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THE PRINCIPLE OF GOOD ADMINISTRATION IN THE WESTERN BALKAN COUNTRIES

- CASE STUDIES: CROATIA AND SERBIA-

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INTRODUCTION

The present research analyses the development of guarantees of the citizen's rights and principle of good administration in the Western Balkan countries, putting a special emphasis on Croatia and Serbia. In particular, driven by the European conditionality these countries undertaking a radical modification of their political, economic and administrative structures aimed to meet the democratic standards. Some of these countries have managed to achieve tangible results while many of them are still grappling with the heritage of the past.

In 2000, the first official announcement to accept the Western Balkan countries into the "European family" was done in the Presidency's Conclusions of the European Council of Fiera.

In 2010, the Western Balkan countries made progress towards potential membership in the EU: Croatia, the Former Yugoslav Republic of Macedonia and Montenegro were officially recognized as "candidate countries" of the Union; and Albania, Bosnia and Herzegovina and Serbia had the status of "potential candidates".

What factors determined the Western Balkan countries' orientation to the European Union? And what are the main problems in achieving the European values, such as good administration?

Without a doubt, the long lasting communist experience led to deeply rooted patterns of administrative behaviour such as widespread corruption, fraud, mismanagement, nepotism and low public trust in state authorities, which represent the main obstacles to reform public administration in these countries and to achieve modern European standards after the fall of communism. Moreover, the wars in the Balkans had direct impact on the reform processes that became very slow and complex.

In order to offer the complete overview on the principle of good administration in the Western Balkan region with particular emphasis to Croatia and Serbia the present work will analysed both *law in books* and *law in action*.

The thesis is divided in four chapters[1].

The first chapter is dedicated to a European Union model of good administration which considers three dimensions: good administration via case law, good administration via European Treaties and good administration in the work of the European Ombudsman.

With regard to the case law of the General Court and the Court of Justice (the European Union Courts) the analysis considers the role and attitude of these Courts in developing the principle of good administration in the EU legal order. The principle of good administration has been derived by their case law from the national legal orders of the Member States.

The research sees in the proclamation of the EU Chapter of Fundamental Rights the leading cause of changing attitudes towards the principle of good administration at the EU level. This section analyzes the legal background of good administration in the European Union context. It will consider whether good administration is regarded as a fundamental value of the European Union and a legally binding value as the Treaties.

Finally, the European Ombudsman, the cornerstone of institutional EU administrative law, plays a leading role in bringing administrative legitimacy across the institutions. Its role in promoting good administrative values in the European Union in particular by adoption of the soft-law Code of good administrative behaviour inspired the adoption of the codes of the European institutions and bodies aimed to improve standards of good administration in their daily contact with the public.

The second chapter analyses the principle of good administration in the regional context. Its focus is on the Western Balkans, often presented as one of the more problematic regions. This analysis will allow for a closer examination and understanding of the principle of good administration in Croatia and Serbia.

The first part of the second chapter reviews the legal background of the constitutional and administrative development of the Yugoslav States with particular focus on the rule of law, efficiency, transparency and judicial review issues. The journey through ex-Yugoslavia, divided in three different periods shows how the Constitutions and administrative legislation increasingly included good administration as an internal value.

[1] Such understanding of structure is inspired by the doctoral work of V. Volpe "Global dimensions of democracy".

Finally, the second chapter focuses further on the EU instruments of assistance and supervision in the accession process of the ex-Yugoslav countries paying particular intention to the concept of the European Administrative Space.

Interaction between the heritage and tradition has historical importance for all ex-Yugoslav states and its analyses will help us to understand the contemporary administrative transition in the quoted above countries.

The third and fourth chapter analyze good administrative achievements in both Croatia and Serbia.

The research analyses five national legal acts: Constitution, General Administrative Procedure Act, Administrative Disputes Act, Law on Right to Access to Information of Public Importance and Law on Public Administration. In this section, the role and aims of national administrative reforms are analyzed along with their problematic aspects. It could be considered as extension of a common legal background developed in the previous chapter.

The chapter dedicated to Croatia deals with the Croatian path in achieving good administrative standards during the enlargement process. Particular attention is paid to the administrative principles and their modification after the adoption of the new General Administrative Procedure Act in 2010.

The chapter dedicated to Serbia analyses the main obstacles of the administrative reform process in Serbia. It will demonstrate that the legal framework is still incomplete and not fully in line with the European standards.

In promoting good administrative standards national courts and judges also have important roles. In case of Croatia and Serbia what is radically new in the present case is the taking of administrative jurisdiction dispute into the judgements of Administrative Courts and the active role that these judgements hope to play in influencing internal dynamics on efficient protection of citizens' rights.

The third chapter analyses the guarantees of an efficient judicial review of the legality of administrative actions in the case-law and deciding on the constitutional complaint through the following seminal cases: 1-U-I-248/1994 – "Assessment of constitutionality of the GAPA"; 2-U-I-206/1992 – "Assessment of constitutionality of the Act on Croatian Citizenship"; and U-III-4673/2008 – "Reformation in peius".

The fourth chapter focuses on two selected judgements in full jurisdiction administrative dispute domain: first with regard to the right to a speedy handling of one's affairs, as in the 2 Ui 88/10 (2009) case, and second with regard to the right to a

motivated decision as in the II-4 Už. 384/12 case. Further, this chapter deals with the Supreme Court's decisions with regard to the "silence of administration" situation.

Ombudsman has a leading role in promoting and protection of human rights and freedoms, and the rule of law. Its contributions to preventing maladministration in Croatia and Serbia are discussed in third and fourth chapter.

The third chapter focuses on the establishment of the Ombudsman in Croatia, which is the first ex-Yugoslav states that has recognized the importance of such an institution. Moreover, it examines the most problematic aspects of good administration: discrimination by public administration (the "Roma Issue") and excessive duration of the administrative procedures.

The forth chapter analyses the role of Ombudsman in Serbia and analyses how the public authorities' follow-up its recommendations in particular with respect to the judicial reforms from 2009 and the right to social security.

It focuses on the increasingly effective role of the Commissioner for information of public importance and data protection in the oversight of the public administration in Serbia. The Commissioner has been introduced in the Serbian legal order by the Law on Free Access to Public Information of 2004. Since 2008 it expanded its competencies in the data protection domain. The Law on Free Access to Public Information stipulates two modalities of administrative disputes: a) in case that against the decision of the National Assembly, the President of the Republic, the Government of Serbia, the Supreme Court, the Constitutional Court, the Administrative Court and the Republic Public Prosecutor a complained is not allowed,[2] and b) the administrative dispute against the decision, that is against the conclusion of the Commissioner brought forth in relation to the complaint lodged by the applicant for the information.

In Croatia the situation in the area is significantly different. Since January 2011, the Agency for Personal Data Protection expanded its competences to the access to information of public importance domain. Bearing in mind that the examination of its work takes place on a longer time scale, the major features of this institution will be analysed under the section of Chapter 3 dedicated to the Law on Right to Access to Information of Public Importance.

2 Article 22(3) of the Law on Free Access to Information from 2004.

The additional part of the thesis are interviews with Prof. Miguel Poiares Maduro, Prof. Nikiforos Diamandoros, and Mr. Rodoljub Šabić.[3]

The main research question are: Whether the European Union conditionality influenced the national legal order in Croatia and Serbia?, How are the administrative justice and the citizen's rights guaranteed vis-à-vis public administration in these states?, To what extent the principles espoused by the action of public administration concur with the content of Articles 41 and 42 of the EU Charter?, and Is there real effectiveness in realizing the principle of good administration in Croatia and Serbia?.

