer service, modeled after consumer practices, gradually entered awareness.[2] This initiated the process of public administration reform (New Public Management), mirroring private sector management practices with the aim of enhancing efficiency and cost savings in administrative procedures. The approach advocated by this reform is based on user-centricity and customer satisfaction, which is now dominant in discussions of e-government.[3] The most precise definition of e-government is that it represents "the use of information and communication technologies in public administration to increase productivity and efficiency in delivering public services, as well as to develop additional aspects of transparency and accountability within public administration".[4] The European Union insists that e-government be "knowledge-based and user-oriented", aiming to bring about certain positive changes in the functioning of public administration and the development of an information society.[5] It is clear that the concept of e-government has evolved in line with technological advancements and other technical achievements. Thus, e-government has become a "global phenomenon".[6] The technology that is an integral part of e-government is used in three areas of public administration: 1) relations between administration and civil society; 2) provision of public services; 3) the functioning of public authorities in all phases of democratic processes.[7] It is important to emphasize that there are different stages in the development of e-government: the first stage, where information is available on how to access services and methods for doing so via the

[2] Duško Martić D., *E-uprava: pojam i značaj*, 2014, *https://pravoikt.org/e-uprava-pojam-znacaj/,* 23. 11. 2023.
[3] *Ibidem*.
[4] Neven Vrček, Anamarija Musa, "E-uprava u Hrvatskoj: Izazovi transformacije uprave u digitalnom društvu", *Forum za javnu upravu – Uprava u digitalno doba, Transformacijski potencijal e-uprave za veću učinkovitost i odgovornost* (ed. Anamarija Musa), Friedrich-Ebert-Stiftung: Institut za javnu upravu, 2016, p. 11.
[5] Dragan Prlja, "E-uprave u Evropskoj uniji i u Srbiji", *Revija za evropsko pravo*, Vol. 8, No. 1, 2006, p. 57.
[6] Dejan Ž. Milenković, *Savremene teorije i moderna uprava*, Fakultet političkih nauka, Beograd, 2019, p. 202.
[7] Marijana Vidas-Bubanja, "Prednosti i ograničenja izgradnje e-uprave u Srbiji", *Časopis za ekonomiju i tržišne komunikacije,* Vol. 1, No. 1, 2011, pp. 74-75.

Internet; the second stage, characterized by one-way interaction, where services are mainly available through electronic forms; the third stage, marked by two-way interaction, where users submit electronic forms and public administration representatives respond to requests and inquiries; the fourth stage can be considered complete, as users do not access services physically or communicate with public administration offices but exclusively through online formats.[8] In this stage, there is complete personalization and automation of e-government, where citizens receive information from public authorities needed to initiate requests for renewal of personal ID cards or driving licenses.[9] In this stage, public administration bodies and authorities invite citizens and other interested parties to express their opinions on proposed public policy measures and participate in the legislative process, thereby developing democratic capacities within society and making the e-government system unique.[10] Electronic governance should serve as a driver for the development of legal values and principles contained in the Constitution, which impact all areas of social life. These values pertain to the transparency of government bodies, the rule of law, protection against discrimination, and the provision of information security to citizens.[11] Emphasizing these values and setting general guidelines and objectives for what e-governance should achieve are integral parts of the Strategy and Program for the Development of Electronic Governance in the Republic of Serbia, which were implemented (from 2015 to 2018 and from 2020 to 2022). For the interaction between citizens and government through e-governance to be effective, timely, and economical, it is necessary to align legal regulations. In this regard, the most significant task is to harmonize the provisions of the Law on General Administrative Procedure with the provisions of other laws and regulations that govern electronic business.

## 3. Achievements of E-government in Serbia

The foundations for the development of e-government in Serbia were established in 2004 with the adoption of the Law on Electronic Signature, and in 2006 with the adoption of the Strategy for the Development of Information Society.[12] The

[8] Milan Palević, "Pravni okvir elektronske uprave u Srbiji", *Zbornik radova* "*XXI vek – Usluge i prava korisnika*" (ed. Miodrag Mićović), Pravni fakultet Univerziteta u Kragujevcu: Institut za pravne i društvene nauke, Kragujevac, 2020, p. 524.

[9] See: Obrad Peković *et. al.* "Uloga javnog poštanskog operatora u razvoju e-uprave u Srbiji", *XXVII Simpozijum o novim tehnologijama u poštanskom i telekomunikacionom saobraćaju* (eds. Vladanka Aćimović, Miodrag Bakmaz, Nebojša Bojović, Dejan Marković), Saobraćajni fakultet, Beograd, 2009, pp. 205-214.

[10] Nenad Spasojević, "Specifičnosti e-uprave: ekonomsko-finansijske konsekvence", *Economics-Innovative and Economics research journal,* Vol. 3, No. 1. 2015, p. 127.

[11] Isidora Ljumović, Dejana Pavlović, "Značaj i uloga e-uprave u unapređenju konkurentnosti privrede Srbije", *Pravci strukturnih promena u procesu pristupanja Evropskoj uniji* (eds. Jelena Minović, Ivan Stošić, Duško Bodroža, Božo Drašković), Institut ekonomskih nauka, Beograd, 2016, pp. 325-339.

[12] D. Prlja, p. 68.

e-portal was established in 2010 as a precursor to e-government, with the Ministry of Telecommunications and Information Society and the Republic Agency for Information Society as the main conceptual creators. Since 2012, Serbia has been a member of the Open Government Partnership.[13] Notably, within the e-portal, an e-service was developed through which citizens can submit requests to public administration in an online format while simultaneously tracking the progress of their electronic requests.[14] The full commitment to digitalization in public administration was demonstrated by the decision of the Government of the Republic of Serbia in 2017 to establish the Office for Information Technology and Electronic Government. As a result, the focus of e-government development is currently outlined in several different strategies and other documents related to the development of public administration bodies, among which the Program for the Development of E-Government for the period 2023-2025, the Strategy for the Reform of Public Administration in the Republic of Serbia for the period 2021-2030[15], and the Action Plan for 2021-2025.[16] Within the Program for the Development of E-Government for the period 2023-2025, priority is given to three areas: 1) modernizing public administration using information and communication tools; 2) enabling cross-border mobility through interoperable digital services; 3) facilitating digital interaction between administration and users to improve the quality of public services.[17] It is crucial to note that one of the focuses of e-government operation is the creation of the e-Court application with the aim of increasing court efficiency. Additionally, it is planned to establish a new register and upgrade the existing one, accessible through the judicial network, thereby increasing the level of legal certainty. Until now, it has been possible to track the progress of cases only through the website. Therefore, the full implementation of e-Courts would enable the necessary increase in the efficiency of judicial institutions. As previously mentioned, the Law on General Administrative Procedure of the Republic of Serbia was enacted in 2016 and has been in effect since June 1, 2017. In the sections "Communication between Authorities and Parties" and "Notification", the Law recognizes and provides for electronic communication between parties and authorities.[18] This communication is defined and conducted in accordance with the legal regulations governing e-government. From

[13] Ljiljana Kolarski , "E-uprava kao pokazatelj razvoja digitalizacije javne uprave u Republici Srbiji", *Perspektive političkih nauka u savremenom društvu* (eds. Andrea Matijević, Nenad Spasojević), Institut za političke studije, Beograd, 2023, p. 26.

[14] D. Ž. Milenković, p. 202.

M. Vidas-Bubanja, p. 81.

[15] Strategy for the Reform of Public Administration in the Republic of Serbia for the period 2021-2030, *Official Gazette of RS*, No. 42/2021 i 9/2022.

[16] Action Plan 2021-2025 for the implementation of the Administration Reform Strategy in Republic of Serbia for the Period 2021-2030.

[17] Proposal of the E-Government Development Programme of the Republic of Serbia 2023-2025 and Action Plan for its implementation, 2023, p. 31.

