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TOWARDS A NEW GENERAL ADMINISTRATIVE PROCEDURE ACT IN THE REPUBLIC OF SERBIA*

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Abstract. *The reform of administrative procedure is a constituent part of the complex processes underlying the public administration reform. The General Administrative Procedure Act is like a monastery in constant need of refurbishment by introducing new institutes which will make it more comprehensive, affluent and versatile. However, considering the circumstances of the New Public Management, the transformation of public administration from an administrative authority into a public service requires a change in the public administration procedures. Thus, the Administrative Procedure Act shall be appropriately amended so as to speed up and simplify the complicated administrative proceedings and to provide for a more efficient legal protection of both public and personal interests.*

Key words: *Administrative procedure, changes in the general administrative procedure act.*

1. THE PLACE AND THE ROLE OF ADMINISTRATIVE PROCEDURE IN THE LEGAL STATE

Administrative procedure is a process of enacting administrative acts. This procedure is regulated by the General Administrative Procedure Act (GAP Act) as well as by a number of other special administrative proceedings acts regulating the administrative practices in particular and special administrative situations. The relationship between the General Administrative Procedure Act and a Special Administrative Proceedings Act is based on the principle of subsidiarity. It means that, in cases where both acts may apply, the application of a special administrative proceedings act has priority over the application of the General Administrative Procedure Act but only provided that there are legal gaps or some ambiguity and imprecision in the special administrative proceedings act.

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The purpose of administrative procedure is to regulate the legal proceedings in decision-making processes on particular rights and obligations of both natural and legal persons in specific administrative matters. The role of the General Administrative Procedure Act is to envisage and normatively frame the procedure in cases where the administration has to decide on legal claims submitted by both individual citizens and legal persons, or in cases when the administration is obliged to act *ex officio* and decide on particular rights, obligations or legal interests of legal subjects involved in administrative matters.

The statutory regulation of administrative procedure is a legal safeguard primarily for the parties who are made aware well in advance what kind of procedural circumstances they may encounter in communication with the public administration. On the other hand, the General Administrative Procedure Act is legally binding for the administration and other state authorities (courts, the Government, the President of the Republic, etc) as well as for other organizations in cases where they are obliged by the rules of procedure to apply the General Administrative Procedure Act; thus, the administrative procedure actually "protects" the parties. It ultimately results in extending the legal boundaries for the purpose of establishing the rule of law where both the state and its administration are under the auspices of the law.

Hence, the General Administrative Procedure Act is very important for every single state because a consistent application of any act (and this one in particular) is the ultimate test for the administration, primarily in terms of observing the binding authority of the prescribed legislation and the discretionary authority (arbitrariness) in the decision-making processes. Moreover, the significance of the General Administrative Procedure Act is turning into an axiom if we take into account the extensive and constantly increasing application of this Act not only in the administrative practice but also in the practice of other public authorities, as well as in the practice of the bodies and organizations of the so-called quasi-governmental public administration sector administration (such as the agencies and other so-called regulatory bodies).

2. THE HISTORICAL DEVELOPMENT AND THE CONCEPT OF ADMINISTRATIVE PROCEDURE

A general administrative procedure act was first enacted in Austria in 1995. The adoption of such an act marked a departure from the concept of "an informal character" of administrative proceedings and the acceptance of the concept of a formalized administrative procedure. The codification of administrative procedure was aimed at bringing to life and upholding the principle of legality in the administrative practice, securing the legal position of the party involved in the administrative proceedings and providing for the protection of the party's rights. In a more general context, it was also a departure from the concept of the police state and a definite incentive to bring the administration under the rule of applicable law, which is certainly the most difficult task for a (legal) state on the road to instituting the rule of law. Thus, the adoption of an act which would comprehensively regulate the activities of administrative officials acting in specific administrative matters indicated that the administration was under the auspices of the law. In the course of these proceedings, the administration was legally bound by stringent and meticulously detailed rules of procedure. It was primarily in the interest of citizens, *i.e.* the party who was well aware in advance of the procedural rules in the relations with the administration,

which additionally reinforced the principle of the party's legal certainty and legal protection in the administrative proceedings.

The concept of administrative procedure is not explicitly defined in the legislation; however, on the basis of the legal provisions contained in the General Administrative Procedure Act, it may be indirectly defined as a procedure or a system of administrative proceedings and decisions for resolving some administrative matter on the basis of the applicable statutory legislation and other regulations. The subject matter of the decision-making process in the administrative procedure is the administrative matter, even though the administrative procedure may also cover some other legal and technical issues which cannot be qualified as an administrative matter.

