

The Macedonian General Administrative Procedure Act: Between Tradition and Modernisation

Ana Pavlovska-Daneva *

Elena Davitkovska **

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The paper outlines the process of the modernisation and improvement of the general administrative procedure in FYR Macedonia. Besides a review of the key novelties and accompanying critical remarks, the paper presents the standards and guidelines for the functioning of the administration which served as a basis for the preparation of the Macedonian Administrative Procedure Act (GAPA), along with various theoretical perspectives on their sources, applicability, and value in use. The purpose of this research

* Ana Pavlovska-Daneva, Professor of Administrative Law at the Iustinianus Primus Faculty of Law, Ss. Cyril and Methodius University in Skopje, FYR Macedonia (redovita profesorica Pravnog fakulteta Iustianianus Sveučilišta Sv. Ćiril i Metod u Skopju, Makedonija, e-mail: anapd222@yahoo.com)

** Elena Davitkovska, Associate Professor, Institute of Economics, Ss. Cyril and Methodius University in Skopje, FYR Macedonia, (izvanredna profesorica Ekonomskog instituta u Skopju, Sveučilište Sv. Ćiril i Metod, Makeodnija, e-mail: edavitkovska@yahoo.com)

is to point out the positive aspects and the shortcomings of the new legislation, which can in turn be used for the further development of the legal doctrine in the field of administrative law, as well as to strengthen the concept of good governance for being implemented by competent public authorities, where the GAPA features as the primary tool for legal and efficient operation.

Keywords: General Administrative Procedure Act – FYR Macedonia, administrative procedure principles, legal protection, parties to the administrative procedure, public authorities, duties and competences

1. Introduction

The main purpose of administrative procedure is for an individual administrative act (decision) to be issued, an administrative activity to be carried out, or an administrative contract to be concluded so that the parties can exercise certain rights and obligations. However, administrative procedure has another purpose, which is to protect the public interest. Namely, not only do the authorities have to act in accordance with the law, they also have to implement the procedure in a manner that is simple (transparent communication with the parties), prompt (as short as possible, with no unnecessary delays), and economical (the costs for the parties have to be as low as possible). On the other hand, the public authority should ensure that none of this will affect the quality of the procedure and the decision, which means that the authority – simultaneously and in addition to conducting the procedure in a simple, transparent, prompt, and economical way – should be mindful of the proper determination of the actual situation which can influence the effectuation of the fundamental principles in administrative procedures, such as the principle of material truth, the principle of hearing the parties, the principle of legality, the principle of proportionality, and other principles which are also guaranteed by the GAPA.

Three broad objectives of administrative procedure can be distinguished in modern democratic states: to promote formal guarantees of individual rights through the application of the principle of legality; to provide a formal guarantee to protect the public interest by insisting on transparent procedures, which will allow, to some extent, control over the administra-

tion; and to create conditions for capital investment and economic development by providing responsible and predictable procedures, which will result in an increased legitimacy of the institutions before the citizens. These objectives can be reached by means of solid and fair administrative procedures, but also with the appropriate structure and organisation of the administration, based on a meritocratic system (Rusch, 2009).

One of the goals of the FY Republic of Macedonia is to modernise and develop its general administrative procedure (AP). The first Macedonian General Administrative Procedure Act (GAPA) was adopted in 2005 (Official Gazette, 38/2005), with some non-conceptual amendments in 2008 and 2011, related to the communication between the parties (public authorities and citizens), delivery, the institute of silence of the administration, and some basic principles. Therefore, it was expected that the FYR of Macedonia, aspiring to join the European Union, would introduce some more significant amendments to the GAPA. For this reason, a new GAPA was introduced: one that was inspired by the idea of reforming the public administration and harmonising the country's legislation with that of Europe. In addition, a simplification of administrative procedures was one of the key priorities in the public administration reform aimed at a transparent, accountable, responsible, and quality public administration that would meet the needs of public service. The GAPA was adopted in July 2015 (Official Gazette, 124/15), with a suspended application of some provisions of up to six months or a year. In this paper, we will try to answer to what extent the new Macedonian GAPA has met expectations and succeeded in having the work of the Macedonian government approximate the requirements and standards set by various European countries as well as the EU itself.

2. Definition and Scope of Administrative Procedure

The term *administrative procedure* comprises the main formal and procedural framework necessary for exercising individual and legal entity rights, obligations, and legal interests vis-à-vis the administration, which are regulated by special or substantive regulations (Grizo et al., 2008, p. 505). The exact content of the notion of the government as a party in administrative procedure varies depending on the historical circumstances, traditional beliefs in different countries and continents, the development and acceptance of the concept of good governance, and the law of each

particular state. In the countries of the European Union and in the EU itself, the administrative procedure serves as an essential tool of dialogue, of communication between the public administration and its customers or users of public services (called *parties*), which enables the progress of society through their partnership. Regulation of administrative procedures is performed in order to reach two goals: first, the implementation of public policies expressed through the public interest determined by law, and secondly, the legal protection of the parties in their relations with the state authorities (Sever & Kovač, 2016, p. 1). Lately, influenced by modern theories of good governance, state laws have been changing and somehow the subject and scope of the laws governing administrative procedure have expanded, along with the types and number of entities that fall under these procedural laws (Grizo et al., 2009, p. 443).

In this paper we are going to offer some answers as to whether the classical Weberian theory of bureaucracy, or perhaps the theory of New Public Management (NPM), have had an influence on the applicable law regulating administrative procedure in modern states, as well as the FYR of Macedonia.