[18] Arts. 56-57, 60-61, 66, 70, Law on General Administrative Procedure of the Republic of Serbia, *Official Gazette of RS*, No. 18/2016, 95/2018 - Authentic Interpretation and 2/2023.

this perspective, the Law on Electronic Document, Electronic Identification, and Trust Services in Electronic Business, which was adopted and came into effect in 2017, is particularly noteworthy. This law prescribes the form and appearance of electronic documents, their authenticity, the method of signing, usage, and more. Article 7 of this Law clearly equates the importance of paper and electronic documents,[19] and Articles 70 and 71 specify sanctions for "the responsible person in a government authority, as well as the authority of an autonomous province or local government unit if, in the process it conducts in the performance of public authority, it does not recognize the validity or disputes the probative value of an electronic document solely because it is delivered in such a format."[20] These provisions provide sufficient grounds for the use of electronic documents in all procedures, even if specific regulations governing those procedures require only paper documentation. In this context, amending all aforementioned regulations that are not aligned with this law is desirable but not necessary for implementing procedures regulated by these regulations as electronic, states the 2018 Regulation Analysis aimed at harmonization with electronic business regulations, conducted as part of the "Towards a Paperless Administration" project.

A potential problem encountered in practice could be actions contrary to Article 215 of the Law on General Administrative Procedure, which explicitly states that "the provisions of laws and other regulations establishing the obligation for a party and other participants in the procedure to provide data on facts recorded in official records, contrary to the provisions of Articles 9 and 103 of this Law, cease to apply after 90 days from the date of entry into force of this Law."[21] These provisions obligate public administration in its entirety to *ex officio* obtain data from registers and records maintained by official duty. The 2018 Regulation Analysis noted that "Article 215 of the Law on General Administrative Procedure repeals the provisions of all other regulations that prescribe otherwise, so all provisions requiring the submission of paper documentation are no longer valid and should be removed during the next amendment of regulations. However, even after the entry into force of Articles 9, 103, and 215 of the Law, laws are being adopted that are in explicit conflict with these provisions, indicating that the drafters of the regulations are not familiar with this Law," according to the conclusion. Overcoming this problem is most significant in establishing the e-GUP information system, which represents a "sophisticated tool for electronic data exchange among all public administration bodies".[22] This information system is based on the Regulation on the Acquisition and Transfer of Data on Facts Recorded in Official Records, which was adopted by the Government of the Republic of Serbia

[19] See: Art. 7, Law on Electronic Document, Electronic Identification, and Trust Services in Electronic Business, *Official Gazette of RS*, No. 94/2017 and 52/2021.

[20] See: Arts. 70-71, Law on Electronic Document, Electronic Identification, and Trust Services in Electronic Business.

[21] Art. 215, Law on General Administrative Procedure.

[22] Support for Employees in Using e-GUP, https://mduls.gov.rs/reforma-javne-uprave/reforma-upravnog-postupka/podrska-zaposlenima-u-koriscenju-ezup-a/, 23. 11. 2023.

on June 7, 2017, and "regulates the manner of data exchange and was enacted to facilitate and speed up the review, i.e. acquisition of data from official records, and for more effective realization of the principles of the Law on General Administrative Procedure." It was followed by the User Manual for the e-GUP Information System. These regulations aim to achieve uniform practice, primarily in accordance with the above-mentioned provisions of the Law. "This is a significant step toward introducing modern e-government in Serbia, and the state is turning to citizens through faster and more efficient work of administrative bodies".[23]

The mentioned Analysis notes that "government authorities still require that, in addition to electronic documentation, printed versions are also submitted and retained, resulting in parallel administration in paper and electronic form and unnecessary resource expenditure for all involved parties. Therefore, it is necessary to adjust the document management system in public administration to electronic communication in the work of state authorities." This leads to the conclusion that, even four years after the introduction of legal regulations in the field of electronic business, the situation "on the ground" is varied and can only be changed through strict and consistent application of legal provisions. When considering and analyzing the implementation of legal regulations in the field of e-government, important indicators of success include user opinions and experiences. As part of the "I Ask" project organized by the European Policy Center, the National Coalition for Decentralization, the Center for Balanced Regional Development, and the Ecological Center "Stanište" with the support of the European Union, a survey was conducted among Serbian citizens in 2021. It revealed that 55% had a negative experience with local government, while 45% had mostly positive experiences, indicating that despite many administrative procedures being eased and expedited through e-government implementation, problems still exist in practice that need to be addressed and aligned with technological advancements and developments. One of the most noticeable problems from this perspective is the communication between government and local authorities, particularly the acquisition of data recorded in official records. This issue is especially emphasized in the Analysis of Regulations Affecting the Development of E-Government in the Republic of Serbia, conducted by the Ministry of Public Administration and Local Self-Government of the Republic of Serbia with support from prominent international donors, where the Law on General Administrative Procedure is recognized as one of the regulations that particularly affect the development of e-government in Serbia. In this context, there is a need to "clearly define the term official records and regulate the general framework for the management of individual official records in specific laws so that it is clear which facts are proven by data from each official record. It is necessary to regulate the issuance of certificates automatically in electronic form based on data from official records at the systemic level within the Law, as the issuance of certificates is defined as an administrative action, and the authority in the administrative

[23] *Ibidem*.

matter acts through an authorized official (Article 39 of the Law), raising the question of whether a certificate can be issued automatically in electronic form based on data from official records".[24] It further states that in accordance with Article 9 of the Law, "the authority is obliged *ex officio*, in accordance with the law, to review data on facts necessary for decision making that are recorded in official records, to obtain and process them," and in accordance with Article 11 of the Law on Electronic Documents, "the authority acquires data from registers and records in electronic form without additional verification, in accordance with the law." This highlights the need for precise definition of legal provisions concerning access to records from other authorities "i.e., the acquisition of data from these records. They should be such that clear responsibility of the authority from whose information system the data are communicated via the service channel is established, for the content, accuracy, and precise description of those data." It is also emphasized that "special attention should be paid to protecting the interests of the party in case there is a need to correct data originating from another authority".[25] Significant progress in this sector was observed during the crisis caused by the coronavirus pandemic, which highlighted the importance of using technology in all aspects of life. The e-government system was modernized during this period, receiving a new design and providing easier access for users.[26] In e-government, there are three main groups of data that are registered: 1) data on citizens; 2) data on legal entities; 3) data on property.[27] Thanks to the e-government system, citizens can perform numerous activities such as scheduling appointments for identity cards and passports, submitting requests for driver's license and health card replacements, obtaining citizenship certificates, as well as extracts from birth, marriage, and death records.

It is certain that the development of e-government in Serbia has led to increased efficiency in the work of public administration bodies, simplified access to information for citizens, and improved the quality and availability of services.[28] However, NALED's research from 2021 shows that nearly three quarters of people have complete information about how e-government functions, yet only 14% of citizens use such services, with most being private sector members. The same research also indicates a concerning statistic: nearly 40% of citizens do not intend to use e-government services, which may be linked to insufficient digital literacy among Serbian citizens.[29] Citizens' arguments against using e-government services include concerns about data security, trust in the work of public administration authorities, computer literacy, and the availability of electronic

[24] Analysis of Innovation and Digital Transformation Processes in the Republic of Serbia, 2021.
[25] Analysis of Innovation and Digital Transformation Processes in the Republic of Serbia, 2021.
[26] Nina Vasiljević, "Značaj sistema e-uprave za sektor zdravstva i socijalne zaštite", *Zbornik radova Fakulteta tehničkih nauka u Novom Sadu,* Vol. 37, No. 6, 2022, p. 890.
[27] See: D. Ž. Milenković.
[28] Љ. Коларски Љ., pp. 27-28.
[29] NALED, Privreda tri puta više koristi e-upravu od građana, *https://www.naled.rs/vest-privreda-tri-puta-vise-koristi-e-upravu-od-gradjana-5585,* 4. 7. 2023.

services.[30] Nevertheless, in recent years, the number of citizens using e-government services has increased, and the latest research by the Office for Information Technology and E-Government shows that 86% of citizens are satisfied with the services they received through e-government.