The administrative procedure is a form of an undisputable legal proceeding which, in that context, most resembles a non-litigious court proceeding. In the administrative procedure, there is no dispute between the administration and the citizen, *i.e.* between the administrative official in charge of the proceeding and the party involved. Moreover, along with acting in the public interest, the administrative official is obliged to protect the rights of the individual citizen(s) involved in the proceedings. The elements of a dispute may eventually appear in the second-instance procedure (on appeal). On the contrary, in the judicial (court) procedure there is a dispute between the parties (the plaintiff and the defendant) either on a private or public law matter. The court is an impartial third party which is to resolve the dispute by awarding relevant sanctions (secondary dispositions) in the form of a judicial decision. On the other hand, the final result of the administrative procedure are not sanctions (imposed by a judgment) but dispositions or rules of conduct given in the form of an administrative act (decision on the party's rights and obligations in a particular administrative matter).

3. The Aims and Objectives of Administrative Procedure and the GAP Act

The administrative procedure is a procedural relation between the public administration (administrative authorities or organization vested with administrative powers) or other bodies and organizations obliged to apply the GAP Act and, on the other hand, the party (or parties). The primary objective of this procedure is to decide on a particular administrative matter. The administrative procedure may be observed as a single and unique relation but also as a body or a system of diverse administrative law relations. The administrative procedure is actually a set of procedural relations interconnected by common principles and goals into specific phases or steps which (perceived as logically connected procedural situations) altogether constitute the administrative procedure. All the individual goals and objectives of the administrative procedure are aimed at accomplishing the common primary objective of the administrative procedure: to decide on a particular administrative matter. All these individual administrative procedure relations are merged and synthetically expressed in a single administrative procedure relation.

The main objective of the administrative procedure is the enactment of an administrative act (decision). This aim is based on the model of efficient, service-oriented and effective public administration, which cannot accomplish any of its goals by being "silent", inactive or passive.

The basic goals of the General Administration Procedure Act are contained in the basis (governing) principles of this Act. The governing principles are the most general legal rules, the ultimate principles, the governing ideas and the highest legal standards which are applied in the process of implementing the statutory legislation on general administrative procedure. These principles have two main functions. First and foremost, they are applied when there is a dilemma whether some legal provision should be implemented or not, and in case there is a problem concerning either the legal interpretation (when it is necessary to establish the actual meaning of a legal norm) or a legal gap (when it is necessary to find a specific legal norm which may be applied to a specific case). The second major function of the basic principles is that they delineate the boundaries of the special administrative proceedings acts, by defining to what extent they can depart from the GAP act (as a general act). Namely, due to the specific nature of administrative matters in some areas of administrative law, the provisions prescribing the necessary departure (exceptions) from the rules of the general administrative procedure must be in compliance with the basic principles of the GAP Act.

In addition to these two basic functions, these governing principles are both the foundation and the guidelines for reforming the administrative procedure because the ideas underlying these principles go far beyond the procedure itself. The entire General Administrative Procedure Act should be reformed and redesigned in a contemporary fashion so as to ensure a complete and consistent implementation of these basic principles, whose underlying spirit has not been put into full effect.

The principles which are explicitly stated in the General Administrative Procedure Act are: the principle of legality; the principle of protection of civil rights and protection of public interest; the principle of efficiency and efficacy; the principle of material truth; the principle of conducting formal hearings; the principle of admission of evidence, the principle of independence; the principle concerning the right to appeal; the principle of finality and enforceability of administrative decisions; the principle of providing legal assistance to the party; the principle of using relevant language and alphabet in the proceedings. In addition, the administrative procedure also includes a number of principles which are not explicitly enlisted in the GAP Act but which have been derived from the explicitly stated principles. In the administrative law theory, there is an almost common agreement that these derived (or implied) principles include the principles of: transparency, *ex officio*, investigation, publicity, legal certainty, protection of legitimate expectations, accountability, and the right to oral and written communication. The authors of some scientific articles in this field also include some other principles, such as: the principle of indirectness and directness, the principle of concentration, etc.

All the above principles contained in the General Administrative Procedure Act are high legal and conceptual standards which are important not only in the process of applying the GAP Act in practice but also for introducing further improvement in the GAP Act, whose current normative contents do not fully implore the ideas underlying the basic principles. The conceptual perfection of these principles is far above the imperfect normative solutions, which is particularly evident in some of the so-called derived principles (such as the principles concerning the protection of legitimate expectations, transparency, accountability, and others).