At the outset, we would like to point out several theoretical determinations of the notion of a legal action or procedure: procedures themselves, according to Stjepanović, represent "activities, performed in a certain sequence, as well as forms that allow state authorities and public services to achieve legal ruling in a particular case" (Stjepanović, 1958, p. 495). Moreover, "all the applicable rules governing the jurisdiction, the forms and the sequence of procedural activities, as well as acts that are adopted as a result of those activities are procedural rules; which are different from the substantive legal rules governing the content of the legal relations that are based, amended, repealed or accomplished through the procedure" (Stjepanović, 1958, p. 495).

In the past legal theorists were divided as to whether administrative law could be considered procedural, because some of them adhered to the view that only judicial institutions have the authority to carry out proceedings. However, this division no longer exists, because it is clear that a separate administrative procedure exists (as a term it covers the general and all the specific administrative procedures), encompassing the Administrative Procedural Law. On the contrary, contemporary legal thought leads to the creation of a legal framework in which there is an expansion of the range of subjects that fall under the rules of the Administrative Procedural Law because of the expansion of the subject of administrative procedure: the administrative matter.

In the FYR of Macedonia the usual determination of the term administrative matter was included in the legal definition as “acts or activities by which the responsibilities of the public administration are expressed and carried out” (Art. 2, 2005 GAPA). In other words, there is no dispute that the authorities’ (central authorities, local self-government units, administrative organisations, and persons to whom public authorities are entrusted) acts and activities by means of which the parties’ rights, obligations, and legal interests are decided upon are administrative matter, a subject of the LGAP.

This image of the subject and scope of administrative procedure refers quite closely to the relations between the public authorities on the one hand, and the citizens (physical and legal entities) on the other hand, when their rights, obligations, and legal interests are in focus. Nevertheless, in addition to this, under the state function there is an extraordinarily broad area of its service role or activity, within which it ensures the provision of public services or services of general interest. This service role can either be performed directly by the state, i.e., by the authorities, or indirectly, by authorising private entities to provide services of public interest, using market based means. In case of the latter option, private entities must fulfil certain criteria, but even so, the ultimate responsibility for the quality and the continuous provision of services belongs to the state. A question that arises when speaking of the service role of the state is whether administrative procedure is applicable. Namely, is it possible that the rights, obligations, and legal interests related to public services are decided upon in an administrative procedure, bearing in mind the relations between the citizens and service providers? Lately, the general administrative procedure appears to be an appropriate source of legal regulation of the procedures for exercising the right of individuals to continuous quality service of general interest. This perception stems from the criticism of the classical Weberian theory of management founded on the principle of strict hierarchy, because it gradually developed new theories of participatory or open public administration, which itself implements the principles of management in the private sector, or market mechanism working methods. In the late 1980s the concept of New Public Management (NPM) was developed based on the principles of efficiency, economy, and orientation towards the client of public sector services. Thus in order to control the public sector, countries are also beginning to incorporate the principles of NPM in their legal systems, which implies decentralisation, privatisation, deregulation, and new forms of responsibility and accountability to the steering and measurement of performance. In

addition to this doctrine, there is the development of the concept of *good governance* (without analysing if these two are opposing or complementary doctrines), which is founded on the service orientation of the administration, or its transformation from a carrier of authoritarian and centralised activities towards service-oriented, decentralised, and participatory activities of the state. According to this theory, the state still awards public authorisations, but does not hold the unique and exclusive right to do so. The model of good management as strategic partner management or the management of public affairs appears as the basis of the third generation of administrative proceedings, given by Barnes (Barnes, 2016, p. 3). In these, the private sector plays a complementary role in the running of procedures together or in complement to the administration authorities. Virant (Apohal Vučković et al., 2011), furthermore, speaks about taking into consideration the need to reduce administrative barriers and improve the quality of administrative services, analysing the doctrine of NPM as a way of ensuring improved public services.

Under the influence of these newer theories of good governance and proper administration most European countries, and even the EU itself, have adopted appropriate regulation that is slowly changing the role of administration in society. Thus in 2015 France adopted the *Code Des Relations Entre Le Public Et L'Administration*, which took effect on January 1, 2016, and whose subject is the regulation of relations between the administration and the public. The term *administration* explicitly stipulates that private entities (legal persons of private law) are included in the performing of a public service.¹ The Finnish Administrative Procedure Act of 2003, which came into force on January 1, 2004, also contains a provision whereby it is enforced in the case of private entities when they decide to manage public affairs. Administrative contracts are explicitly mentioned and regulated in the Finnish GAP.² A similar solution can be found in the Croatian GAP of 2009, stating that it is applicable to the providers of public services, but only if it is provided by law that the rights of the users can be protected in litigation.³ The Croatian GAP is applied upon the

¹ Code des relations entre le public et l'administration, Article L100-3, available at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=4ECE9E522FC216D2049D485C79C9DBBF.tpdila19v_1?idSectionTA=LEGISCTA000031367302&cidTexte=LEGITEXT000031366350&dateTexte=20161024.

² Administrative Procedure Act, 434/2003, Section 2/3, Section 3, available at: <http://www.finlex.fi/fi/laki/kaannokset/2003/en20030434.pdf>.

³ Zakon o općem upravnom postupku, NN 47/09, Art. 3/3.

conclusion of administrative agreements. In the Slovenian GAP there is no explicit provision whereby private entities fall under the regime of administrative proceedings; there is only one paragraph according to which if other legal entities decide on the rights, obligations, and legal interests of the parties in administrative work, only then will the provisions of the GAP apply to them. This law does not recognize either original or subsidiary administrative contracts as a legal institute, whether directly or indirectly. They are, however, regulated by other laws (such as the Law on Public–Private Partnership), which indicate the GAPA applies.