## 4. Conclusion

Progress in public administration reform has primarily been achieved due to the Serbian government's commitment to this area and the timely definition of the legal framework that supports the implementation and development of e-government. This is confirmed by numerous reports and analyses resulting from the joint efforts of the Ministry of Public Administration and Local Self-Government and credible international agencies and donors supporting reforms and the implementation of e-government in Serbia. It has also been shown that civil society organizations have played a significant role in the development of e-government through their initiatives, legislative proposals, and research contributions. This highlights the importance of non-governmental organizations in the development and enhancement of the state's social and democratic capacities.[31] A recent public opinion poll conducted in 2021 by the European Policy Center, the National Coalition for Decentralization, the Center for Balanced Regional Development, and the Ecological Center "Stanište," with the support of the European Union, shows that nearly every other resident of Serbia (45%) believes that local self-government adequately cares for its citizens.

Thanks to the development of e-government, both users and public administration bodies save time when obtaining certain documents.[32] There is also a reduction in paper usage for printing, leading to environmental benefits and a decrease in corrupt practices.[33] The most significant benefit for citizens arising from the development of e-government is that services are available to users at any time, without physical barriers to accessing desired and necessary services provided by public administration bodies. This ensures "respect for user services".[34] Therefore, it is important to focus on educating employees in public administration to fully comply with new legal procedures and to demonstrate the benefits of using e-government to users, ensuring there are no manipulative elements in the process. This would lead to improved technical and informational literacy across different population structures. This is an

[30] Jasmina Đurašković, "Kompetentnost u upotrebi elektronskih servisa državne uprave u Srbije", *Serbian Journal of Engineering Management*, Vol. 3, No. 1, 2018, p. 39.

[31] See: Nikola Perišić, Savo Simić, "Medijske javne politike nevladinih organizacija u poboljšanju kvaliteta izbornog procesa u Republici Srbiji od 2019. do 2023. godine", *Analitički centri: Uloga u kreiranju javnih politika u Srbiji* (ed. Nada Raduški), Institut za političke studije, Beograd, 2024, pp. 102-124.

[32] Ivan Kos,"E-uprava", *Pravnik: časopis za pravna i društvena pitanja,* Vol. 51, No. 101, 2017, pp. 85-86.

[33] See: Tony Bovaird, Elke Loffler, "Understanding public management and governance", *Public management and governance* (eds. Tony Bovaird, Elke Loeffler), 4th edition, London, 2023, pp. 3-13.

[34] D. Ž. Milenković, p. 206.

important aspect as information literacy enables the development of society as a whole.[35] A notable drawback in the process of public administration reform, which somewhat slows down the process, is the insistence on paper documentation, as highlighted in the Analysis of Regulations for Harmonization with Electronic Business Regulations, as well as the parallel administration of paper and electronic forms and the unnecessary resource expenditure for all involved parties, as noted in the 2021 Analysis of Innovation and Digital Transformation Processes in the Republic of Serbia. These issues are primarily addressed through the education of responsible officials in public administration, raising awareness about the importance of e-government, and insisting on consistency and standardization in practice and application of legal regulations. Since 2018, various training programs and types of education have been conducted for employees in municipalities and other public administration bodies.[36] Addressing this issue requires amendments to the Law on General Administrative Procedure and other laws and legal acts within its jurisdiction. It is crucial to address these challenges efficiently because the development of e-government can positively impact the development of other social aspects, such as economic development and/or greater citizen involvement in democratic processes.[37] Another important factor contributed by the development of e-government is the reduction of corruption. It is known that we live in an area with a deeply rooted corrupt spirit. By accelerating the work of e-government, this illegal activity is minimized when citizens need various services from public administration bodies.[38] Another reason for the reduction in corruption levels is the transparency brought by e-government.[39] At the same time, through digital data storage, another challenge arises, which is the protection of personal data. This is ensured through a system where it is recorded which official accessed which data and for what reason.[40] A serious indicator of the development of e-government in Serbia was presented in the United Nations E-Government Development Survey for 2022, which provides an overview of the state and development of electronic governance in 193 UN member countries. For the first time, Serbia entered the group of countries with the highest e-government development index, ranked 40$^{th}$ globally (an improvement of 18 places compared to 2020) and first in the region. Serbia now ranks better than some European Union countries such as Croatia, Bulgaria, Hungary, the Czech Republic, and Slovakia (United Nations E-Government Development Survey 2022).

[35] See: Nikola Lazić, Nikola Perišić, "Međuuniverzitetska saradnja Francuske i Bosne i Hercegovine - Studentska mobilnost i uloga francuskog obrazovnog sistema u osnaživanju visokog obrazovanja u Bosni i Hercegovini", *Srpska politička misao*, Vol. 82, No. 4, 2023, pp. 111-131.

[36] NALED, Razvoj eUprave. 2023. *https://naled.rs/razvoj-euprave,* 4. 7. 2023.

[37] See: M. Vidas-Bubanja, pp. 73-88.

[38] See: D. Prlja, pp. 55-81.

[39] *Ibidem*, p. 58.

[40] Blic, Kancelarija za IT i eUpravu: Zaštita ličnih podataka građana je prioritet rada eUprave, 2024, https://www.blic.rs/vesti/drustvo/kancelarija-za-it-i-eupravu-zastita-licnih-podataka-gradana-je-prioritet-rada-euprave/q6rzlzg, 5. 7. 2024.

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# USE OF MINORITY LANGUAGES IN ADMINISTRATIVE PROCEEDINGS IN SERBIA

*Abstract*

*The paper explores the implementation and challenges of minority language use in administrative proceedings in Serbia. Rooted in robust legal guarantees, the Serbian legal framework provides for the official use of minority languages, yet its practical application reveals persistent obstacles. Through an examination of the reports and case law of the state bodies, the paper singles out and analyzes the most evident challenges to the effective use of minority languages in administrative proceedings: the absence of basic prerequisites for conducting administrative proceedings in a timely and efficient manner in minority languages and an insufficient number of civil servants with adequate command of these languages. The paper proposes further institutional and policy interventions that might enhance the realization of this linguistic right of minorities in Serbia.*

**Keywords:** Linguistic Minority Rights, Official Use of Minority Languages, Minorities in the Republic of Serbia, Law on Administrative Procedure, Administrative Proceedings.

## 1. Introduction

Over the last two decades, Serbia has adopted a whole new set of legal provisions on the official use of minority languages. The major part of these changes was triggered by the process of stabilization and association with the European Union and the growing relevance of the pan-European instruments for minority protection. The main *raison d'etre* of the legislative interventions was the preservation of minority languages spoken in Serbia and, hence, of the linguistic identity of its national minorities.

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The use of minority languages in administrative proceedings is an important part of the strategy for the preservation of minority languages. The Law on General Administrative Procedure (hereinafter: LGAP), enacted in 2016,[3] contains an express provision on the use of minority languages in administrative proceedings. In the paper, the authors investigate the level of implementation of this provision by analyzing the official data on the use of minority languages and point to the most critical aspects of the existing institutional set-up for the realization of this linguistic minority right. The aim of the paper is to provide an account of the major obstacles to the efficient realization of the right and suggest possible pathways toward a more effective implementation of its legal guarantees.

In conducting the research, the authors primarily relied on the socio-legal method as a way to examine and explain the practical realities of the official use of minority languages in Serbia. For that purpose, the authors analyzed data found in the official reports and case law of the main state bodies entrusted with the task of protecting the rights of citizens, including minority rights, in dealings with the public bodies or supervising their implementation. The selected evidence was complemented by a review of relevant reports from other state bodies and international governmental organizations. The investigation is limited to the minority languages that have the status of languages in official use at the municipal and provincial level.

The paper is structured in the following way: The first section provides a brief introduction to the legal and societal context of the use of minority languages in administrative proceedings in Serbia. The central section of the paper delves into the practical challenges of conducting administrative proceedings in minority languages by pointing out the major obstacles and exploring their impact on the realization of this minority language right. Finally, in conclusion, the paper brings forward some recommendations for improving the implementation and enforcement of the existing legal guarantees.

## 2. The Legal and Societal Context

After the dissolution of Yugoslavia, and in particular since the democratic uprising that took place at the beginning of the century, the Serbian legal regulation of the official use of minority languages underwent substantial changes. These changes were undertaken under the direct influence of the process of stabilization and association with the European Union and were a reflection of the rapid developments in European minority rights law.[4] The main objective was to provide

[3] Law on General Administrative Procedure, *Official Gazette of RS*, 18/2016, 95/2018 Authentic interpretation, 2/2023 Decision of Constitutional Court.