4. WHAT SHALL BE CHANGED IN THE GENERAL ADMINISTRATIVE PROCEDURE ACT?

The administrative procedure reform is a constituent part of a complex process of public administration reform which is primarily aimed at ensuring professionalism, rationalization, depolitization, efficiency, transparency, accountability, knowledge investment, partnership, participation, and citizens' content with the administrative practices. Yet, the administrative procedure reform yields both individual resistance and objective problems.

The General Administrative Procedure Act may be compared to a monastery in constant need of reconstruction and refurbishment. The GAP Act has to include new institutes which will make it more comprehensive, affluent and versatile. It is, therefore, necessary to carry on rebuilding it instead of "removing things" and shortening the administrative procedure. Regardless of the democratic and egalitarian principles it rests upon, the existing concept of administrative procedure basically protects the administration and brings citizens into a subordinate position. Let me remind you that this concept of administrative procedure is based on the Austrian model, which is definitely not the only one in Europe in this area. As a matter of fact, the administrative procedure has become quite complicated and bulky (due to the repetition of some institutes contained both in the Administrative Procedure Act and in the Act on the Judicial Review of Administrative Acts); it is slow and time-consuming (due to the long time limits for issuing public documents and decisions); it is confusing and difficult to read due to the imprecise and inconsistent terminology (e.g. in defining the notion of an administrative act, the limitation periods, etc) so that the parties find it difficult to understand and use in the process of exercising and protecting their rights and legal interests (due to "the silence of the administration"). Ultimately, considering the circumstances of the New Public Management, transforming the concept of public administration from an administrative authority into a public service requires a change of administration proceedings.

In the modern general administrative procedure, as a legal procedure of the new millennium, human rights as well as the rights and freedoms of the man and the citizen shall have the central position this system. They have to be tailored to serve the needs of the people, thus conceptually transcending the concept of administration as a state "authority" as well as the current constitutional and legal normative frameworks resting upon the concept of generalization, administrative power and birocratic interests.

(1) First, it is highly inappropriate that none of the articles of the Administrative Procedure Act contain either the term or the concept or the definition of an administrative act, which is the final outcome of the administrative procedure. Such a state of affairs may have been caused by a number of historical and linguistic reasons but this omission certainly cannot be justified.

(2) Second, there is a permanent inconsistency in the manner of calculating limitation periods in the Administrative Procedure Act, as well as the incompatibility between the limitation periods as contained in the Administrative Procedure Act and in the Act on the Judicial Review of Administrative Acts, which is certainly confusing and may result in absurd legal and factual situations. Moreover, there is rather absurd legal terminology from the past century and a number of ambiguous legal terms, such as: restitution (reinstatement), "nailing a document to the door", etc).

(3) Third, it is necessary to further improve the institution known as "the silence of the administration" *de lege ferenda* in order to provide a more efficient administrative proceedings and adequate protection of the rights and obligations of legal subjects in the administrative law relations. This process of strengthening the administrative responsibility can ensue in several directions.

The first direction pertains to a complex of questions concerning the problem of limitation periods in the administrative procedure.

The first question is related to the *legally binding nature of time limits* in administrative proceedings. To what extent are the prescribed time limits legally binding and are they the only mechanism that can make the administration work and prevent its inactivity or tardiness? Even thought the time limits are legally binding, the omission to observe them does not necessarily have to be sanctioned. This raises the question of their legally binding nature. Namely, the time limits are mainly prescribed for instructional purposes; they oblige the administration to observe a specific rule of behaviour which is legally binding but whose inobservance is not directly sanctioned. Therefore, there are no direct procedural consequences that may affect the administration

The second question is related to providing an *adequate length of a time limit*, allowing the administration sufficient time to take some action, i.e. to issue and deliver its administrative decision (in the form of an administrative act, a certificate, etc); the administration is considered to be "silent" only after the expiry of the prescribed time limit. In that context, there are three basic solutions. The first option is to shorten the existing time limit (of 30 or 60 days) for a legally binding administrative action, which shall improve the efficiency of the administrative action. The need to shorten the time limit is supported by the argumentation questioning the sustainability of all the time limits which were laid down at the end of the 20th century and the beginning of this century, particularly having in mind the present current developments in the computer-assisted administration of the 21st century. The second option is that the existing time limit should be extended to three months (for example), which would give the administration sufficient time to decide (positively or negatively) on the submitted claim. This alternative is closely related to the second direction for enhancing the accountability of administrative officials. The third option would be to accept the system of flexible time limits, which further opens the question of their relevance and effectiveness.