[3] The idea to put interviews in the thesis came from reading the doctoral work of V. Volpe.

Chapter 1 - Good administration in the European Union

1. Towards Good administration

1.1. Good administration via case law

On the occasion of the recognition of the right to good administration in the Charter of Fundamental Rights of the European Union in 2000, the Praesidium of the Convention which drafted the Charter stated:

"The *right* to good administration is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general *principle* of law."[1]

The jurisprudence of the European Courts has profoundly contributed to the introduction and development of the good administration principle in the European Union legislation. After presenting its evolution in the case law of the Courts, the section focuses on the guarantees of good administration, by analysing the judgements. By examining this issue more closely, it will be shown that the good administration has been developed as an "umbrella"[2] principle comprising a flexible source of rights and obligations.

[1] *Explanations relating to the Chaprter of Fundamental Rights*, Official Journal of the European Union C 303/17, 14 December 2012, p. 28.

[2] I borrowed this term from K. Kanská. See: K. Kanska, *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights*, in *European Law Journal,* Vol. 10, 3/2004*,* p. 305.

1.1.1. Origins

The first tracks of requirements regarding proper administrative rules can be found in the early case-law such as the *Algera*[3] case in 1957 where the Court of Justice considered the problem of the revocability of administrative acts. In Court's opinion:

"The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries. Thus the revocability of an administrative measure vitiated by illegality is allowed in all Member States."

Additionally,

"It is generally acknowledged that unduly late withdrawal, occurring considerably later than the date on which withdrawal could have been pronounced, is contrary to the principle of good faith [...]"

At least two points emerge from the sentence; first, the Court's method to fill a gap in written law was based on the interpretation of the national legislation of the Member States. Especially during the initial phase[4], the Court referred to comparative law as an aid to interpretation[5] which is present even today but much less extent.[6] The Court was mostly inspired by the national constitutions,[7] which explains why European

[3] Joined Cases 7/56 and 3/57 to 7/57 *Algera v Common Assembly* [1957] ECR 39, para. 59.

[4] See: Case 14/61 *Hoogovens v Hogh Authority* [1962] ECR 253, pp. 283-284; Case 81/72 *Commission v Council (Staff Salaries)* [1973] ECR 575, pp. 577, 579 and 583; Case 155/79 *AM & S Europe Limited v Commission of the European Communities* [1982] ECR 1575 pp.1585 and 1599.

[5] There are cases in which the Court put „the present state of Community law" as a reason for this approach. For example, see Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483 para. 14**: „...** *in the present state of Community law*, the conditions under which a company may transfer its central management and control from one Member State to another *are still governed by the national law* of the State in which it is incorporated and of the State to which it wishes to move."

[6] According to the T. Tridimas the Community judiciary may be criticised in sence that „does not always take comparative law sufficiently seriously." (T. Tridimas, *General Principles of EU Law,* Oxford University Press, 2006, p. 23).

[7] „The Court is bound to draw inspiration from the constitutional traditions common to the Member States" (Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1977] ECR 1975 para. 13.

administrative procedure is "decisively influenced by constitutional law".[8] The second point refers to the principle of legality (rule of law), well known in the national constitutions,[9] according to which the public authorities have to observe the law. The Court considered that, in the case when the administrative measure is illegal, revocation is possible according to the national legislation of Member States. Moreover, it considered that unduly late withdrawal, occurring considerably later than the date on which the withdrawal could have been pronounced, is contrary to the "principle of good faith". Although the Court did not expressly refer to the good administration, the case may be seen as the first attempt to illustrate it.

References to "good", "sound" or "proper" administration could be found in the seventies and eighties with aim to provide better service of the Community administration.[10] In the *Lucchini*[11] case, for example, the Court of Justice found that the Commission infringement the principles of good administration behaviour leaving the applicant on doubt as to its intentions when the undertaking autonomously took steps to minimise the excess production. Or, in the *Arning*[12] case, when the Court decided that the Commission must bear the costs of the proceedings, in which, its actions are absence of "good administrative practice".

Good administration was mainly discussed together with other principles and rights.[13] Its function in the judiciary methodology has been seen mostly as subsidiary and supportive, rather than autonomous and justiciable. Whenever Community authorities breach a component of the principle that imposes a self-standing obligation, for example the right to a hearing or the duty to state reasons, such a breach may lead to the annulment of the decision. However, in the absence of such a breach, the principle is an unreliable ground for review.[14] This points to the fact that the good administration initially was defined as a *standard* of conduct directed at ensuring the

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[8] See: J. Schwarze, *European Administrative Law,* Sweet and Maxwell, London, 1992, p. 1431. Schwarze points that the English and German systems currently exercise decisive influence in the field of European administrative procedure. *Ibid.,* 1430.

[9] In 1986 in the *Les Verts* case the Court stated: „It must first be emphasized in this regard that the *European Economic Community is a Community based on the rule of law*, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." (Case 294/83 *Les Verts v European Parliament* [1986] ECR 1339, para. 23).

[10] See: Case 61/76 *Geist v Commission* [1977] ECR 1419, para. 44; Case 120/73 *Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz*, para. 5.

[11] See: Case 179/82 *Lucchini v Commission* [1983] ECR 3083 para. 27.

[12] See: Case 125/80 *Arning v Commission* [1981] ECR 2539, para. 20.

[13] See for example: Case 120/73 *Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz v Commission* [1973] para. 5; Case 46/85 *Manchester Steel Limited v Commission* [1986] paras. 11-18; Case 270/82 *Estel v Commission* [1974] ECR I-1195, paras. 15, 25.

[14] See more T. Tridimas, *op.cit.*, p. 411.

proper functioning of Community institutions. Clearly, this segment of good administration, as a *soft law*, is mostly displayed by the European Ombudsman's interventions; however, the Courts also endorse this view. Recently, it has been reaffirmed in the *Dynamiki*[15] case in 2008 when the Court considered that the immediate responses to requests in the absence of a legal obligation to do so "demonstrate a level of diligence characteristic of good administration". It stated that the Commission breached its duty of diligence and good administration by not complying with the legal duty to act within a reasonable time. Nevertheless, this breach of duty did not "restrict the applicant's ability to assert its rights before the Court" and therefore it should not lead to the annulment of the decision.

As a conclusion to this early case-law, it has to be noted that the principle of good administration is two-sided. In fact, it involves both legal and non-legal rules. To illustrate this point we will cite the Opinion of the Advocate General Slynn in his often quoted opinion in the *Tradax*[16] case:

"To keep an efficient filing system may be an essential part of *good administration but is not a legally enforceable rule. Legal rules and good administration* may overlap (e.g. in the need to ensure fair play and proportionality); the requirements of the latter may be a factor in the elucidation of the former. *The two are not necessarily synonymous*. Indeed, sometimes when courts urge that something should be done as a matter of good administration, they do it because there is no precise legal rule which a litigant can enforce [...]"

Hence, it follows that good administration can be covered by a legally-binding acts of a certain State or a supranational organization, but also it is their necessary complement, when constituting the so-called *soft law* (because of the absence of legal sanctions).[17]

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[15] Case T-59/05 *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* [2008] paras. 152-153.