[4] On the role of minority standards in the process of stabilization and association: Vladimir Đurić, "Službena upotreba jezika nacionalnih manjina u radu organa uprave", *Strani pravni život,* Vol. 69, No. 3, 2019, pp. 49-68; Snježana Vasiljević, "The Legal Aspects of the Protection of Minorities in the Process of Stabilization and Association", *Croatian Accession to the European Union* (ed. Katarina Ott), Vol. 2, 2004, pp. 249-272; The development of European standards in the field also came about as a consequence of the developments in the

conditions for the preservation of the linguistic identity of its national minorities as well as their equality with the majority population.[5] The basic premise was that such a goal could be achieved by enabling the official use of languages that have the greatest chance of benefiting from these legal arrangements because their speakers have a substantial share in the population at the municipal or provincial level.

The existing legal guarantees are a manifestation of the multiethnic character of the country. Serbia is home to twenty-one ethnic communities.[6] Seventeen minority languages are spoken throughout its territory, according to the 2022 population census, which are the mother tongue of approximately 12 percent of its citizens.[7] The Autonomous Province of Vojvodina is the most linguistically diverse area, where five minority languages have the status of a language in official use in the provincial public bodies.[8] The linguistic map of Vojvodina is even more complex at the local self-governance level, where minority languages are in official use in 41 out of the 45 municipalities situated in the province.

Conducting public proceedings in minority languages represents an important part of the strategy for the preservation of minority languages through their official use, which translates into a pertinent minority right that has been guaranteed by the Constitution and the basic laws in the field.[9] The Serbian legal framework establishes a firm legal obligation for public authorities to safeguard the right of members of national minorities to have proceedings conducted in their language before public bodies. LGAP expressly provides for the use of minority languages in administrative proceedings. In Article 4, which is part of the introductory section, it stipulates that the administrative proceedings shall be undertaken in the Serbian language and Cyrillic script, but also in the language and script of a national minority in official use. The provision postulates the use of minority languages in administrative proceedings to the rank of a general rule to be applied by public bodies at all levels of the country's territorial organization. More detailed rules for its application are found in the Law on the Official Use of Language and Script, which in 2010 became the central piece of legislation on the official use of minority languages.[10]

international sphere, such as through the qualification of some minority rights as non-derogable. For more on this: Ana Zdravković, "Pravo na život sagledano kroz prizmu apsolutnih ljudskih prava", *Pravni život*, No.12, 2019, pp. 337-355, 338; Milica V. Matijević, Ana Zdravković, "Some Reflection on the Non-Derogable Character of Freedom of Thought, Conscious and Religion and the Concept of Absolute Human Rights," *Savremeno državno-crkveno pravo* (eds. Vladimir Đurić, Dejan Đukić), Institut za uporedno pravo, Pravoslavna Mitropolija Crnogorsko-primorska, Beograd, 2022, pp. 743-770, 751.

[5] Art. 2, para. 2, Constitution of Republic of Serbia, *Official Gazette of RS*, 98/2006, 16/2022.

[6] Republic Statistical Office of RS, Results of census of population, households and dwellings in 2022: On the population of RS according to ethnocultural characteristics, 2023, p. 22, *https://www.stat.gov.rs/en-us/vesti/statisticalrelease/?p=14061,* 20. 8. 2023.

[7] *Ibidem*, 13.

[8] Art. 24, para. 1, Statute of AP Vojvodina, *Official Gazette of APV,* 20/2014.

[9] Constitution of Republic of Serbia, Art. 79, para. 1; Art. 11, para. 4, Law on the Protection of Rights and Freedoms of National Minorities, *Official Gazette of FRY*, No. 11/2002, 57/2002, *Official Gazette of RS*, No. 72/2009, 97/2013 Decision of Constitutional Court, 47/2018.

[10] Law on Official Use of Language and Script, *Official Gazette of RS*, No. 45/91, 53/93, 67/93, 48/94, 101/2005, 30/2010, 47/2018, 48/2018 correction.

## 3. The Data on the Use of Minority Languages

Fully reliable data on the use of minority languages in administrative proceedings in Serbia do not exist because the public administration bodies are not obliged to collect statistics on the number of proceedings conducted in minority languages.[11] Some data are available for the Autonomous Province of Vojvodina. According to the last report of the Provincial Secretariat for Education, Regulations, Administration, and National Minorities – National Communities (hereinafter: Provincial Secretariat),[12] in 2022, a total of 509 administrative proceedings were carried out in minority languages in the province. The report says that all 509 proceedings were conducted in the Hungarian language and script by the public administration bodies of the two Vojvodina municipalities where members of the Hungarian minority make up a majority local community.[13] According to the same source, the provincial bodies in the given year did not use any minority language in administrative proceedings.[14] The data on the use of Hungarian presented in the sixth state report on the implementation of the Charter for Regional or Minority Languages point to an even lower number of administrative proceedings conducted in this language.[15]

As far as the other parts of the country are concerned, available evidence is even more scarce and indicates that administrative proceedings were conducted in minority languages in only a few municipalities. For instance, in 2021, a total of 923 administrative proceedings in the Albanian language were conducted in the municipality of Bujanovac, while in the first half of 2022, a total of 286 proceedings were recorded.[16] In the same period, only two written submissions in Bulgarian were registered in the municipality of Dimitrovgrad.[17] For the municipality of Bačka Palanka, it was reported that 91 requests to conduct proceedings in the Slovak language were lodged in 2019, but there are no data on the number of proceedings that were actually carried out in that language.[18] Given the absence of a state-level mechanism for monitoring the official use of minority languages, the real number of proceedings conducted in minority languages might be higher. Nonetheless, the principal conclusion that can be drawn from the official reports

[11] See LGAP, Art. 211.
[12] The Provincial Secretariat is in charge of supervising the implementation of provisions on the official use of minority languages in AP Vojvodina.
[13] Pokrajinski sekretarijat za obrazovanje, propise, upravu i nacionalne manjine – nacionalne zajednice, Informacija o službenoj upotrebi jezika i pisma u AP Vojvodini [Provincial Secretariat for Education, Regulations, Administration and National Minorities – National Communities, Information on the Official Use of Language and Script in AP Vojvodina], 2023, p. 14.
[14] *Ibidem.*
[15] Republic of Serbia, Sixth periodical report presented to the SC of the CoE in accordance with Art. 15 of the ECRML, 05.01.2023, MIN-LANG (2023) PR 1, 134*, https://rm.coe.int/serbiapr6-en/1680a9b40a*, 21. 3. 2024.
[16] *Ibidem*, p. 78.
[17] *Ibidem,* p. 117.
[18] *Ibidem*, p. 196.

and theoretical accounts is that the overall number of administrative proceedings conducted in minority languages is low.[19]

## 4. Obstacles to the Implementation of Legal Guarantees

The insufficient use of minority languages in the work of public bodies has been constantly reported as the most problematic aspect of the realization of the linguistic rights of national minorities. While some other aspects of the official use of minority languages have improved,[20] the presence of these languages in administrative proceedings has not shown any notable increase in the last two decades. The changes brought by the 2016 LGAP, when the provision regulating the use of minority languages was articulated in a simpler manner and moved to the section of the general provisions, seem not to have had any impact on its application.

According to the Provincial Secretariat, the most immediate reason for the underutilization of minority languages in administrative proceedings is the low number of requests for conducting administrative proceedings in minority languages.[21] The various factors that have led to such a situation are usually encapsulated in the observation that members of minorities in Serbia do not avail themselves of the possibility to have administrative proceedings conducted in their own language in order to avoid the longer and more complex administrative procedures and additional costs.[22] A closer investigation of the reports reveals a number of different obstacles to the equal official use of minority languages. The most evident are those which point to the absence of the basic conditions for the timely and efficient conduct of administrative proceedings in minority languages. Others concern the insufficient number of civil servants who are capable of putting this right of minority communities into practice.