Hence the exact response to the legal dilemma of the extent and scope of the general administrative procedure that will be used, as well as which entities in a particular state it shall apply to, should always be sought in the provisions of the procedural law regulating this procedure. Or, specifically, the laws on general administrative procedure will regulate whether the rules of the general administrative procedure will govern all relations between the citizens and the public authorities, or whether those rules will be applied only when there is no specific law (*lex specialis*). In that sense, the laws will also determine whether the general administrative procedure will be applied when public services and public services providers are concerned.

Subject to regulation in the Macedonian GAPA is the procedure for the protection of rights and legal interests of citizens (individuals, legal persons, and other parties), and for the protection of the public interest. This procedure shall be applied to all public authorities⁴ – ministries; state administration bodies; organisations established by law; other state bodies; and legal and physical persons who are allowed, by law, to perform public powers and authorities of the municipality, the City of Skopje, and municipalities in Skopje (local government units), when performing their legal powers to act, decide (issue individual administrative acts), and take other administrative actions in administrative matters.

The GAPA provides for the application of the principle of *lex specialis derogat lex generalis*, or, in other words, as a general regulation it has a subsidiary application because by special laws specific issues can be regulated differently from the GAPA, “but must not be contrary to the basic principles and purpose of LGAP, nor... be used to reduce the protection of rights and legal interests of the parties guaranteed by GAPA” (Art 2/2).

⁴ *Public authorities* is a new term introduced by the LGAP of 2015, which generally includes all entities and organisations which have to follow the administrative procedure.

However, when it comes to service providers, the LGAP is fully equated with the public authorities, leaving no room, as is the case with the Croatian solution, to be applied only to those administrative actions which are provided by judicial protection. In this case, the Macedonian GAPA provides no possibility for exemptions from its application: “This law applies to all administrative acts of public authorities and public service providers.” (Art 2/1). Furthermore, elaborating on the concept of *services of general interest*, the GAPA defines these as “administrative actions that are provided to the citizens as generally available services at an affordable price and with adequate quality, continuously, transparently without discrimination of customer service”. To highlight the fact that private entities that provide services of general interest fall under this regulation, the GAPA continues: “If services of general interest are provided by a private service provider, the client must not have less legal protection than when the service would have been given by the public authority” (Art 103). This practically means that the public sector as a whole has to apply the GAPA (Koprić et al., 2016, p. 39).

Another novelty in the law resulting from the contemporary understanding of the concept of good governance transformed into a National Strategy to Reform the Law on Administrative Procedure,⁵ is that it applies when a public authority performs its tasks of administrative law through other unilateral administrative actions that are not covered by the notion of an administrative act, but an act of citizen rights, their duties, and legal interests, such as the delivery of information, warnings, notices, and similar concepts.

The term *administrative act* is broadly defined in the Macedonian GAPA, and despite the adoption of administrative acts and the protection of users of public services, it includes the conclusion of administrative agreements. An *administrative agreement* is defined in the glossary of the GAPA as “a contract which the public authority concludes with the party because of exercising public authorities within the competence of the public authority when this is determined by a special law.” (Art 4/1, line 5 and 11). This means that administrative agreements, too, are subject to the GAPA, although they are extremely poorly and imprecisely defined therein. In contrast, since 2006 the Administrative Disputes Act (ADA) has contained the definition of administrative contracts as subject to settlement

⁵ Strategy to Adopt a New Law on General Administrative Procedure, the Government of FYRM in 2013; See Administrative Procedure Act (OG 124/15). The Strategy was developed with the help of OECD-SIGMA.

in an administrative dispute, which is a much more accurate and simpler explanation of administrative contracts, but it was not used in the glossary of the GAPA (Davitkovski & Pavlovska-Daneva, 2009, p. 190). This diversity in the definition of the term *administrative agreement*, which is a relatively new institution in Macedonian positive law, under-researched in legal theory, causes different interpretations by different subjects (judges of administrative courts, judges of civil courts, and public servants) and unfortunately, results in an uneven application of the law.

3. Basic Principles of Administrative Procedure

General legal principles have been known as a legal source for a long time, with reference to countries that fall under the civil law system in Europe, and whose legal systems are based on the tradition of Roman law. They present the basic values and standards that competent authorities use in the interpretation of written legal rules and filling legal gaps (Šikić & Ofak 2011, p. 128). These principles are contained in all the national legal systems which regulate administrative procedure, and lately even the general principles of the European Union have become particularly important, which is why they are incorporated in national rules on administrative jurisdiction.

Thus the right to good administration is a rather basic principle of administrative law in accordance with Art. 41 of the EU Charter of Fundamental Rights,⁶ which stipulates the right to a fair and impartial handling of affairs within a reasonable time, and includes the right to be heard, to have access to one's file, to use any official language of the EU, to have the EU compensate any damage, and the obligation to state reasons for all decisions. In order to make the concept of good administration more specific, a Code of Good Administrative Behaviour is adopted, containing classical legal mechanisms to protect the rights of the party in its communication with the management rule of law, proportionality, impartiality, the right to be heard, access to information, an explanation of the decision, the use of legal remedies, and modern principles of participation, transparency, efficiency, and decision-making within a reasonable time. Furthermore, the EU has undertaken efforts to adopt a Law of Administrative Procedure. This Law is mentioned in the European Parliament

⁶ Official Journal of the European Communities, 2000/C.

resolution of 15 January, 2013, with recommendations to the Commission (2012/2024(INL)). The objective of this effort is to duly implement the aforementioned right from Art. 41 of the Charter, namely, the right to good administration. However, it is crucial to emphasise that the Law of Administrative Procedure of the European Union is still just an idea, with a long way ahead before its implementation. More recommendations in this direction, aside from the EU, have been adopted by the Council of Europe (Rec (2004) 6 (2007) 7 (2004) 20 (2010) 13). These are related to improving the use of remedies, good administrative and judicial control over administrative acts, effective means to shorten excessively lengthy procedures, and other issues (Sever & Kovač, 2016, p. 1).