[16] See: Case 64/82 *Tradax v Commission* [1984] ECR 1359, 1381 and 1385. *The Opinion of the Advocate General Sir Gordon Slynn,* Delivered on 27 October 1983, p. 1386, available at: http://eur-lex.europa.eu. In the event that preceded this judgment, the applicant sought access to certain documents of the Commission. The Court emphasized that there is not an explicit right to a matching document, but that the Commission should allow insight "as an expression of good administration, and not a legal obligation." See: L. Millett, *The Right to Good Administration in European Law,* in *Public Law*, 20002, pp. 311 - 312.

[17] This was followed in the further case-law. For example, in *ABB Asea Brown Boveri Ltd* case the Court declared that „regrettable conduct on the part of a member of the team dealing with a case does not in itself vitiate the legality of the decision adopted in that case. Even if that official did infringe the principle of sound administration [...]" or in *Aseprofar and Edifa* case the Court stated that the rules adopted „in interests of the sound administration [...] do not constitute procedural guarantees" on

The growth and increasing diversity of Community administrative action in the nineties influenced the elevation of good administration to a general principle of law and its recognition as autonomous and justiciable principle.[18] This is illustrated in the *BASF*[19] case where the Court of First Instance (today General Court) considered the possibility of raising the minimum levels of procedural protection which led to a further assessment of possible future developments of "legalization" of the rules of good administration (and as not justiciable considered *soft law*[20]).

General principles of law "express constitutional standards underlying the Community legal order so that recourse to them is an integral part of the Court's methodology".[21] The function of the general principles of law, as it has been suggested, is interpretative to "influence the effectiveness" of rules which could not be annul by the European Courts.[22] Increasingly, the Court of Justice has applied the general principles of law to the rules leading administrative proceedings to guarantee the legal protection of individuals in Community.[23]

Finally, Article 41 of the European Union Charter of Fundamental Rights in 2000 inspired further development in the case-law and explicit recognition of the right

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which individuals may rely. See: J. Mendes, *Good Administration in EU Law and the European Code of Good Administrative Behaviour,* in *EUI Working Paper LAW,* 2009/09, European University Institute, Florence, p. 4.

[18] T. Tridimas, *op. cit.,* p. 410; some commentators have pointed to the fact that the principle of sound administration is a general principle of law. See: K.P.E. Lasok and T. Millet, *Judicial Control in the EU: procedures and principles,* Richmond, 2004, p. 368; the case law of the eighties established that the general principles bind not only the Community institutions but also the Member States where they implement Community law. This is further expanded in the nineties. The Court stated: "Consequently, where Community rules leave Member States to choose between various methods of implementation, the Member States must comply with the principle stated in Article 40 (3)." Under Article 40 (3) of the EEC Treaty the common organization of the agricultural markets to be established in the context of the common agricultural policy must "exclude any discrimination between producers or consumers within the Community". That provision covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down. Consequently, it is also binding on the Member States when they are implementing the said common organization of the markets. See: Joined Cases 201 and 202/85 *Klensch v Secrétaire d'État à l'Agriculture et à la Viticulture* [1986] ECR 3477 paras. 8 and 10.

[19] Joined cases T-79/89 *BASF AG and others v Commission of the European Communities* [1992] ECR II-315, rvsd on appeal Case C-137/92 Commission v Basf and others [1994] ECR I-2555 para. 76.

[20] H.P. Nehl, *Principles of Administrative Procedure in EC Law,* Oxford, 1999, p. 49.

[21] T. Tridimas, *The General Principles of EC law*, Oxford, 1999, p. 10.

[22] *Ibid.*, p. 33.

[23] See: J. Wakefield, *The Right to Good Administration,* Kluwer Law International, the Netherlands, p. 65. „I think confusion can be caused here by the concept of *general principles of law.* Different general principles may have different functions, they may have different effects, and they may differ in their scope. While the Court of Justice made in my view, a great advance thirty years ago by including the protection of fundamental rights within the scope of general principles of law, and thus ensuring such protection in the absence of any Treaty provisions, the time may now have come to recognise the very diverse character and scope of the different general principles." F. G. Jacobs, *Human Right in the European Union: The Role of the Court of Justice,* in *E. L. Rev.,* 2001, 331 – 341, at p. 337. See: *Ibidem.*

to good administration. Already after its adoption, in *max.mobil Telekommunikation Service GmbH v Commission*[24] case, the General Court used the principle to its full potential:

"It must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States."

Additionally,

"It is in the interests both of the sound administration of justice and of the proper application of the competition rules that natural or legal persons who request the Commission to find an infringement of those rules should be able, if their request is rejected either wholly or in part, to institute proceedings in order to protect their legitimate interests."

This first reference to the right to good administration by the General Court suggests at least two points: First, unlike the Court of Justice, the General Court has demonstrated much more activism in protection of the fundamental right to good administration. In particular, its reliance on the EU Charter before the latter was given binding force by the Treaty (the pre-Lisbon period).[25] Furthermore, the Charter was used to confirm rights already existing as general principles in the EU legal order.

Judgments on the right to good administration are rarely used as a ground for judicial reviewing alone. One of the few cases can be found more recently in the *New Europe Consulting and Brown*[26] case. The applicant company, which had executed a number of contracts in the Central and Eastern European region, had been blacklisted from future projects following complaints by government officials in Hungary. Once the applicant company found out about the blacklisting they represented their case following which the Commission issued a rectifying fax removing the applicant company from the black list. The applicant brought an action against the Commission

[24] Case T 54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2000] ECR II-313, paras. 48, 56 and 66.

[25] The further jurisprudence of the General Court confirms its opinion held in the first citation with approval of the right to good administration (the Article 41 of the EU Charter). See, for example, Case T-211/02 *Tideland Signal v Commission,* ECR [2002] II – 3781 and Case T-321/01 *Internationaler Hilfsfonds eV v Commission,* judgment of the General Court, 18 September 2003. The first reliance on the right to good administration by the Court of Justice was in 2006.

[26] Case T – 231/ 97 [1999] *New Europe Consulting and Brown v Commission* ECR II-2403 paras. 15, 31, 45 and 46.

arguing that the Commission acted contrary to the principle of proportionality and with lack of care. The claim was addressed by the Court in terms of breach of good administration.[27] The Court held that the principle was breached because the Commission failed to carry out an investigation into the alleged irregularities. Consequently, the Court found a manifest lack of care and granted damage to the company.

Good administration gradually developed through the case-law. It was initially invoked as a non-legal rule used in association with other principles, rights and obligations to cover gaps in the Treaty and written legislation of the Community, but its importance has not lessened as the Community legal order built up. Starting from the nineties, it was recognized as one of the general principles of law and in 2000 as the right to good administration.

[27] "The Court finds that, by those apparently separate claims, the applicants in substance are complaining about one single course of action amounting to a breach of the principle of sound administration". *Ibid.*, para. 31.

1.1.2. Guarantees

The European Courts attitude toward the principle of good administration was followed by recognition of numerous rights and obligations as fundamental guarantees in promoting the quality of administration. Through such activism of the jurisprudence the concept of good administration gradually evolved as an "umbrella" principle. In considering the Court's achievements, the question which arises in this context is what are the guarantees of the principle of good administration?