### *4.1. The Lack of Basic Requirements for the Use of Minority Languages*

A closer look at the official accounts on the realization of linguistic minority rights shows that some of the basic prerequisites for the efficient conduct

[19] See: Committee of Experts of the ECRML, Fifth Evaluation Report on Serbia, 17.03.2023, MIN-LANG(2023)3, 12-13. para. 78; Advisory Committee on the FCPNM, Fourth Opinion on Serbia, June 26, 2019, ACFC/OP/IV(2019)001, 26; Committee of Ministers, Recommendation CM/RecChL(2023)4 on the application of the ECRML by Serbia, October 4, 2023.

[20] Such as, for instance, the use of minority languages and scripts in the names of public bodies. See: Provincial Secretariat, Information on the Official Use of Language and Script in AP Vojvodina, 2020, 12, *https://www.puma.vojvodina.gov.rs/etext.php?ID_mat=207,* 29. 8. 2023.

[21] Provincial Secretariat, 2023, p. 14.

[22] See, for instance: Republic of Serbia, Fifth Report submitted to the Advisory Committee on the FCPNM, September 1, 2022, ACFC/SR/V(2022)003, 73, *https://rm.coe.int/5th-sr-serbia-en/1680a87637*, 2. 2. 2024; Strategy of Prevention and Protection Against Discrimination (2022 to 2030), *Official Gazette of RS*, 30/2018, 44-45. See also: Predrag Dimitrijević, Dejan Vučetić, "Ostvarivanje prava na službenu upotrebu jezika i pisma prilikom upravnog postupanja u Republici Srbiji", *Zbornik radova Pravnog fakulteta u Nišu*, Vol. 54, No. 70, 2015, pp. 229-252, 247.

of administrative proceedings in minority languages are still missing. The most apparent is the non-existence of the texts in minority languages of the basic procedural laws, including LGAP. Although the Law on the Protection of Rights and Freedoms of National Minorities, as the basic law in the field, dedicates an entire article to this subject matter, and there it establishes a clear duty of the competent ministry to secure translation of all the laws relevant for the realization of minority rights (Art. 11a),[23] so far, only the laws that lay down the minority and anti-discrimination standards have been translated into minority languages. In the Province of Vojvodina, the legal acts adopted by its main bodies are regularly translated into all five languages in official use,[24] yet that does not compensate for the lack of translations of the basic state level legislation. The same applies to the local level, where one often finds that only a municipal statute was translated into all languages in official use.

The problem was identified already in 2010 in a report written for the ombudsman, when it was observed that it is difficult to enforce the provisions on the use of minority languages in proceedings without translations of the major procedural laws and that the absence of such translations could lead to the use of unstandardized legal terminology.[25] In other words, the lack of a minority language version of LGAP could result in administrative acts with a negative effect on the legal position of the parties to proceedings and the overall level of legal certainty. Two years ago, the central authorities also acknowledged in the last report on the implementation of the Framework Convention for the Protection of National Minorities (hereinafter: FCPNM) that the lack of translations of laws governing procedures before public bodies makes it "difficult to implement such procedures by employees in the administration and judiciary."[26]

Another important precondition for the equal use of languages in administrative proceedings is the availability of administrative forms in minority languages. One of the official reports noted that the legal guarantees for the equal official use of languages are more effectively implemented in the municipalities in which the administrative forms were translated.[27] However, the data collected by the Provincial Secretariat show that in the majority of municipalities in Vojvodina, the most linguistically diverse part of the country, the administrative forms are not fully or are not at all translated into minority languages.[28]

The lack of administrative forms in minority languages is just one aspect of the problem, another is the inaccessibility of the existing forms to members of

[23] See also, Art. 11, para. 6, Law on the Official Use of Language and Script.

[24] Provincial Assembly Decision on Publishing Regulations and Other Acts, *Official Gazette of APV*, 54/2014, 29/2017, 12/2018.

[25] Goran Bašić, Ljubica Đorđević, *Exercise of the Right to Official Use of Languages and Scripts of National Minorities in the Republic of Serbia, Protector of Citizens of the Republic of Serbia*, 2010, p. 59.

[26] Republic of Serbia, Fifth Report, pp. 73-74.

[27] Ombudsman, Special Report on the Official Use of the Hungarian Language and Script, 2018, p. 42, *https://ombudsman.rs/attachments/article/5947/Poseban%20izvestaj%20(srpski).pdf,* 23.3.2024.

[28] Provincial Secretariat for Education, Regulations, Administration and National Minorities – National Communities, *https://www.puma.vojvodina.gov.rs/index.php?lang=7,* 03. 06. 2024.

minority communities. In the last two decades, Serbia has been working towards a comprehensive reform of its public administration, and a vital segment of that reform was an e-government program. Consequently, an important set of activities for the realization of the right to use minority languages and scripts, as laid down in the 2016 Action Plan for the Exercise of the Rights of National Minorities, was "provision of electronic information, services, and documents on the E-Government Portal in the languages of national minorities."[29]

However, so far these activities have only been partially completed. Administrative forms in minority languages are available to a very limited extent and only on the websites of some municipalities,[30] while the central, statewide e-governance web portal (E-uprava) does not provide access to administrative services in minority languages.[31] Even though each municipality is obliged to establish and maintain an official website,[32] and such website shall be in all the languages and scripts in official use,[33] the majority of municipalities in Vojvodina have monolingual websites. Those that provide access to administrative forms in minority languages often do not meet the standards in the field. Such websites are often only partially translated into minority languages[34] or include low-quality translations with so many terminological, syntactic, or other errors that the minority language versions are practically unusable.[35] The conditions are even worse at the provincial level where, according to the Provincial Secretariat, only one out of 26 public administration bodies has the website fully translated into all five languages in official use in the province, while the other three have their websites partially translated or translated into only one of these languages.[36]

The situation with the notice boards at the premises of public bodies does not differ much from the one found in the virtual environment. While there is a notable improvement when it comes to the names of public bodies, the information that administrative proceedings can be conducted in minority languages is rarely displayed in offices.[37] To what extent public servants in charge of conducting

[29] Government of RS, Action Plan for the Exercise of the Rights of National Minorities, March 3, 2016, Activity No. 5.10.

[30] See for instance, the official web pages of the city of Novi Sad, Vrbas and Srbobran.

[31] In the course of the research, the authors contacted the administrators of this web portal and asked whether access to public administration services is provided in two minority languages (Hungarian and Slovak). The answer was negative (on file with the authors).

[32] Art. 28, para. 1, Law on E-Government, *Official Gazette of RS*, 27/2018.

[33] Art. 6, Regulation on the Conditions for the Establishment and Maintenance of a Website of Public Administration Bodies, *Official Gazette of RS*, 104/2018.

[34] See, for instance, the official website of the Municipality of Pančevo.

[35] Provincial Ombudsman, Representation of Languages of National Minorities in Official Use in the Official Web Presentations of Provincial Bodies and Local Self-Government Units, 2018, 42, *https://www.ombudsmanapv.org/ombapv/sr/istrazivanja.php?id=Istra--ivanje-2018-Zastupljenost-jezika-nacionalnih-manjina-na-internet-prezentacijama*, 3. 2. 2024.

[36] Provincial Secretariat, 2023, pp. 22-23.

[37] See, for instance, Ombudsman, Special Report on the Official Use of the Bulgarian Language and Script, 2021, 29, *https://www.ombudsman.rs/attachments/article/7286/Посебан%20извештај%20о%20службеној%20употреби%20бугарског%20језика%20%20и%20писма.pdf*, 22. 3 2024.

administrative procedures fulfill their statutory duty to determine the language of the procedure by asking the party to opt for one of the languages in official use is another question,[38] which gets even more complex when we look at the statistics on the number of civil servants with adequate command of minority languages.