The implementation of these principles, rules, or guidelines contributing to the harmonisation of administrative procedures in member states and candidate countries can still be perceived as a two-way process leading to the creation and strengthening of the single European Administrative Space.

But if we start from the beginning of this chapter, in which we expressed the belief that the fundamental legal principles in the countries of the European continental legal system represent a traditional source of law, influencing the interpretation and application of rules, we will easily conclude that the basic principles existed, were codified in legislation, and applied even before the aforementioned documents were adopted. The Macedonian codes on administrative procedure originated from the Austrian GAPA (Koprić, 2005, p. 2), and both when it was part of a federal state and after its independence in 1991 the above rules of good administration were implemented in legislation. The following part of the paper will analyse the principles that were established in the GAPA of 2005 and its amendments vis-à-vis the European standards, and a parallel will be drawn to illuminate whether the basic principles of the new GAPA of 2015 are significantly different.

Macedonia, like most countries in the region, contains these rules codified in a separate chapter entitled “Basic Principles” in the GAPA: legality; proportionality; economy and efficiency of procedure; equality, impartiality and objectivity; service orientation of public authorities; determining the material truth; hearing the parties; free evaluation of evidence; delegating responsibility for solutions; legal protection; finality of the administrative act; validity of the administrative act; and active assistance to the party.

If we compare these principles of 2015 with the provisions of the GAPA of 2005 and the amendments, it can be concluded that there have been no drastic changes and no substantive news, but changes more cosmetic

in nature have taken place. However, the Macedonian GAPA of 2015 contains a principle which is quite unusual for other GAPAs, and it is the principle of delegation of the authority to decide (to issue a decision), which we will discuss in this chapter. On the other hand, the principle of proportionality attracts attention, although realistically, it could also be found in the previous law under the name of “protecting the rights of the parties and the public interest.” Special attention will be given to this question too. And finally, a serious, we could say substantial, change can be found in the newly established principle of legal protection, not because parties were not entitled to use remedies in previous legislation, but because by reading the contents of the principle of legal protection it can be concluded that it changes the meaning of the institute of silence of the administration, which has until now existed as a positive legal presumption (made by the amendments to the GAPA of 2010) and now the negative fiction that administrative silence means rejection of the party request and thus the right of appeal is back in force (this solution was contained in the GAPA of 2005). This is the last topic that will be developed separately in this paper.

As for the other principles, we consider it necessary to point out that the principle of legality is met in all procedural rules governing any kind of legal (administrative or judicial) procedure. However, some authors single out certain jurisdictions as examples of broader and more detailed regulation of this matter. Thus Trpin (Trpin, 2009, pp. 55–70) points out the Finnish GAPA, according to which, besides the classical duty of public authorities to act within the law and with the purpose of the law, there is a duty of equal and impartial treatment of citizens when they interact with public authorities, which means not only when public authorities decide on their rights. This remark can be taken as an example of this comparison: Finland includes the right to an impartial decision in an administrative procedure contained within the principle of legality; Slovenia and Croatia have such principles explicitly mentioned in the general provisions of their GAPAs, but Macedonia gives this right to the parties in administrative procedure by the principle contained in Art. 8 – the principle of equality, impartiality, and objectivity. The Croatian GAPA also lacks a principle which is still in force in the Macedonian GAPA, and this is the right to the final administrative act. Some authors (Bienenfeld, 2010, p. 283) assume that the final administrative act has the same properties as an executive administrative act, which is vague and unacceptable for us because there are situations when the act has been executed, but is not yet final. Those are administrative proceedings in which the appeal

does not delay the execution, and they are common, especially when the management imposes obligations on the parties (tax solutions and so on). Hence we think it is good that the lawmakers decided to leave the “old” principle of the finality of the administrative act in the new GAPA as well. The principles listed as rights or standards in the law of the EU can be seen as absent from the Macedonian GAPA principle of access to information⁷ (in nearby countries it is included in the Bulgarian, Albanian, and Croatian GAPAs), the principle of protection of acquired rights (in nearby countries it is included only in the Croatian GAPA), and the principle of protection of legitimate expectations. In the practice of the European Court of Justice, the protection of acquired rights is part of the principle of legal certainty. The protection of acquired rights in theory and in judicial jurisprudence in different states, added the principle of legitimate expectations of the party (Schünberg, 2000; Barak-Erez, 2005). In the Macedonian GAPA the principle of the validity of the administrative act is also proclaimed, which means irrevocability of the act⁸ by the public authority or permissibility to be annulled, repealed, or amended only in cases determined by law. This guarantee of validity or invariance of the act is prescribed in order to prevent the party from initiating a retrial on the same subject, but primarily to protect it from repeal of the act by the public authority that issued it. In this respect, this principle contains the protection of the acquired rights of the party. The theory differentiates between material and formal validity. The first refers to a ban on the public authority revoking the act, and formal validity is an obstacle for the parties to challenge the act using legal remedies (Borković, 2002). Regarding the protection of legitimate expectations of the party, there is no such explicit principle in the legislation of nearby countries. However, in Croatian GAPA this principle can be found through the interpretation of some provisions. Basically, legitimate expectations are rights for which the party has instituted administrative proceedings and whose implementation is expected to receive an administrative act. For instance, say one

⁷ Although there is no specific principle by this name, the Macedonian LGAP contained a provision (Art. 42) according to which parties in the administrative procedure have the right to review the case file, which could be considered partial implementation of the principle of access to data.