Regarding to the case law a number of decisions are remarkable.[28] For the purpose of this inquiry, however the most interesting is the *Technische Universität München*[29] case, prior to the Charter of Fundamental Rights, where importing of a scientific instrument without paying customs duty fees was refused by the Commission on the ground that equivalent apparatus was manufactured in the Community. The Court highlighted, among others, that the Community institutions "have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present."[30]

The Court found a triadic formula linking duty of diligence (or duty of care), the right to a hearing and the obligation to state reasons, as essential procedural guarantees to ensuring the protection of the individual in administrative decision-making process.

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[28] The EU Charter of Fundamental Rights includes explanations relating to its full text.
Explanation on Article 41 — Right to good administration
"Article 41 is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined *inter alia* good administration as a general principle of law (see *inter alia* Court of Justice judgment of 31 March 1992 in Case C-255/90 P *Burban* [1992] ECR I-2253, and Court of First Instance judgments of 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* [1999] ECR II-2403). The wording for that right in the first two paragraphs results from the case-law (Court of Justice judgment of 15 October 1987 in Case 222/86 *Heylens* [1987] ECR 4097, paragraph 15 of the grounds, judgment of 18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, judgment of 21 November 1991 in Case C-269/90 *TU München* [1991] ECR I-5469, and Court of First Instance judgments of 6 December 1994 in Case T-450/93 *Lisrestal* [1994] ECR II-1177, 18 September 1995 in Case T-167/94 *Nölle* [1995] ECR II-2589)." See: *Explanations of the Charter of the Fundamental Right, op. cit.,* p. 28.

[29] Case 269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469.

[30] *Ibid.,* para. 14.

The first element of the triadic formula, principle of diligence, departs from previous case law understood as a duty to make decisions on the basis of all information which may have a bearing on the interests of those affected.[31] The particular impetus for its recognitions as fundamental requirement of good administration could be found in the *Detlef Nölle*[32] ruling where the Court stressed that the Commission had not examined all relevant aspects and had failed to take account of essential factors in selecting the appropriate reference country so breaching the principle of care. According to the Opinion of Advocate General van Gerven in this case „ in a matter […] in which the Community institutions have a wide discretion, it is all the more important that the decision adopted shall be subject to a careful review by the Court with regard to observation of essential formalities and the principles of good administration, which include the duty of care."[33] Its reasoning was further followed by the European Court of Justice.[34]

The duty of diligence is interrelated with the right to a motivated decision and right to be heard. Thus, a breach of duty of diligence exists when a decision is absent of explanation on which it is based or when the party is denied the opportunity to express its opinion on the facts and circumstances taken into account by the authority in the concrete case.[35]

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[31] See: Joined cases 16-59, 17-59 and 18-59 *"Geitling" Ruhrkohlen-Verkaufsgesellschaft mbH, "Mausegatt" Ruhrkohlen-Verkaufsgesellschaft mbH "Präsident" Ruhrkohlen-Verkaufsgesellschaft mbH and associated companies v High Authority of the European Coal and Steel Community* [1960] ECR 17 para. 20; Case 14/61 Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v High Authority of the European Coal and Steel Community [1962] ECR 253; Case 120/73 Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz [1973] ECR 1471 p. 1481. For a detailed reading of the origins of duty of diligence in Community law see: H.P. Nehl, *Principles of Administrative Procedure in EC Law,* Hart Publishing, 1999, Chaps. 8-9; L. Azoulai, *Le principe de bonne administration,* in J. B. Auby, J. Dutheil de La Rochère (eds.), *Droit Administratif Européen,* Bruxelles, Bruylant, pp. 496-511 and A. Serio, *Il principio di buona amministrazione nella giurisprudenza comunitaria,* in *Rivista Italiana di Diritto Pubblico Comunitario,* n. 1/2008, pp. 251-264.

[32] Case 167/90 *Detlef Nölle, trading as "Eugen Nölle" v Hauptzollamt Bremen-Freihafen* [1991] ECR I-5175 para. 13.

[33] *The Opinion of the Advocate General van Gerven,* Delivered on 4 June 1991, para. 28, available at: http://eur-lex.europa.eu.

[34] See P. Craig, *EU Administrative Law,* Oxford University Press, Oxford, 2006, p. 374.

[35] It is illustrated well in the *Sytraval and Brink's France* case in which the Court held „that the Commission's obligation to state reasons for its decisions may in certain circumstances require an exchange of views and arguments with the complainant, since, in order to justify to the requisite legal standard its assessment of the nature of a measure characterized by the complainant as State aid, the Commission needs to ascertain what view the complainant takes of the information obtained by it in the course of its inquiry. The Court of First Instance considered that, in those circumstances, that obligation constitutes a necessary extension of the Commission's obligation to deal diligently and impartially with its inquiry into the matter by eliciting all such view s as may be necessary". See: Case T-95/94 *Sytraval and Brink's France v Commission* [1995] ECR II-2651 para. 26.

In recent case law the importance of the principle of diligence was increased as a procedural protection of individuals and in reviewing the procedural legality of the Community institutions, administrative and legislative decision making process.[36]

The right to be heard was recognized as a requirement of good administration in early case-law. In *Alvis*[37] case from 1963 the Court of Justice held that "according to a generally accepted principle of administrative law in force in the Member States […] the administration of these States *must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them*. This rule meets the requirements of sound justice and good administration and must be followed by Community institutions."

The principle *audi alteram partem* (or *audiatur altera pars*), derived from Roman Law[38], is based on the assumption that a person must have an opportunity to be heard, in cases where a decision affecting his/her rights or interests, before a decision is made. However, the process of recognition of the right to a hearing as general principle was gradual and slow.

It was formulated in *Transocean Marine Paint v Commission*[39] case in which the Commission made an exception from the Treaty prohibition[40] on an agreement concluded between the members of the Transocean Marine Paint Association. "Subsequently, it renewed the exemption but made the renewal subject to an onerous condition, in relation to which the association considered that the Commission had not given it the opportunity to make its views known in advance. The problem for the Association was that Community written law did not provide for a hearing in the

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[36] See more: H. P. Nehl, *Good administration as procedural right and/or general principle?,* in H. Hofmann and A. Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration,* Edward Elgar Publishing Limited, UK, 2009, p. 331.

[37] Case 32/62 *Alvis v Council* [1963] ECR 49, p. 5.

[38] See: Ž. Bujuklić, *Forum Romanum: Rimska država, pravo, religija i mitovi* [*Forum Romanum: Roman empire, law, religion and myths*], JP Službeni Glasnik, Beograd, 2007, p. 450.

[39] Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 106 para. 17.

[40] It was the Article 85 (1) of the Treaty Establishing European Economic Community:

" 1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:

(*a*) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;

(*b*) the limitation or control of production, markets, technical development or investment;

(*c*) market-sharing or the sharing of sources of supply;

(*d*) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or

(*e*) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract".

circumstances. Regulation No 99/63[41] required the Commission to inform undertakings of the objections raised against them but did not provide for a hearing in relation to the conditions which the Commission intended to attach to a decision granting exemption."[42] The Court held that the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority, must be given the opportunity to make his point of view known.