The third question is related to the need to provide a *maximum time limit* for legal protection in case of the "silence of the administration". In our legal system, there is no ultimate (maximum, preclusive) time limit for the applying legal remedies (legal claims and appeals) in case of the "silence of the administration". For this reason, the legal claim or appeal (in case of "silence") cannot be overdue but only premature, which means that they may "only" be filed before the expiry of the urgent statutory limitation periods for publishing (issuing and delivering) an administrative decision. It primarily includes publishing a decision (both a first-instance and a second-instance decision) but it also refers to the taking all compulsory substantive administrative law actions, particularly if the administrative action is closely associated with a specific time limit.

Finally, the prescribed legal remedies are not aimed *against* "the silence of the administration" (as an institute) but can only be applied *in case of* "the silence of the administration". This is so because the subject matter of a legal claim or appeal is not di-

rectly "the silence" (inactivity) of the administration but the negative decision whose legality is being challenged. A legal claim and appeal against "the silence of the administration" does not exist. The party and other authorized persons may not file a legal claim or and appeal against the administration for "silence"(inactivity) which is formally legalized as legitimate conduct of the administration by means of fiction and a legal presumption of a negative administrative act. The party may only challenge the legality of the respective negative administrative act or action.

The second direction is related to introducing a *presumption of a positive administrative act* into the General Administrative Procedure Act as a general rule which would be applied in case when the administration remains "silent". As a matter of fact, such a presumption already exists in our legal system but it is applied only as an exception; namely, its application is confined only to some "narrow" and special administrative matters, constitutional-administrative matters or administrative matters related to some private law matters. This presumption, which has been living a modest and marginal life, should now be raised to the rank of a general rule. However, it should be done cautiously, thoughtfully and with moderation in order to avoid going to the other extreme. It is necessary to strike the right balance between the public interests of the administration and the private interests of the citizens and other legal subjects. Such a well-balanced and step-by-step approach points that:

- it is first important to institute the concept of "silence" as a positive act, but only in certain administrative matters and not as a general rule. It would be the *first phase* in the process of creating an efficient and effective administrative system. Only in *the second phase* would it be possible to go for a more radical positive concept of "the silence" of the administration which would be used as a general rule; or
- the positive concept of "the silence" of the administration should be introduced at once as a general principle, which would be "softened" by numerous exceptions.

Thus, the extension of the time limit would contribute to introducing a positive concept of "the silence" of the administration.

The third direction would be to rebuild the existing legal grounds and develop new options for instituting an efficient mechanism for the remuneration of citizens in case of "the silence" of the administration and any other omission to act.

The fourth direction would be to introduce coercive measures which are to be awarded either by courts or second-instance supervisory authorities; these measures would directly open the possibility for the exercise and legal protection of the party's rights and interests in case when the administration (by remaining "silent") prevents their exercise and protection, drawing the party into the birocratic administrative procedure labyrinth. However, coercive measures would be applied only in extraordinary cases, as a final resort, particularly in those administrative matters where the protection of the public interest would still justify the "necessity" of preserving the negative concept of "the silence of the administration".

The global process excommunicates (both actually and formally) an administrative system which remains "silent" and omits to act. Such an administrative system rests upon the principle of formal legality and state authority; it is an out-dated administrative model characterized by highly limited internal as well as external communication, which keeps

being "silent" not only in its relations with citizens but also within its own governmental structure. Such administrative system is highly inconsistent and contradictory in itself.

It is, therefore, necessary to create institutes which will foster a more efficient and creative administration practices instead of putting the administration to sleep by institutes such as "the silence of the administration". This institute is a "mask" of quasi-efficient birocracy, which is living in a fictitious world and pretending to be doing some work whereas it is actually hiding behind legal fictions which are allegedly in the interest of the citizens. Such metaphysical administrative systems are a matter of the past; they cannot be denied their "museum" value but they are quite useless and impracticable in a modern prolific state which endeavours to build a positive and productive relation with its citizens. The administration which wants to build positive relations with its citizens must be constructive, efficient and up-to-date. The administration mustn't be "a bad teacher". All its energy and potentials shall be set free in an efficient and effective action, instead of hiding behind the legal fictions such as "the silence of the administration".

The responsibility of the administration for inactivity or failure to act shall be subject to a "more rigorous" control because such practices may be even more dangerous for the citizens and the society at large. A failure or omission to act is just one step away from abuse (if not already). In fact, the system of administrative responsibility may be best activated (both in the repressive and in the preventive form) only by applying the concept of "the silence of the administration" as a positive act (i.e. a system of reporting).