⁸ Art. 16: “An administrative act which cannot be appealed, nor can it have an administrative dispute, and which decides on rights, obligations, or legal interests of the party is a void administrative act. The administrative act becomes void even if the client waives the right to appeal. A void administrative act may be revoked, cancelled, or amended only in cases determined by law.”

has received notice from a clerk of the competent public authority that one meets all the legal requirements to build an extension to their house, and that one is expected to submit a formal request with the necessary documentation. Expecting (to get) a decision, they may make an investment or incur financial costs in preparation for the construction activities prior to formal submission of the request. Meanwhile, a possible change to the policy of the municipality/state through a modification of the existing regulations could lead to a different decision of the public authority, which might be to the detriment of the party. In this situation, the doctrine of the protection of legitimate expectations applies, which does not mean automatically granting the party what they wish for despite the changed conditions and regulations, but instead giving the party an opportunity to be heard before their application is rejected, in order to prove their expectations. The outcome would be to compensate the client or possibly allow for an exemption from the new regulations and allow the extension if it does not jeopardise the interests and legal rights of third parties (e.g. the neighbours).

In the Croatian GAPA, influenced by the German concept of administrative law, the accepted provisions resolve such legal situations by using several principles and provisions of the Act. In Art. 103, the guarantee to acquire rights is determined, so that the public authority may issue the guarantee as a decision on the party and guarantee the rights even in the face of changing facts. This decision shall not prejudice the rights of others or the public interest. Furthermore, in Art. 155 the law provides that the public authority is obliged to issue, upon the client's request, a written notice of the terms, conditions, and procedures for exercising any right or its legal interest in a particular administrative matter. Bearing in mind these two provisions (first, the issuing of a written notice of the conditions of eligibility – for example, the interior of the house – and secondly, the guarantee of a solution that meets the conditions for exercising the right, in which the party can start investing in the extension before submitting a formal request), we can rightfully say that Croatia could, under certain circumstances, apply the doctrine of protection of legitimate expectations of the party, even though it is explicitly introduced as a basic principle of the administrative procedure. In Macedonia there is no such legal possibility, nor does our legal theory support such solutions, because the legal system is far being able to assure that the warranty solutions will be translated into concrete administrative acts; i.e., that public authorities will be able to keep their word, and this would cause additional chaos among the parties in terms of their expectations. In addition to this line of reason-

ing, there is still an extremely high percentage of unanswered requests of the parties in certain administrative procedures, which indicates an overly frequent use of the institute of silence of the administration. If we take the consequences of the institute of administrative silence to mean a loss of the party or its *de facto* (and now *de jure*) inability to accomplish something, then there is no logical argument that would lead to the conclusion that this condition (silence of the administration) would be significantly more pronounced in situations when the warranty deed or notice of eligibility is required (which in themselves do not represent constituent acts like most of the solutions, but merely declaratory legal acts).

From a theoretical point of view, some authors (Schünberg, 2000, pp. 26-28) believe that respect for legitimate expectations of the parties is a principle that should be applied only in order to satisfy the interest of the party, but it is also useful for enhancing the efficiency of the administration. They stress three arguments in support of this position. First, a respect for legitimate expectations strengthens confidence in institutions because they allow the party to play a participatory role and provide opportunities that, together with the management, shape the decision that should come from the administrative procedure: to foster cooperation. Secondly, respect for legitimate expectations encourages the management to provide correct and accurate information on which to base its policies, and citizens will know in advance the information and facts that can provide broad support for such policies or will be able to propose measures to rectify them. Thirdly, legal protection of legitimate expectations of the parties will contribute to a gradual rather than an abrupt change of policy or laws, because the management will be bound by the expectations of the citizens arising from existing laws, and their change will be carried out in stages so that the parties will have an opportunity to adapt to the new policies.

Our position on this issue is that the protection of legitimate expectations of the parties is not, and cannot, constitute a single principle whose content could be observed by the public authorities by a simple installation of laws on administrative procedures. Rather, it is a whole doctrine, a set of legal opinions, but also a set of guidelines and strict prohibitions or restrictions on the activities of public authorities. Therefore, the implementation of this doctrine or concept via positive law should be seen as a multitude of provisions through which GAPA principles are rendered in one country, while in other countries it should be seen in the applicable laws and the constitution. Specifically, in the FYR of Macedonia there is no explicit principle of protection of legitimate expectations of the party,

no guarantee act, nor is the administration obliged to notify the parties of the fulfilment of conditions for their acquisition of certain rights. However, we still believe that the essence of these concepts is preserved and included in numerous other provisions:

- the principle of legality – as provided in the GAPA,
- the principle of validity, which is provided in the GAPA and further elaborated above,
- the constitutional prohibition of the retroactive application of laws,
- the right to free access to public information as a constitutional category operationalised by a separate law,
- the obligation of the *vacatio legis* of all laws when they drastically change the legal regime, or when a certain state policy lasts for a longer period of time,
- the delay of the implementation of new laws which establish new policies up to a full year (as was the case with the General Administrative Procedure Act, the Law on Administrative Servants, the Law on Public Sector Workers, and other laws) in order to leave an option for the citizens to adapt to the newly stipulated conditions,
- the principle of hearing the party and providing active assistance to ignorant persons, as is consistent with historical tradition in the Macedonian LGAP.

Hence we rightfully think that, in view of the principles of the general administrative procedure, the Macedonian GAPA meets the highest European standards of good administration provided for in international law.

3.1. Principle of Proportionality

The principle of proportionality has an extremely valid role in EU Law⁹ and rose to prominence with the strengthening of European integration processes. At the same time, this principle has become subject to differ-

⁹ It was developed by the jurisprudence of the European Court of Justice, originally as a tool for judicial review of the administration. Furthermore, in signing the Maastricht agreement, the member states decided to regulate this principle in Art. 3b (3) together with the principles of delegated authority and subsidiarity. The Amsterdam Treaty does not change this provision; it only further edits some practical aspects of the application of the principle of proportionality in the Protocol annexed to the Treaty on European Union (Protocol attached to the EC Treaty). Consequently, there is only one basic provision Art. 5 (3) in the EU Treaty which provides that no Union action must come out of what is necessary

ent interpretations in theory (Maliszewska-Nienartawics, 2008, p. 89), particularly regarding its implementation in national law.