In the further case law, the Courts had a rigid "attitude" towards the right to be heard and referred it only to the procedures in which "sanctions, in particular fines or penalty payments, may be imposed."[43] Starting from the nineties the case-law changed.[44] In *Technische Universität München* case the right to be heard was recognized as appropriate in the context of administrative proceedings. In the *Lisrestal*[45] case the General Court made clear that the right was available in all "proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person". However, it should be noted that the scope ratione personae of the right to be heard are persons "adversely affecting" by a decision, despite the previously intention of the Court to establish the wider formulation "persons perceptibly affected by a decision."[46]

The principle of good administration of right to be heard is encapsulated in two provisions of the European Union Chapter of the Fundamental Rights, Article 41 (2) the right to be heard and Article 46 (2) the right to a fair hearing.

The third element of the triadic formula is obligation to state reasons. The importance of this principle has been explained in the case-law where it is linked to the ability to assess the legality of the administrator's actions and to ensure that the administrative authority acts within the parameters of powers. In the *Heylens* case the Court stressed that "effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which

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[41] *Regulation n. 99/63/EEC of the Commission of 25 July 1963 on the hearings* (available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31963R0099&model=guichett&lg=en). This Regulation was replaced with Regulation No 2843/98, Official Journal 1998 L354/18, which is from 2004 replaced by Regulation No 773/2004, Official Journal 2004 L 123/18.

[42] See T. Tridimas, op. cit., p. 372.

[43] See: Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461 p. 511.

[44] Compare: Case 49/88 *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v Council of the European Communities* [1991] ECR I -3187 para 15. The Court found that „the right to a fair hearing [...] must be observed not only in the course of proceedings which may result in the imposition of penalties".

[45] See: Case T-450/93 Lisrestal v Commission [1994] ECR II-1177 para 42.

[46] See *supra* the opinion of the Court in the Case 17/74 *Transocean Marine Paint*.

the matter is referred may require the competent authority to notify its reasons."[47] It is explained that in defending rights an individual should have full knowledge of the relevant facts in order to decide whether application should be made to the Court for judicial review.

Also, in the *Orkem* case, the Court pointed out that any decision which the Commission might adopt on conclusion of an investigation, in this case into anti-competitive behaviour, could include only those objections on which the undertaking concerned had an opportunity of making known its views.[48] The statement of reasons ensures that the individual has had an opportunity to state a position on all matters germane to that decision. This principle is recognised as a part of the right to good administration in Article 41 (c) of the EU Charter as the obligation of the administration to give reasons for its decisions.

The European judiciary has been established and elaborated, besides duty of diligence, right to a hearing and obligation to state reasons, other procedural guarantees of good administrative behaviour, such as the right to timely treatment, access to information, principle of liability of Community institutions, official correspondence in one's language, etc.

The right to timely treatment is one of the most important aspects of good and efficient administration. In the *Guerin*[49] case the Court held that "the Commission's definitive decision must, in accordance with the principles of good administration, be adopted within a reasonable time after receipt by the Commission of the complainant's observations." According to the case-law the obligation to act within reasonable time is often connected with the principle of due diligence and legitimate expectations.[50] Protection of legitimate expectations requires public authorities to exercise their powers over a period of time in such a way as "to ensure that situations and relationships

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[47] See: Case 222/86 *Heylens v Commission* [1987] ECR 4097, para. 15.

[48] See: Case 374/87 *Orkem SA v. Commission* [1989] ECR 3283, para. 25 - "For the purposes of that inter partes procedure, Article 19 of Regulation No 17 and Regulation No 99/63 provide in particular that the undertaking concerned is entitled to make known in writing and, if appropriate, orally its views on the objections raised against them; See also the judgments of 13 February 1979 in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, and of 7 June 1983 in Joined Cases 100 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825. In any decision which the Commission might be prompted to adopt on conclusion of the procedure, it will be entitled to set out only those objections on which the undertaking concerned has had an opportunity of making known its views."

[49] See: Case C-282/95P *Guerin Automobiles v Commission* [1997] ECR I-1503 para. 37.

[50] L. R. Perfetti, *Diritto ad una buona amministrazione, determinazione dell'interesse pubblico ed equità,* in *Rivista Italiana di Diritto Pubblico Comunitario,* 3-4/2010, p. 810. See, for example, Case 59/70 *Kingdom of the Netherlands v Commission of the European Communities* [1971] ECR 369 paras. 15-22, where the Court held reasonable time-limits to be necessary in connection with the requirements of legal certainty and of the continuity of Community action.

lawfully created under Community law are not affected in a manner which could not have been foreseen by a diligent person."[51]

The jurisprudence, however, did not determinate a precise, maximum time-limit. The question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages to be followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved.[52] In the *RSV*[53] case, for example, the Court of Justice stressed that the delay "in giving the decision could establish a legitimate expectation on the applicant's part" moreover "the Commission has given no valid justification for the long time it took to give its decision". This points to the fact that considerable delay in taking a decision must be justified by special circumstances.

It has to be noted that the Courts have not raised status of the right to be heard to a general principle which protects fundamental rights and therefore its breach "does not justify automatic annulment of the contested decision"[54] unless the time-limit in question was mandatory.[55]

The Article 41 (1) of the Charter of Fundamental Rights mirror reasonable time in the right of every person "to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union".

General right of access to information or principle of transparency is fundamental for understanding the reasons of administrative proceedings. The European Courts, here too, played a significant role in establishing and elaborating its nature and content. However, the recognition of general principle of transparency brought the reforms in by the Treaty of Amsterdam from 1997.[56] Unlike other aspects

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[51] See: Case C-63/93 *Duff and Others v Ministry of Agriculture, Fisheries and Food and the Attorney General* [1996] ECR I-569 para. 20.

[52] See: Case T-127/98 *UPS Europe SA v Commission* [1999] para. 38; Case T-73/95 Oliveira v Commission [1997] ECR II-381, paragraph 45, and Joined Cases T-213/95 and T-18/96 SCK and FNK v Commission [1997] ECR II-1739, paragraph 57; Case T-81/95 *Interhotel v Commission* [1997] ECR II-01265 para. 65.

[53] Case 223/85 *RSV v Commission* [1987] ECR 4617 paras. 14 and 17.

[54] See: J. Wakefield, *The Right to Good Administration,* Kluwer Law International, Netherlands, 2007, p. 73.

[55] See: Case C-254/03 P *Eduardo Vieira SA v. Commission* [2005] ECR I-237, and at First Instance, Joined Cases T-44, 119 and 126/01 *Eduardo Vieira SA, Vieira Argentina SA, Pescanove SA v. Commission* [2003] ECR II-1209. See also *Interhotel* case where the Court clearly pronounced that "in proceedings for annulment, even an unreasonable delay cannot in itself render the contested decision unlawful" (*Ibidem*).