### *4.2. The Lack og Personnel with Adequate Knowledge of Minority Languages*

Much has been written so far about the inadequate representation of members of minority communities in public sector bodies in Serbia. For many years, this shortcoming has been placed high up on the list of obstacles to the realization of minority rights in the country-specific opinions of the Advisory Committee on the FCPNM and, consequently, it has had a prominent place in our country's efforts to earn positive progress reports from the European Commission.[39] Since 2018, a number of laws regulating employment in public bodies have been amended or new laws adopted in an attempt to increase the representation of minority communities through the use of affirmative action measures, primarily in the process of recruitment. This has also been followed by different policy level interventions.[40]

Yet, the public sector bodies in the Republic of Serbia are still not representative enough of the ethnic composition of its population, and this has a bearing on their capacity to apply administrative procedures in minority languages.[41] As said, through the numerous legislative interventions, the rules governing the employment and status of civil servants in public bodies were amended or new laws adopted. For instance, the Law on Civil Servants in Art. 9, para. 3 establishes the duty of the central level bodies to conduct recruitment by paying due attention to whether the ethnic composition of their employees reflects, to the greatest extent possible, the ethnic composition of the population. The same provision is found in Art. 19, para. 3, of the equivalent provincial level law.[42] These provisions

[38] Law on the Official Use of Language and Script, Art. 13, para. 1, For an example of a breach of this duty in practice, see: Commissioner for the Protection of Equality, Opinion No. 07-00-298/2019-02, November 29, 2019.

[39] More on the standard of adequate representation in the opinions of the Advisory Committee in: Milica V. Matijević, "Towards a Better Understanding of the Standard of Adequate Representation of Persons Belonging to National Minorities in the Public Sector", *Strani pravni život*, Vol. 63, No. 4, 2019, pp. 19-39; Milica V. Matijević, "Adequate Representation of Persons Belonging to National Minorities in the Public Sector: The Nature, Content and Scope of Obligations in the Comments of the Advisory Committee for the Framework Convention," *Strani pravni život,* Vol. 64, No. 4, 2020, pp. 55-68.

[40] See: Action Plan for the Exercise of the Rights of National Minorities, 2016, Chapter VIII.

[41] See: Commissioner for the Protection of Equality, Regular Annual Report for 2023, 2024, 173; Ministry of Human and Minority Rights and Social Dialogue of RS, Report on a Visit to the National Councils of National Minorities in Their Seats, 2021, 15. *https://minljmpdd.gov.rs/wp-content/uploads/2024/04/Izvestaj-o-poseti-NSNM-u-njihovim-sedistima-2021.god-.pdf*, 14. 3. 2024; Resolution CM/ResCMN(2021)11, 2021, 3; European Commission, Serbia 2023 Progress Report, November 8, 2023, SWD(2023) 695 final, 50. Compare with: Coordination Body for the Implementation of the Action Plan for Ch. 23, Report on the Implementation of the Revised Action Plan of Ch. 23, III quarter 2023.

[42] Law on Employees in Autonomous Provinces and Local Self-Government Units, *Official Gazette of RS*, 21/2016, 113/2017, 95/2018, 114/2021, 92/2023, 113/2017, 95/2018, 86/2019, 157/2020, 123/2021.

are further elaborated in bylaws, which set rules for determining whether the ethnic composition of a workforce reflects the ethnic composition of the population and lay down other rules governing the application of the affirmative action measures.[43]

There are a number of factors that cast doubt on the ability of these affirmative action measures to bring about the achievement of the aim for which they were introduced. Apart from being too complex and requiring the collection of sensitive personal data, their main deficiency is that they place primary importance on the ethnic affiliation of a candidate for recruitment. Knowledge of minority languages would be a better criterion than the formal declaration of minority identity. Such a criterion could serve both as a proxy for minority identity and a reliable tool for ensuring that the greater representation of minority communities actually leads to the greater use of minority languages in administrative proceedings.[44] K. Beretka follows the same line of reasoning when she notes that "belonging to a national minority and speaking the language of a national minority are two different categories" and that a better solution would be to recruit civil servants who speak minority languages, notwithstanding their ethnicity.[45]

Knowledge of minority languages can also be set as a requirement for filling certain positions in provincial and municipal bodies, as stipulated in bylaws,[46] yet the available data show that this possibility is rarely used.[47] In effect, it is reported that knowledge of minority languages and knowledge of foreign ones are often set as alternative employment requirements.[48] Another aspect equally important for our considerations, is the question of whether an employee's command of a minority language enables him or her to conduct administrative procedures in that language. In its recent report, the Provincial Secretariat notes that the courses on administrative law terminology are currently not available either within the higher education programs in minority languages or through the programs for professional development of civil servants.[49] This further explains why there is an insufficient number of civil servants with the ability to handle administrative proceedings in minority languages and the current status of these languages in the work of public bodies.

[43] Regulation on Conducting an Internal and Public Competition for Filling Job Positions in Autonomous Provinces and Local Self-Government Units (Official Gazette of RS, 107/2023), Art. 11. For a more detailed analysis see: Milica V. Matijević, "Afirmativne mere za zapošljavanje pripadnika nacionalnih manjina u državnoj upravi Republike Srbije – osvrt na postojeća rešenja", *Pravni život,* Vol. 3, No. 11, 2019, pp. 589-605.

[44] See, M. V. Matijević, 2019, p. 14.

[45] Katinka Beretka, "Language Rights and Multilingualism in Vojvodina", *International Journal on Minority and Group Rights*, Vol. 23, No. 4, 2016, pp. 505-529, 519.

[46] Art. 18, para. 2, Provincial Assembly Decision on Provincial Administration, *Official Gazette of APV*, 37/2014, 54/2014, 37/2016, 29/2017, 24/2019, 66/2020, 38/2021.

[47] See the website of the Provincial Secretariat.

[48] Provincial Ombudsman, Knowledge of the Languages and Scripts of National Minorities in Official Use in Provincial Administration Bodies - Survey, 2015, p. 18, *https://www.ombudsmanapv.org/riv/attachments/article/1589/Istrazivanje_sluz_upotreba_jezika_2015.pdf* 4. 4. 2024.

[49] Provincial Secretariat, 2023, p. 23.

## 5. Conclusion

The legal framework for the use of minority languages in administrative proceedings, created in the last twenty years, provides firm legal foundations for the long-term realization of this right. Yet, the overall number of administrative proceedings conducted in minority languages has remained low, which indicates that the existing legal guarantees need to be complemented with the requisite institutional and policy measures.

The paper singled out and analyzed the most apparent obstacles to the effective implementation of this minority right that were identified by the state bodies. The analysis shows that the basic requirements have not yet been met for the effective and timely conduct of administrative proceedings in minority languages. Minority language versions of the major procedural laws, including LGAP, do not exist. The administrative forms have mostly not been translated into minority languages, and the newly introduced virtual tools for the provision of administrative services are not available in these languages. The insufficient number of civil servants with the ability to handle administrative proceedings in minority languages is another important impediment to the realization of the existing legal guarantees. The investigation indicates that the amendments to the relevant laws, which were undertaken with the aim of increasing the level of representation of minority communities in public administration, do not seem to provide an adequate response to all the aspects of the problem at hand.

Given that the paper analyzed only the most evident obstacles to the effective implementation of the use of minority languages in administrative proceedings and that their list might be longer, as well as the mutually reinforcing character of these obstacles, there is no doubt that better results in the field could be achieved only through a more systemic approach to the official use of minority languages. This would, first and foremost, require an evaluation of what has been achieved so far and what measures need to be undertaken in order to enable the members of minority communities to realize and the state bodies to effectively implement this minority right. Such evaluation could be part of the broader process of drafting the new action plan for the protection of minority rights.[50]

The ongoing public administration reform could be an important avenue for providing the conditions for efficient and timely handling of administrative proceedings in minority languages. The transformation of the Serbian public administration "from an administrative authority into a public service" has led to the simplification of administrative procedures and the creation of an administrative environment that could ensure a more efficient realization of both public and private interests.[51] Accordingly, one of the basic features of the reformed ad-

[50] The previous Action Plan was created as a medium-term strategic document with no explicit time limits *vis-à-vis* its duration, yet most of the activities envisioned by it were to be implemented until the end of 2018.
[51] Predrag Dimitrijević, "Towards a New General Administrative Procedure Act in the Republic of Serbia," *Facta Universitatis*, Vol. 8, No. 1, 2010, pp. 33-42.

ministrative law is that the scope of application of LGAP has been significantly broadened to enable greater uniformity of services provided by public bodies and their harmonization across the country.[52] This, in itself, could improve conditions for the use of minority languages in administrative proceedings.