The origins of the principle of proportionality can be found in the theories of the School of Natural Law and in liberal thought of the early 17th century, based on the understanding that the purpose of the state is limited to the core of the creation of the community. Individuals voluntarily join a social community for the purposes of jointly safeguarding their rights to life, liberty, and property (and these are fundamental rights that are based on the natural state of man, the individual). It is only for the protection of these rights or this natural state that the community has the right to apply coercion to individuals, and thus the intensity of the applied coercion must be reduced to a minimal extent; i.e., such as is necessary to achieve the social goal.

In the Macedonian GAPA the principle of proportionality is a new principle, although this novelty is primarily reflected in its name because of the legislator desire to follow European trends. As to its content and essence, we can freely say that it takes place in the predetermined principle of protection of the rights of the parties and the protection of the public interest. In both terms (principle of proportionality and protection of the rights of the parties and the protection of the public interest) we have the same content whose essence consists of the prohibition to unduly restrict the rights of the party, taking any action by the public authorities while protecting the public interest determined by law. In other words, the type, form, content, and manner of any administrative activity must be such that the activity achieves the goal of the law in a given situation, i.e. the scope of the administrative activity must be proportionate, i.e. adapted to the goal. When, however, under the law certain obligations are imposed upon the party or another participant in the proceedings, those legal measures that are less difficult or more favourable to them must be applied, if those measures will achieve the legitimate aim pursued. This principle applies to all actions in the procedure. For example, when there is a possibility for the decision to be implemented in a number of ways and by using different tools, it will take place in the manner and by using the means that lead to the fulfilment of the target, which is to say those most favourable for executor. Conversely, the public authority is authorised to immediately apply a stricter manner or means of enforcement of the obligation, if it concludes that the mildest manner or means would

to achieve the objectives of the Treaty. More provisions can be found in the Protocol on the application of principles of proportionality and subsidiarity.

not achieve the aim of enforcement, i.e., the law. Furthermore, the principle of proportionality is operationalised in other provisions of the GAPA, such as those relating to the administrative agreement. In particular, it is envisaged that the public authority unilaterally terminate the administrative contract and, when necessary, to remove the immediate threat to the life and health of people or property *if that danger could not be removed otherwise* (Art. 101/2). Here is another example of the concrete operationalisation of the principle of proportionality through the provisions of the GAPA: in dealing with a complaint, if the appellate authority finds that the administrative act regarding which the complaint has been submitted is correct in terms of the facts and the application of the law, but that the purpose for which it has been adopted as an administrative act can be achieved by other means more favourable to the party, it will amend the administrative act in this regard (Art. 109/14). In order to properly resolve the matter, the appellate authority may amend the first instance administrative act based on the appeal in favour of the appellant regardless of the request indicated in the appeal (reformation in melius), and within the request submitted in the first instance proceeding, if that does not infringe the right of another person (Art. 109/15). These provisions could be found in the previous GAPA and their source or basis was the principle of protection of the rights of the parties and the protection of the public interest. In the present GAPA the prohibition of *reformatio in peius* is not regulated; i.e., the ban and the exceptions to the rule that the appellate authority shall not amend the appellant administrative act to the detriment of the party are not regulated. In terms of protecting the rights of the parties this is a progressive solution, but, on the other hand, the former GAPA contained such a prohibition with strict exceptions referring to the protection of the public interest. From this perspective, it can be said that the new GAPA stresses the protection of the rights of individuals, creating a slight imbalance in the protection of the public interest, unlike the previous legislation. We think this is a serious legal gap in the law, because its application could include the interpretation that starts from the basic principle that everything that is not forbidden by law is allowed; no editing or ignoring the principle of *reformatio in melius* may lead in practice to a free application by the public authorities under the pretext that they are protecting the public interest, which would clash with the decades-old traditional system of parties using legal remedies. Hence when following new trends in neighbouring countries, or in international law on the amendment of domestic legislation, states must be very careful and precise in taking up new institutes and incorporating them into

national legislation, because this must not be viewed only from a future perspective but should also take into account everything from the past.

3.2. Principle of Delegation of the Authority to Decide (to Issue a Decision)

By means of this principle the GAPA creates a basis, even a sort of legal obligation (to avoid a collision of laws), for changes to the Organisation and Operation of the State Administration Act. Namely, this refers to reducing the powers of political appointees (ministers, directors, mayors, rectors, deans, directors of institutes, and other governing authorities of public institutions) to decide in specific administrative matters on the rights, obligations, and legal interests of the citizens. The GAPA contains provisions (Art 24) that specify this principle. Contrary to past practice, when procedures could be carried out by *de facto* public servants, so that the minister, director, or mayor could just sign off on them, now every public authority must establish a separate organisational unit (department or sector) within the organisation, in order to conduct certain administrative procedures, and the head of the department or the person authorised by the head will carry out administrative procedures, issue, and adopt decisions.

This principle finds its operationalisation in the GAPA provision relating to the officer. In administrative proceedings the public authority acts through an authorised officer. If the officer authorised to conduct the administrative procedure is not stipulated by a special law or bylaw, the head of the public authority or another authorised person is obliged to act on behalf of the organisation to determine the organisational unit (ward or department) responsible for each type of administrative matter within its jurisdiction. The authorised official conducts and completes the procedure. Through this provision, the predetermined principle of delegation of the authority to resolve complaints is specified in the GAPA.