[56] Until the end of the eighteenth century the „traditional standard of public administration was discreteness and secrecy", see *European principles for public administartion,* Sigma Papers No. 27, CCNM/SIGMA/PUMA(99)44/REV1, 22 November 1999, p. 12 (available at: http://www.oecd.org/dataoecd/26/30/36972467.pdf). Such historical resistance to the principle of

of good administration, which primarily developed via general principle of law, the right of access to documents was based on the interpretation of written text by European Courts.[57] Thus, the European Courts annulled a number of decisions of the Community institutions refusing access to their documents, but not on the ground that the it was breached a general principle of transparency, but on the grounds such as automatic application of non-mandatory exceptions[58], the inappropriate use of the authorship rule[59], the refusal to consider partial access[60], or the inadequacy of the reasons given for refusal.[61]

After the adoption of the Treaty of Amsterdam the Court of Justice has changed its judicial review from initially more procedural to the more substantive review of the legality of decisions refusing access to documents.[62] In the case *Jose Maria Sison,*[63] for example, the Court of Justice laid down that interpretation of the exceptions to access to documents should be interpret narrowly and the subject in concrete case is one of the listed exceptions. Nonetheless, the General Court sometimes interpreted the right to partial access to documents in the light of the general principle of proportionality in order to require from the institution to consider such right.[64] On the other hand, there are cases where the jurisprudence found this principle as an argument to refuse such right and explained it as protection of good administration. However, the European Courts approach has been towards a greater transparency.[65]

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transparency and public access to documents demonstrates the „sensitive nature" of this issue in the Member States legal orders. During the time, however, the Courts elaborated a number of principles now incorporated in the Regulation No 1049/2001. For detailed analyse of the Regulation No 1049/2001 see *supra* § 1.2.4.2.2.

57 See: J. Shaw, *Law of the EU,* 3th ed, Palgrave Law Masters, Houndmills-Basingstoke-Hampshire, 2000, p. 343; The origins of the principle of transparency could be found in the sixties when the Court of Justice treated the right of access to the document as integral part of the rights of defence, see more: P. Settembri, *Transparency and the EU legislator: „Let He Who is Without Sin Cast the first Stone",* in *Journal of Common Market Studies,* Vol. 43, 3/2005, p. 639.

58 See Case T-105/95 *WWF UK (World Wide Fund for Nature) v Commission* [1997] ECR II-2765 para. 43.

59 See Case T-174/95 *Svenska Journalistförbundet v Council of the European Union* [1998] ECR II-2289 para 59.

60 Case C-353/99 P, *Kuijer v Council* [2001] ECR I-9565 para. 13.

61 Case T - 211/00 *Kuijer v Council* [2002] ECR II-485 para 16. For a detailed reading of principle of transparency in the case-law see: P. Craig, *op. cit.*, pp. 350 – 360.

62 See: S. Prechal and M.E. de Leeuw, *Transparency: A General Principle of EU Law?,* in U. Bernitz, J. Nergelius and C. Cardner (eds), *General Principles of EC Law in a Process of Development,* Kluwer Law International, 2008, p. 208.

63 See: Case C-266/05 P *Jose Maria Sison v Commission* [2007] ECR I-01233 paras. 45, 60 and 63. In the terms of the Court: „In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001" (para 60).

64 In the *Hautala* case the Court stated that the Council should consider the partial access to the documents in the light of the principle of proportionality. See: Case T-14/98 *Hautala v Council* [1999] ECR II-2489 para. 87.

65 See: S. Prechal and M.E. de Leeuw, *Transparency: A General Principle of EU Law?, op. cit.,* p. 209.

It is very surprising that drafters of the Charter did not recognize the right of access to information under the right to good administration. However, the right of access to documents is recognised in Article 42 of the Charter where it states that "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium." In the context of this work we will consider the right of access to documents as part of the right to good administration [see *infra* § 1.2.4].

The right to compensation for damage done by Community is recognized in the European jurisprudence under the general principle of liability of Community institutions. Traditionally, in the field of administrative action, the case-law accepted that any damage caused by illegal conduct might give rise to liability.[66] For example, in the *Zückerfabrik Schöppenstedt*[67] case the Court held that liability of the Community institutions could be based on whether the breach was the result of legislative or individual action.[68]

Judgment in the *Bergaderm*[69] case played a particularly important role in developing of the principle of liability of Community institutions. In the background of this case the issue was the Council Directive relating to cosmetic products.[70] According to this Directive the Member State should not allow marketing of cosmetic products not made in compliance to the Directive. By adoption of the Directive many undertakings "suffered". Among them, Bergaderm SA brought an action against the Commission looking to recover compensation for its loss. In the first instance, the General Court held that the adaptation of the Directive could lead to liability only if the Commission had violated the superior rule of law for the protection of individual. In the concrete case the Directive was a measure of general application.[71]

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[66] For example, Case 145/83 *Adams v Commission* [1985] ECR 3539 and Case T-390/94 *Aloys Schröder v Commission* [1997] ECR II-501. See: T. Tridimas, *op. cit.,* p. 478.

[67] Case 5/71 *Zückerfabrik Schöppenstedt v Council* [1971] ECR 975.

[68] The Court stated: "Where legislative action involving measures of economic policy is concerned, the Community does not incur noncontractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions […] of the Treaty." *Ibid.,* para. 11.

[69] Case C 352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* [2000] ECR I-5291.

[70] Council Directive 76/768 of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (Official Journal 1976 L 262, p. 169). The Directive has been further amended by Council Directive 93/35/EEC of 14 June 1993, Official Journal 1993 L 151, p. 32. Full text of the Directive is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0768:en:NOT.

[71] For detailed discussion of the *Bergaderm* case background see: T. Tridimas, *op. cit.,* p. 487.

On appeal the Court of Justice stated that "Court of First Instance misinterpreted the legislation in considering that the Commission did not infringe a rule of law intended to confer rights on individuals."[72] Such formulation replaced the attribute superior of the rule of law used by the General Court. Furthermore, the Court of Justice explicitly stated that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[73] In respect to the second condition "the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion."[74] Where the Member State or the institution in question "has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."[75]

In respect to the *Bergaderm* case the Court of Justice concluded that is a sufficiently serious breach of a higher-ranking rule of law when Community institutions manifestly and gravely disregard the limits on their discretion without showing a higher-ranking public interest.[76] Thus, it recognized link between liability and discretion irrespective of the legislative or administrative character of the measure.[77] However, it may be difficult for the individuals to found that the breach of the right to good administration follows "in so far as the Community institutions did not fail completely in the duty of care and proper administration which they owed to the applicant but simply failed properly to appreciate the extent of their obligations under that principle, the breach of the principle of care cannot […] be regarded as a sufficiently serious breach or a manifest and grave breach" as defined in the case-law of the Court of Justice".[78] The right to compensation of damages caused by Community institutions is contained in Article 41 (3) of the EU Charter as the part of the right to good administration.

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[72] Case C 352/98 P *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission, op. cit.,* para. 62.
[73] *Ibid.,* para. 42.
[74] *Ibid.,* para. 43.
[75] *Ibid.,* para. 44.
[76] *Ibid.,* para. 59.
[77] See: T. Tridimas, *op. cit.,* p. 488.
[78] As noted by K. Kánska in the Case T-167/94 *Nölle v Council* [1995] ECR II-2589 para. 57, see K. Kánska, *op. cit.,* p. 321.

The right of every person to correspondence in one's language will be the last issue to be analysed in this section. The language right guarantees every person to write to the Union's institutions and to receive their answer in one of the languages of the Treaties.[79] The right is based on the principle of legal certainty which ensures the individuals will know what the law is and to be able to appraise their actions accordingly. The scope of application of the language right as developed by the jurisprudence of the European Courts refers only to documents emanated by the same institution. For example, in the *Trefilunion SA*[80] case the General Court held that only documents emanated from the Commission must be addressed in the language of the case excluding the annexes to the statement of objections which were not derived from the Commission itself.[81] For the parties who are outside the EU the official language of the decision depends of their relations within the EU, whether with a Member State or the Community itself.[82] Actually, the European enlargement process could lead to restrictions of the language right in order to save efficiency and economy of administrative proceedings.[83]

The language right is recognized under the Article 41 (4) of the EU Charter as essential part of the right to good administration as well as in the Article 343 of the Treaty of Lisbon.