The digitalization of public services is another, for the present discussion, even more important aspect of public administration reform. The introduction of the "one-stop shop" approach to the delivery of administrative services,[53] the use of IT systems and registries in processing administrative matters, the expansion of digital public services available through the state e-governance portal, the virtual administrative forms, the use of AI tools, and other innovations brought to the administrative law by the recent technological development, could be exploited to remove many of the obstacles to the equal use of minority languages in administrative proceedings analyzed in the paper. At some point, further technological breakthroughs in the provision of administrative services could also assist state bodies in overcoming the limitations ensuing from an insufficient number of public servants with adequate knowledge of administrative law terminology in minority languages.

To conclude, the identified challenges require a more systematic and integrated approach to the implementation and monitoring of the existing legal framework for the official use of minority languages. This would require a periodic and comprehensive evaluation of the current state of affairs in the field. The ongoing public administration reform and the rapid digitalization of administrative services could become a fast track for providing many of the missing requirements for the equal use of minority languages in administrative proceedings.

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# INTERESTED PARTY TO ADMINISTRATIVE PROCEDURE

*Abstract*

*An individual whose legal position is affected by administrative procedure can obtain the status of interested party. Fundamental procedural prerequisites for acting as a full party to administrative procedure are legal capacity, procedural standing and substantive standing. Legal capacity and procedural standing are governed in detail by administrative and procedural laws which are in force in Bosnia and Herzegovina. Substantive standing, which is more of a substantive character, is not explicitly regulated by relevant legislation. Determining one's legal capacity and their procedural standing in practice poses no major challenges. Substantive standing, on the other hand, is more difficult to determine, especially in the case of an interested party to administrative procedure.*

*Therefore, current laws on administrative procedure (except for the Law on Administrative Procedure of Bosnia and Herzegovina) should at least be supplemented by the provisions that would regulate the legal position and procedural rights of an interested party to administrative procedure in more detail. More comprehensive regulation of this matter would help the authorized body deal with cases involving interested parties. In this regard, the Law on General Administrative Procedure of the Republic of Serbia contains some legal solutions that might serve as a guide for improving the existing rules of administrative procedure.*

**Keywords:** Administrative Procedure, Party to Administrative Procedure, Indirect Party, Interested Party.

## 1. Introduction

Four legislative acts laying down general rules of administrative procedure in Bosnia and Herzegovina define a party to procedure as "a person upon whose request a procedure has been initiated, or against whom the procedure is conducted, or who, in order to protect his/her rights or legal interests, has the right to participate in the procedure."[1] Conceptual definition of a party to administrative

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[1] Art. 38, Law on General Administrative Procedure of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, No. 13/02, 87/07-revision, 50/10 and 66/18; Art. 48, Law on Administrative Procedure of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 2/98, 48/99

procedure, which is procedural by nature, encompasses a direct party (who can be active or passive) and an indirect party. The active party to procedure is the one upon whose request a procedure to acquire certain rights, reduce or be discharged of certain obligations etc., is initiated. A passive party to administrative procedure is the party against whom a procedure has been initiated *ex officio* in order to impose specific obligation, restrict or abolish previously granted rights etc. Given that deciding on the right or obligation of either of these parties may collaterally affect the legal interest or legal right of other individuals, those individuals may appear in the procedure in the role of what legal theory refers to as interested party, intervenor, ancillary party, third party etc.[2] Interested party is the party whose legal interests may be affected by the outcome of administrative procedure. When the outcome of a certain procedure, i.e. the manner in which a matter is resolved, may be to the detriment of the rights or legal interests of an individual, such individual is granted the status of (indirect) party to the procedure for the purpose of protecting their rights or legal interests while the procedure is in progress.

Typically, administrative procedures are unilateral, which implies that the administrative body is confronted with one individual or, at times, two or more individuals whose interests do not conflict (the so-called multiple parties to administrative procedure). However, if two or more parties with conflicting interests participate in administrative procedure, the procedure is said to be bilateral or multilateral.[3]

Fundamental procedural prerequisites for acting as a full party to administrative procedure are legal capacity, procedural standing, and substantive standing. The absence of these prerequisites relieves the administrative body of conducting the procedure and issuing decisions. An authorized person is bound to ensure that such prerequisites exist during the entire procedure.

Legal capacity and procedural standing are governed in detail by general administrative and procedural legislation. Therefore, their existence is fairly easy to determine.[4] Legal capacity, unlike procedural standing, is a key prerequisite for substantive standing.[5] Substantive standing, on the other hand, which is more substantive by nature, is not explicitly regulated by relevant legislation. Thus, its existence is more difficult to determine in practice, especially concerning inter-

and 61/22; Art. 41, Law on Administrative Procedure of Bosnia and Herzegovina, *Official Journal of Bosnia and Herzegovina*, No. 29/02, 12/04, 88/07, 93/09, 41/13 and 53/16; Art. 35, Law on Administrative Procedure of Brčko District of Bosnia and Herzegovina, *Official Gazette of Brčko District of Bosnia and Herzegovina*, No. 48/11 – revised text 21/18 and 23/19.

[2] Branislav M. Marković, *Položaj i uloga stranke u upravnom postupku*, Stručna knjiga, Beograd, 1995, p. 90 *et seq.*; Dragan Milkov, "Položaj stranke u upravnom postupku", *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 39, No. 3, Novi Sad, 2005, pp. 242-243; Zoran Tomić, *Komentar Zakona o opštem upravnom postupku sa sudskom praksom i registrom pojmova*, deveto izdanje, Službeni glasnik, Beograd, 2012, p. 141; Mirjana Rađenović, "Zainteresovano lice kao stranka u upravnom postupku", *Godišnjak Pravnog fakulteta Univerziteta u Banjoj Luci*, No. 41, Banja Luka, 2019, pp. 41-42.

[3] For example, involving in administrative procedure individuals whose interests conflict with the rights and legal interests of the main party. More in: Z. Tomić, p. 142; D. Milkov, pp. 242-243.

[4] Instead of all, see: Arts. 38-40, Law on General Administrative Procedure of the Republic of Srpska.

[5] If a party to a procedure loses procedural standing, a legal representative will act on its behalf, which will affect that party's substantive standing. Б. Марковић, p. 90.

ested parties. This is because it is necessary to determine the relationship between the rights and legal interests of a specific individual and administrative matter as a subject of administrative procedure in which one or more parties are already involved.[6] Case law clearly demonstrates when certain individuals have a legal interest to participate in legal procedure, such interest being, for example, ownership rights to property or the right to use property.[7]

## 2. Legal Status of Interested Party to Administrative Procedure

The legal interest of a certain individual in the outcome of a particular legal procedure results from substantive, i.e. special provisions governing that particular area of administrative law.[8] Sometimes, the question of indirect substantive standing is resolved only after the main legal issue has been decided.[9] A way around this dilemma might be to explicitly stipulate by the law the circle of individuals who have a legal interest to participate in the procedure. One such example is the Croatian Construction Act.[10] It appears, however, that in this way, the concept of party to the administrative procedure is narrowed down, deviating from the principle that anyone who is entitled to some right must be allowed to protect that right in the administrative procedure which potentially infringes it.

When an individual becomes aware that administrative procedure is in progress and believes that deciding on the rights or obligations of another person may affect their rights and legal interests, this individual may claim the status of a party to that procedure to protect their rights and legal interests. The authorized person in charge of the procedure shall assess the merits of the request to become a party to the procedure and issue a decision, be it granting or denying the status required.[11] If the individual is granted the status of a party to the procedure, he/she will from that time on participate in the procedure as a party to the procedure.

[6] M. Rađenović, p. 40.

[7] Z. Tomić, p. 143 *et seq*.; Pero Krijan, *Komentar Zakona o upravnom postupku Federacije Bosne i Hercegovine*, Sarajevo, 2005, pp. 72-74.