Although we are aware that this principle should not find its place in the rules for conducting administrative proceedings, our attitude is positive towards this new legal solution. To put it simply, for a few decades Macedonia had the tradition of administrative procedures legally carried out by politicians in the most classical sense of the word – ministers, directors, mayors, and similar figures. This was bringing about negative consequences for several reasons. First, this was because of the principle of professionalism and competence. Secondly, this was because of the principle of

devolution, meaning that an appeal or objection has to be decided upon by a higher authority, and there were no higher authorities than the ministers at the ministries or the mayor in the municipalities. Thus in different historical periods various “legal” mechanisms were fabricated to solve this problem. One was the formation of secondary government commissions, which proved to be absolutely ineffective and were even challenged by legal analysts because the government is a part of the executive authority of which the administration is an integral part (a minister decides through a commission on the appeal against a decision of another minister of the same government). Other mechanisms were: changing the constitution (Official Gazette 107/2005), leaving the legal guarantee of the right to appeal against administrative acts; until the formation of bulky, expensive, and again extremely politicised secondary state committees elected by the parliament which would have to guarantee their “independence” of the executive branch (which the citizens still in no way feel because the parliamentary majority representing the policy of the ruling party/coalition comprises the government). Therefore, a climate, i.e. political will to include the delegation of competence as a basic principle of the GAPA was created during its adoption. SIGMA was especially influential in that respect, imposing pressure on the authorities. Now all the conditions have been created for administrative cases to be solved by professional and competent persons, which stand behind the decisions they make and vouch for them with their own signatures, and thus the pressure officials make on them will be reduced because the responsibility for the legality of the act is their own and not of the officials.

3.3. Principle of Legal Protection

The principle of legal protection against any administrative activity or inactivity, as well as against *real acts* (assurance, notification, confirmation, and so on) is broader than the principle of the double-instance (control) procedure set out in the previous law, because the latter is confined only to the appeal against the administrative decision.¹⁰ The right to appeal

¹⁰ The previous Macedonian LGAP guaranteed the right to appeal only against an individual administrative act (decision), but it did not consider *real acts* and other activities of the public authorities. On the contrary, the new LGAP determines a broader principle from the right to appeal in its Article 14, which is the principle of legal protection containing not only the right to appeal, but also the right of administrative objection as a new legal remedy in Macedonian administrative procedure.

(the double-instance procedure) is also addressed in the principle of the legal protection of the party. The appeal is a regular legal remedy provided for in any democratic legal system. Using the right of appeal allows the initiation of the mechanism of control (review) of the decision with which the complainant is not satisfied and has requested that it be removed from legal transactions or changed in their favour. The right to appeal is an important element for the realisation of constitutionality and legality.

However, in the Macedonian legal system certain limitations were imposed which should not have been imposed because their application had already raised the question if the right of appeal is really a regular legal remedy in the administrative procedure, or if it is starting to take on the property of exception. Namely, following the above reasons, in 2005 Article 15 of the constitution was amended, which guaranteed an appeal against the acts of the state administration. Amendment XXI remained a guarantee for the use of ordinary means, which implicitly means if the appeal is ruled out by law, the party is left with another type of regular legal protection, which is to bring a lawsuit, i.e., court control over the administrative acts. However, at that time the GAPA was in force, establishing the right of appeal as a general rule for all administrative procedures, with the exception of those where the complaint is legally inadmissible. Interpreting these two provisions contained in the constitution and the GAPA complementarily, a legal system was established under which the appeal is the proper legal remedy under the LAP as *lex generalis*, but only where there is no adequate appellate authority to decide on it, and it could be excluded by a special law (*lex specialis*). A number of substantive laws were changed; the right of appeal was replaced by the citizen's right to initiate an administrative dispute. Meanwhile, the new GAPA was adopted in 2015, in which the principle of legal protection reads: "Against the first instance administrative acts, the party has the right to appeal *in cases determined by law*." (Art. 14/2). Considering the fact that a number of laws do not contain an explicit right to appeal because it was the general rule contained in the GAPA, which did not need to be repeated in the material regulations, while other pieces of legislation explicitly excluded the right to appeal (which again was the general rule in the GAPA order to enable direct legal protection of the parties), this has now left the citizens facing an extremely restrictive legal possibility to use their right to appeal. In our view, we need a serious review of all regulations in the field of administrative law and adaptation to the intention of the legislator by expressly stipulating the right to apply or modify the said provision of the GAPA by

deleting the words *in cases specified by law* so that the right to a complaint gains the character of a general rule.

Silence of the administration. On the other hand, the GAPA establishes a general right of appeal for all citizens if the public authority does not respond to their requests within the legally prescribed period (Art. 14/3). Therefore, after six years of the fictitious existence of the “positive legal presumption of the administrative silence”, the GAPA again explicitly introduced the principle that “silence of the administration” was considered to mean a rejecting the application of the party. Positive fiction in the silence of the administration is a European standard; it is a recommendation by all international institutions dealing with the improvement of administrative legislation in countries aspiring to join the EU. However, the usual way of transitioning from one legal solution to another is to prescribe a provision which would be applicable and not just an elusive wish. Thus, it would have been appropriate, when in 2008 the competent authorities decided to change the legal meaning of the institute of silence of the administration, for them to be aware of the degree of efficiency, competence, and responsiveness of the administration in their own country, as well as its capacity to deal with the real situation on the ground. Thus, the right of a party to acquire a right which it submitted in a request even when the public authority has not responded to that request within the legally prescribed deadline was to be provided only as a possibility to be arranged expressly provided by law. Afterwards, the competent Ministry for the Affairs of the Public Administration would carry out an analysis to determine which administrative procedures are really feasible for the administrative silence to mean that the competent authority has responded positively to the request of the party and those situations would be regulated by special regulations (*lex specialis*). Instead, although this was not essential for compliance with EU law, the competent authorities in FYR Macedonia prepared (and by the ruling majority in the parliament) and adopted the legal obligation for administrative silence to be deemed as an acceptance of the party’s request. For almost 8 years the decision has existed only in writing, and was mainly ridiculed by the legal profession but never encountered practical use. It was so invalid and inapplicable that not only did it impede the party’s knowledge of its right, but denied their right to appeal because there was a legal presumption that the party’s request had been approved, and therefore there was nothing to appeal against. Losing the right to appeal because of a “received positive decision”, the party lost the right to sue and to initiate administrative proceedings before the administrative court. On the other hand, the party could not