The study of case-law shows that good administration is a complex concept. The European courts (in particular the General Court has demonstrated much more activism) imposed a non-exhaustive list of procedural guarantees of good administration putting numerous rights and obligations under its "roof": duty of diligence, right to a hearing, obligation to state reasons, principle of legitimate expectations, principle of transparency, right to timely treatment, principle of proportionality etc. In this way, it was underscore the procedural nature of the concept of good administration which is further accepted in the EU Charter.[84]

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[79] The Article 55 of the Treaty of Lisbon sets following languages: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish language.

[80] Case T-148/89 *Trefilunion Sa v Commission* [1995] ECR II-1063.

[81] *Ibid.,* para. 21; See also Case T-77/92 *Parker Pen v Commission* [1973] ECR 215 para. 70.

[82] See, for example, Case 6/72 *Continental Can v Commission* [1973] ECR 215 para. 12: „Written documents, which any organ of the Community sends to a person subject to the jurisdiction of a Member State, are to be drawn up in the language of that State. As the applicants have their registered office in a third state, the choice in the present case of the official language of the decision had to be based on what relations existed within the Common Market between the applicants and one state or another of the Community."

[83] See: K. Kánska, *op. cit.,* p. 322.

[84] Millett said that "[by] good administration is meant good administrative procedures." See: L. Millett, *op. cit.,* p. 310.

1.2. Good administration via European Treaties

1.2.1. Treaties: 1951-1997*

1951: The good administration was not included in the the Treaty establishing the European Coal and Steel Community (ECSC) signed on 18 April 1951. In Article 5 (3) of the treaty was explicitly declared that "the institutions of the Community shall carry out […] activities with a minimum of administrative machinery and in close cooperation with the interested parties".[85] The absence of good administration on the initial European institutional phase is confirmed by the Treaties of Rome.[86]

* This part of work is inspired and based on the V. Volpe "Global domensions of democracy", and in particular to chapter I "Rewarding democracy".

[85] Activities of the Community were declared in the Article 5.2:
- enlighten and facilitate the action of the interested parties by collecting information, organizing consultations and defining general objectives;
- place financial means at the disposal of enterprises for their investments and participate in the expenses of re-adaptation;
- assure the establishment, the maintenance and the observance of normal conditions of competition and take direct action with respect to production and the operation of the market only when circumstances make it absolutely necessary;

1957: The European States that had signed the Treaty of Paris in 1951, signed in 1957 in Rome the Treaty establishing the European Economic Community (EEC), together with the Treaty establishing the European Atomic Energy Community (EURATOM). As well as in the case in the ECSC Treaty, the EEC Treaty does not recognize the importance of administrative principles and mechanisms. Nonetheless, Article 157 (2) could be considered the first step in the slow inclusion of good administration into the Community legal framework and it stated that the members of the Commission "shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations resulting therefrom and in particular the duty of exercising honesty and discretion as regards the acceptance, after their term of office, of certain functions or advantages."

1986: The Single European Act (SEA), didn't bring significant changes.

1992: the Treaty on the European Union (TEU) and Treaty establishing the European Community (TEC) known as the Maastricht Treaties. In Title XVII "Development cooperation" the TEU recognised the good administration with inclusion of the term "maladministration", for the first time in European administrative lexicon. According to Article 138 (d) the European Parliament "shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies." In the absence of the definition of maladministration in the Treaty, its concept is developed by European Ombudsman[87] [see *infra* § 1.1.3.].

On the other hand, the TEC included into the Community legal framework rights and obligations which today make part of the wider concept of the right to good administration. Thus, Article 190 established the duty to give reasons that apply to regulations, decisions, and directives adopted jointly by the Council and the European Parliament, or by the Council or the Commission and states that the reasons shall refer

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- publish the justifications for its action and take the necessary measures to ensure observance of the rules [...] in the present Treaty.

[86] See, *Carta Europea dei diritti: art. II.101 e il diritto ad una buona amministrazione nella Costituzione Europea, evoluzione della legislazione,* Consiglio Regionale della Lombardia, Milano, April, 2006, p. 5.

[87] The main goal of establishing the Ombudsman institution was to provide alternative supervision with respect to administrative activities. The European Ombudsman was given the task of making the Union more accountable by „providing an independent critical appraisal of the quality of administration by Community institutions and bodies and a stimulus towards improvement". See: K. Heede, *Enhancing the Accountability of Community Institutions and Bodies: the Role of the European Ombudsman,* in *European Public Law,* Vo. 3, No. 4, 1997, p. 588; The European Ombudsman has been modelled according to the Danish Ombudsman plan. Compare: K. Heede, *European Ombudsman: redress and control at Union level,* The Hague, Kluwer Law International, 2000, p. 45.

to proposals or opinions which were required under the Treaty;[88] and Article 215, which states the right to reparation of damages caused by the Community institutions or by its employees in the performance of their duties. The Final act of the TEU contains the Declaration on the Right of Access to Information, according to which "a conference of representatives of the governments of the Member States […] considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration."

1997: The Amsterdam Treaty had important principles relevant for our inquiry. It took into account the word "considers" from the Conference by providing the right of access to documents, which explicitly recognize the principle of transparency in the European context. Article 1 of the Treaty states that decisions shall be taken as openly and as closely as possible to the citizens, and Article 255 (1) provides:

"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, the Council and the Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3."

Article 255 (2) stipulated that the general principles concerning such access and the limits thereto should be determined by the Council, acting in accord with Article 251 of Treaty procedure, within two years of entry into force of the Treaty of Amsterdam. Article 255 (3) instructed each institution to adopt rules of Procedure regarding access to documents.

The principle is enforced by Article 21 (3), which foresees the "language right", i.e. the right to write to institutions in one of the Treaty languages and receive an answer in the same language, and by Article 88 (2), which recognizes the right to a fair hearing, limited to the field of state aids, by "giving notice to the parties concerned to submit their comments" before the Commission takes measures.

[88] It is worth noting that Article 190 imposed a duty to give reasons not only for administrative decisions, but also for legislative norms, such as regulations or directives.

1.2.2. Good administration vs. Maladministration

The term "maladministration" was introduced by the Treaty of Maastricht simultaneously with the European Ombudsman, a well-known institution in the national legal orders.[89] However, neither the drafters of the Treaty nor the framers of the Ombudsman's Statute made any effort to define maladministration, thus this first recognition of good administration in a negative sense was not followed with the proper definition of its concept.