[8] It is crucial to differentiate legally interested parties from factually interested parties who also have specific interests regarding the outcome of the procedure. However, such interests are not based on legal provisions (movant in the special administrative procedure). For example, in the process of inspection, which is initiated and conducted *ex officio*, the party to the procedure can only be a natural person or legal entity that is, the subject of said inspection. Any physical or legal entity can request an inspection procedure, and the inspector, having established the facts and taken the appropriate measures, shall inform the party who initiated the inspection of its results in writing. Art. 35 pertaining to Art. 41, para. 1 and 2, Law on Inspections of the Republic of Srpska, *Official Gazette of the Republic of Srpska* No. 18/2020; The party who initiated the inspection procedure can be a party to another procedure (e.g. the procedure for issuing a building permit, setting up a business, etc.) on the grounds of having a legal interest in a particular administrative matter, but cannot be a party to the inspection procedure.

[9] Z. Tomić, p. 141.

[10] The Construction Act of the Republic of Croatia, *Official Gazette*, No. 153/13, 20/17, 39/19 and 125/19; See more in M. Рађеновић, p. 44 *et seq*.

[11] This rule is laid down by all four laws on administrative procedure currently in force in Bosnia and Herzegovina. Instead of examining all four legal texts, see Art. 127, Law on General Administrative Procedure of the Republic of Srpska.

The individual who was denied the status of a party to the procedure or an interested party may lodge a special appeal against such a decision. The Law on Administrative Procedure explicitly states that in case of an appeal against the decision, the administrative procedure is suspended[12] and shall remain so until the final decision on the appeal has been issued.[13] Such a legal solution, however, does not seem to be in line with the principle of efficiency of administrative procedure, as suspension of the procedure interrupts statutory deadlines for different procedures and the deadline for issuing a decision.

Unlike the text of the Law on Administrative Procedure of Bosnia and Herzegovina, relevant entity laws and laws of the Brčko District of Bosnia and Herzegovina do not provide for suspension of the administrative procedure until the appeal lodged against the decision to deny the status of a party to the procedure is decided. However, in order to ensure that the principle of efficiency of the procedure does not override the rights of the individual who claims the status of an indirect party, the law should at least stipulate that the individual who has been denied the status of a party to the first-instance procedure be informed of such decision. The Law on General Administrative Procedure of the Republic of Srpska explicitly stipulates such obligation of the authorized person, the content of the information, and the way in which it is to be delivered.[14] It is with good reason that the importance of such provisions is emphasized, especially bearing in mind that the laws on administrative procedure of neither Republic of Srpska nor the Federation of Bosnia and Herzegovina and Brčko District stipulate when the preclusion period for appealing the decision denying the status of a party to the proceedings begins to run.[15] The appeal against such decision should contain arguments concerning the right of the individual to appeal and arguments for revoking or amending the first-instance decision.

Unlike domestic legislation, the Law on General Administrative Procedure of the Republic of Serbia contains a provision stipulating that the authority shall dismiss the request if, inter alia, the requester evidently does not have the right or legal interest decided upon in the procedure.[16] Furthermore, it explicitly stipulates a point in time until which an individual who is not party to the administrative procedure can submit his/her request to obtain the status of a party to the procedure (until the completion of the second-instance procedure).[17]

Conversely, the Law on Administrative Procedure of Bosnia and Herzegovina explicitly states that the decision of an administrative body can be challenged, among other things, when an individual who was entitled to participate in admin-

[12] Art. 139a, para 1, sec. 6, Law on Administrative Procedure of Bosnia and Herzegovina.
[13] *Ibidem*, Art. 139a, para. 2, sec. 5.
[14] Art. 152, Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, No. 18/16, 95/18- authentic interpretation and 2/23 - decision of Constitutional Court.
[15] The preclusion period should start on the day "when the individual whose request was denied learned about the decision." М. Рађеновић, p. 48.
[16] Art. 92, para 3, Law on General Administrative Procedure of the Republic of Serbia.
[17] *Ibidem*, Art. 93.

istrative procedure either as a party or interested party was denied that right, and when a party or interested party was not given the opportunity to give their view of facts and circumstances that led to said decision.[18] This suggests that the procedural rights of the interested party are regulated in more detail at the state level of Bosnia and Herzegovina than at other levels of authority. However, despite the fact that neither entity laws nor Brčko District Law on Administrative Procedure contains such provisions, the right of an indirect party to an appeal clearly stems from the duty of the first-instance administrative body to complete the procedure, among other things, when the appellant had been entitled to participate in the procedure which resulted in a decision but was denied that right, or when they failed to exercise that right, with the reasons therefor explicated in their appeal.[19]

If an interested party did not participate in either first or second-instance procedure when they ought to have done so, they may file a motion that the procedure be renewed. The motion is to be filed within one month from the day of the delivery of the final decision.[20] If a person was not delivered the final decision, they are entitled to request the delivery of said decision.[21] After the administrative act issued on the motion to renew the procedure or the administrative act issued in renewed procedure has become final, an administrative dispute can be initiated.

## 3. Conclusion

Given that the laws on (general) administrative procedure of either the Republic of Srpska, Federation of Bosnia and Herzegovina or Brčko District of Bosnia and Herzegovina neither explicitly nor in any other way regulate the procedural rights of the interested party in administrative procedure, administration and courts are faced with a multitude of challenges concerning interpretation of general administrative and procedural legislation and provisions of special legislation governing the rights of these individuals. In order to expedite and support the actions of the authorized body in dealing with such individuals, it is recommended that the existing rules laid down by the laws on general administrative procedure at least be supplemented by provisions that would regulate in more detail the status and procedural rights of the interested party. A guide to improving the existing legislation might be found in certain - here presented - provisions of the Law on Administrative Procedure of the Republic of Serbia.

[18] Art. 219a, para. 2, sec. 2 and 3, Law on Administrative Procedure of Bosnia and Herzegovina.

[19] Instead of all, see Art. 221, para. 2, Law on General Administrative Procedure of the Republic of Srpska.

[20] Cf., e.g. Art. 234, para. 1, sec. 9 concerning Art. 237, para. 1, sec. 5, Law on General Administrative Procedure of the Republic of Srpska.

[21] "The party is entitled to request the delivery of the final decision issued in administrative procedure in which they did not participate, with an attached invitation to request renewal of the administrative procedure subject to 249 (234), paragraph 9 of the Law on General Administrative Procedure and concerning Article 252 (237), paragraph 1, section 5 of the Law on Administrative Procedure." The decision VSV, Už. 739/63 of February 22, 1963, cited from Z. Tomić, p. 530.

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# ZAINTERESOVANO LICE U UPRAVNOM POSTUPKU

*Sažetak*

*Stranka u upravnom postupku može biti zainteresovano lice, tj. lice čija se pravna situacija dodiruje sa predmetom upravnom postupka. Osnovne procesnopravne pretpostavke punovažnog stranačkog istupanja u upravnom postupku su: stranačka sposobnost, procesna sposobnost i stranačka legitimacija. Stranačka i procesna sposobnost su detaljno uređene zakonima o upravnom postupku koji se primjenjuju u Bosni i Hercegovini. Stranačka legitimacija, koja je po svojoj prirodi više materijalnopravnog karaktera, nije izričito regulisana. U praksi se povodom utvrđivanja stranačke i procesne sposobnosti uglavnom ne javljaju problemi, dok je stranačku legitimaciju teže utvrditi, posebno kada se radi o zainteresovanim licima.*

*Iz tog razloga, trebalo bi bar postojeće odredbe zakonâ o opštem upravnom postupku (sa izuzetkom Zakona o upravnom postupku BiH) dopuniti odredbama kojima će se detaljnije urediti položaj i procesna prava zainteresovanog lica jer bi se time znatno olakšalo postupanje nadležnog organa kada se takvo lice pojavi pred njim. U tom dijelu, Zakon o opštem upravnom postupku Republike Srbije sadrži izvjesna rješenja koja mogu poslužiti kao putokaz za eventualno dograđivanje normi zakonâ o upravnom postupku.*

**Ključne riječi:** upravni postupak, stranka, indirektna stranka, zainteresovano lice.

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