in practice realise the law for which the public authority had not acted, especially when it came to monetary claims (the right to social assistance, the right to compensation for maternity leave, the right to child benefit, the right to study scholarship, and similar rights), but also non-monetary claims such as issuing permits, licenses, or certificates (permit for the opening of a facility, building permit, permit to carry weapons, certificate of citizenship, and similar documents). Of course, there are situations and procedures in which the date of submission of the application and evidence that the legal conditions have been met may be ground for the implementation of the requested right even without a decision issued by the administration, but they are specific and rare. Such situations were to be regulated by separate laws, because they were not a general obligation. For these reasons, these provisions remained unutilised, and in practice the officers applied six-year-old laws as if the positive legal presumption of administrative silence never existed. All this gave rise for the new GAPA to return to the old solution through the formulation quoted above and contained in Art. 14/3. Because the GAPA contains the general principle of its subsidiary application, there is no legal impediment, where feasible and appropriate, with special laws for the silence the administration to be considered as an acceptance of the party's request.

The GAPA, despite the appeal as a regular legal means, introduced the re-building (recurrence) of the procedure (Art. 104). The party has the right to appeal against real acts, as well as the actions of the providers of services of general interest. It can initiate an administrative dispute against secondarily issued administrative acts, as well as against those administrative acts issued in the first instance against which the party may not appeal.

4. Conclusion

The introduction of the GAPA of 2015 was a lengthy process for several reasons. First, this law could only be passed in the parliament with a two-thirds majority, and the opposition made numerous remarks regarding its content. The law was eventually passed during the opposition's boycott of the work of the parliament; i.e., in its absence, when the government was supported by two thirds of the parliamentarians. This fact leaves a mark on the GAPA and its concept, because the question of why it was so urgent to pass the law in the short period when the opposition was absent from parliament will always remain. Secondly, some of the recommendations provided by SIGMA experts were strongly opposed by local experts

who were not consulted in the (pre)legislative process in any manner; specifically, not one public deliberation was organised by the parliament. One of these recommendations was the introduction of the principle of legitimate expectations of the parties, as well as the right of the party receiving a guarantee act. Our standpoint is that these additional principles and rights are in no way necessary, as their aim is achieved by other provisions of the GAPA. Thirdly, Macedonia's administration and political officials (ministers, directors, and other officials) are still not ready to implement the new provisions of the GAPA, as evidenced by the fact that:

- the right to administrative objection is yet to be used in administrative procedures;
- parties still have no access to administrative judicial protection (protection before the administrative court) in the case of their administrative contracts, bearing in mind that their disputes are still resolved before regular civil courts;
- electronic communication, which is mandatory for public authorities, has not yet been implemented;
- many substantive laws have not yet been harmonised with the GAPA, especially regarding the formation of special organisational units that need to carry out administrative procedures (the systematisation acts have not yet been amended) or, for instance, regarding the deadline for filing an appeal, which according to the GAPA should not exceed 15 days;
- the principle of proportionality does not bring about any practical benefit for the parties, considering that all the penalties are prescribed in the substantive laws applied by the authorities, and are disproportionately high considering their aim and the standard of the Macedonian economy.

To conclude, so far the experience in regard to the application of the GAPA indicates that there is an essential need for training, as the prerequisites for its adequate implementation were not met even during the year-long *vacatio legis*.

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THE MACEDONIAN GENERAL ADMINISTRATIVE PROCEDURE ACT: BETWEEN TRADITION AND MODERNISATION

Summary

The paper outlines the process of the modernisation and improvement of the general administrative procedure in the Former Yugoslav Republic of Macedonia. It contains a review of the crucial novelties and accompanying critical remarks. Furthermore, the paper presents the essential standards and guidelines for the functioning of the administration, which served as a basis for preparation of the Macedonian Law on General Administrative Procedure (LGAP) along with various theoretical perspectives. The paper starts with a definition of the administrative procedure in the legislation and in several doctrines. A few perspectives are offered: the administrative procedure can be defined in the light of the classical Weberian theory of bureaucracy or with regard to modern doctrines such as New Public Management (NPM). Speaking of legislative definitions, on the other hand, the paper outlines the Macedonian LGAP, but also the respective laws of other countries (France, Finland, Croatia, and others). The paper goes on to offer an overview of the basic principles of administrative procedure, making particular reference to newly introduced ones in the Republic of Macedonia. A special emphasis is placed on the principle of proportionality, the principle of delegation of the authority to decide (to issue a decision), the principle of legal protection, and silence of the administration as its subcomponent. These principles are thoroughly analysed, as are the reasons and the needs why they were introduced to the Macedonian LGAP. Finally, several critical remarks are made. The authors conclude that the process of the adoption of the LGAP is highly problematic, and that there is a serious lack of training of the public servants who are expected to implement it in the future.

Keywords: General Administrative Procedure Act – FYR Macedonia, administrative procedure principles, legal protection, parties to the administrative procedure, public authorities, duties and competences