For these reasons, we are in favour of the concept of "the silence of the administration" as a presumed positive administrative decision, which shall not be treated as a marginal legal institution but introduced into the contemporary General Administrative Procedure Act as a general rule in order to provide a modern and efficient administrative procedure. The concept of "the silence of the administration" as a presumingly positive administrative act which is aimed at meeting the party's request should be prescribed as a general rule which would apply in the general administrative procedure. The direct effect of this rule would be to normatively frame the responsibility of the administration for inactivity or non-performance, and institute relevant prevention measures. The concept of "the silence of the administration" as a negative administrative act was obviously progressive idea at some point in the past but it is definitely an out-dated idea from the past century. It is a remnant of the past which may survive even today but only as and exception, i.e. in exceptional cases concerning special administrative matters, special administrative proceedings and special legislation which are characterized by the dominant or predominant role of the class interest of the birocratic state

(4) Fourth, a special segment in the administrative procedure reform is a set of extraordinary legal remedies, which have a special position and role in the administrative proceedings. Every extraordinary legal remedy has its rationale and legal justification, its specific aim and a special legal proceeding which justifies the need for applying such an instrument in order to protect either the private interest of an individual or the public interest in the administrative proceedings. Each extraordinary legal remedy is instituted on a complex of rules which provide a rationale for such a legal remedy and constitute a specific legal and factual environment where the legal instrument is activated (by authorized persons) to act with a specific purpose pertaining to that particular legal remedy. This special physiog-

nomy of the extraordinary legal remedy can be distinguished upon a careful analysis of the legal grounds, the legitimate persons (authorized to seek such a remedy), the specified requirements and time limits for their application, which all justify the introduction of extraordinary legal remedies into the positive administrative procedure law.

However, in comparison to other legal procedures such as the criminal procedure or the civil procedure, the administrative procedure contains an *enormous* number of extraordinary legal remedies. The administrative practice has shown that many of the prescribed extraordinary remedies are hardly ever used, primarily because it is quite difficult to meet the legal requirements for their application. It is, therefore, necessary to either remove some of the existing legal remedies or rephrase some which may be justified as necessary, whereas some legal grounds for activating some of the repealed legal remedies should be included as legal grounds in the remaining legal remedies. The analysis of the applicable Administrative Procedure Act shows that the following legal remedies should be excluded from the new administrative procedure: the request (motion) to change and repeal an administrative decision related to an administrative dispute (as it is contained in the Act on the Judicial Control of Administrative Acts); the request for the protection of legality (this intervention of the public prosecutor is redundant and prolongs the proceeding); the request to repeal and cancel a decision on the grounds of supervision *ex officio* (as this institute is a constituent part of the administrative supervision); the request to cancel and modify an enforceable decision either upon approval or upon request of the party (which is rarely used in practice). Other legal remedies should be either reformulated or removed. The institute of restitution (reinstatement) should be reinstituted into the system of extraordinary legal remedies. It would significantly unload, speed up and simplify the complicated administrative procedure and provide for a more efficient protection of both public and personal interests.

Ultimately, a different model of administration shall be built into the administrative procedure, as the very "heart" of public administration, which is to enable the better communication between the administration and the citizens. The cult of the administrative procedure as an untouchable, bulky and complicated procedure of the past century should stand some changes. The contemporary administration and its efficient administrative procedure raise an issue of its practical and realistic rather than metaphysical normative framework and objectives, whose primary task is to help citizens exercise and protect their rights and interests (along with the general public interests) in the most expedient, time-efficient and cost-effective way. It implies *administrative and human rights – here and now!* Can these standards of pragmatic axiology be recognized in this "eternal kingdom" of positive administrative law existentialism?

U SUSRET NOVOM ZAKONU O OPŠTEM UPRAVNOM POSTUPKU U REPUBLICI SRBIJI

Predrag Dimitrijević

Reforma upravnog postupka je sastavni deo složenih procesa reforme javne uprave. Zakon o opštem upravnom postupku je svojevrstan manastir treba stalno dograđivati novim intitucijama i činiti ga kompletnijim, bogatijim i raznovrsnijim. Međutim, promena koncepta javne uprave od upravne vlasti do javne službe u uslovima New Public Menagementa-a, zahteva promenu procedure delovanja javne uprave. To zahteva promenu Zakona o opštem upravnom postupku. On mora biti brži, jednostavniji i snabdeven efektivnim pravnim lekovima u interesu stranke i javnom interesu.

Ključne reči: *upravni postupak, izmene Zakona o opštem upravnom postupku.*