The term *maladministration* in the legal sense appeared, for the first time, in the British Parliamentary Commissioner Act [hereafter "Act"] in order to define the subject of the control of the British Ombudsman.[90] However, the Ombudsman's competitions are imposed in very strict manner. Thus, the Ombudsman is deprived to review cases for which there exists legal remedy at the authorized court or tribunal.[91] In other words, "the Ombudsman is prevented to act in situations in which either courts or tribunal is more adequate to discuss some issue. The term of maladministration in this system is mainly limited to irregularities of non-legal character, namely that are not of explicit legal character. The exception is the situation when the Ombudsman comes to conclusion that it is not likely and reasonably to expect that the legal remedy will be (or was) applied."[92]

In the First Annual Report[93] the European Ombudsman produced that a non-exhaustive list of conduct that would amount to maladministration and included therein administrative irregularities and omissions, the abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay, and

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[89] In 1993, when the Treaty of Maastricht entered into force, seven of twelve Member States had an Ombudsman institution at the national level. Other five Member States (Germany, Greece, Luxembourg, Italy and Belgium) had similar institutions on regional or municipal levels. See: O. Pollicino, *L'Ombudsman comunitario: limiti e potenzialità di un istituto nel quadro della "scommessa" della cittadinanza europea,* in *Diritto Pubblico Comparato ed Europeo,* 4/2006, p. 1746. For a detailed description of evolution of Ombudsman in Italy and Germany see in this number of *DPCE*: R. Scarciglia, *L'istituto del Difensore civico in Italia fra "declamazioni", poteri di fatto e regole procedimentali*, pp. 1773 – 1782; and F. Palermo and J. Woelk, *L'Ombudsman in Germania e Austria: tra competenze generali e settoriali, una discrasia tra forma e sostanza,* pp. 1733 – 1745.

[90] See: M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

[91] See Article 5 (a) of the Parliamentary Commissioner Act available at: http://www.legislation.gov.uk/ukpga/1967/13/contents.

[92] For an detailed reading about the work of the British Ombudsman see M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), op. cit.

[93] According to the Article 138 (e) of the Maastricht Treaty the Ombudsman is obliged to submit an Annual report to the European Parliament on the outcome of his inquiries.

lack or refusal of information.[94] Furthermore, the Ombudsman pointed out that this list "is not intended to be exhaustive. The experience of national ombudsmen shows that it is better not to attempt a rigid definition of what may constitute maladministration. Indeed, the open ended nature of the term is one of the things that distinguishes the role of the Ombudsman from that of a judge."[95]

In Resolution from 1997 the European Parliament stressed that "the role of the Ombudsman should support the institutional balance laid down by the Treaties and, in particular, the correct exercise of the discretionary powers of the Commission, the European Parliament and the Court of Justice", thus "it is necessary to have a clear definition of the term maladministration."[96] Consequently, the Ombudsman proclaimed in his Annual Report for 1997 the concept of maladministration stating that "maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it", moreover "[…] investigates whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, his first and most essential task must be to establish whether it has acted lawfully."[97]

At least two significant aspects should be underlined with regard to definition; first, maladministration is based on the concept of legality requiring the EU institutions to respect their legal obligations. There are instances of maladministration if a Community institution or body fails to act in accordance with the Treaties, legally binding provisions of Community legislation and the rules and principles of law established by the Court of Justice and Court of First Instance.[98] Second, the concept of maladministration goes further than the law, requiring the Community institutions to be also service-minded and to ensure that individuals are properly treated and enjoy their rights fully.[99]

Illegality usually entails maladministration; the opposite is not always true and findings of maladministration by the Ombudsman do not necessarily mean an

[94] See, Annual Report from 1995, pp. 8 and 9.
[95] Ibidem
[96] Resolution of the European Parliament on the Annual Report on the activities of the European Ombudsman in 1996, C4-0293/97 - A4-0211/97, 18 June 1997, point 4.
[97] *Annual Report from 1997,* pp. 23 and 24. The statement was repeat again in 1998, see, *Annual Report from 1998*, p. 47.
[98] See, *Annual Report from 1995, op. cit.,* p. 8.
[99] P.N. Diamandouros, *The European Ombudsman and good administration post-Lisbon,* in D. Ashiagbor, N. Countouris and I. Lianos, *The European Union after the Treaty of Lisbon,* Cambridge University Press, 2012, p. 213.

illegal act that could be sanctioned by a court.[100] The fact that maladministration does not mean illegality enables the Ombudsman to have a complementary role to that of the courts.[101]

[100] In this context see: Joined cases T-219/02 and T-337/02 *Herrera v Commission* [2004] , and case T-193/04 R *Hans-MArtin Tillack v Commission* [2006] para. 128.
[101] P.N. Diamandouros, *op. cit.,* p. 213.

1.2.3. Treaties: 2000-2009*

2000: The proclamation of the European Union Charter of Fundamental Rights represented a turning point in the recognition of good administration in the Community written legislation. The Charter constitutionalised the fundamental principle of administrative procedure to a subjective public right to good administration.[102]

2001: The Treaty of Nice, amending the Treaties on European Union, the Treaties establishing European Communities and certain related acts, adopted in 2001, did not incorporated the Charter of Fundamental Rights.[103] This issue was addressed in the Convention on the Future of Europe which instructed to consider, among other matters, "whether the Charter of Fundamental Rights should be included in the basic treaty".[104] The task of considering this question was given to a "Convention" that emulated the body which had drafted the Charter itself. The Convention's Working Group II was assigned the task of considering how the Charter might be incorporated and the implications of such incorporation. The Working Group's final report called for consideration of incorporation "in a form which would make the Charter legally binding and give it constitutional status."[105]

2004: The Constitutional Treaty, as agreed by the Convention, contained the full Charter. Thus, the right to good administration is supposed to have stronghold in the Constitutional Treaty, or more precisely, Treaty establishing a Constitution for

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* This part of work is inspired and based on V. Volpe "Global domensions of democracy", and in particular to chapter I "Rewarding democracy".

[102] „The Charter is the first in the world to include a right to good administration as a fundamental right in a human rights declaration. For the citizens, it is a clear step forward from the basic rules of citizenship contained in the Maastricht Treaty". See: J. Söderman, *The Struggle for Openness in the European Union,* speech delivered on 21 March 2001.

[103] Rather, it was solemnly proclaimed by the European Parliament, Council of Ministers and European Commission (but not the Member States) at Nice on 7 December 2000 after the Presidency Conclusions of the Cologne European Council proclamation on 4 June 1999 that "protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens". See: *Presidency Conclusions*, *Annex IV*, Cologne 3 and 4 June 1999, p. 43 (available at: http://www.consilium.europa.eu). For an elaboration of procedural aspects of the Charter Convention, see G. De Burca, *The drafting of the European Union Charter of Fundamental Rights,* in *European Law Review,* 26/2001, pp. 126 – 138.

[104] *The Convention on the future of the EU* (populary known as Laeken Declaration), December 2001, SN 273/01.

[105] See more: *The final report of Working Group II*, CONV 354/02, Brussels, October 2002. Available at: http://register.consilium.europa.eu.

Europe, signed in 2004. According to the Article III-398 "in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration."[106]

The status of the Charter of the Fundamental Rights and its position in the Constitutional Treaty was clear. The Charter was "recognized" in Article I-9 (1) and the entire text became Part II of the Constitutional Treaty. However, the Constitutional Treaty had never entered into force but was subject to ratification by all member states, two of which subsequently rejected it in referenda (Holland and France).

2007: Finally, the Treaty of Lisbon signed in 2007 and entered into force in 2009, concludes this section and lays out the relevant legal framework. The EU Charter of Fundamental Rights was amended and proclaimed a second time in 12 December 2007, parallel to the Lisbon Treaty, and published afterwards.[107]

According to Article 6 (1) "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." It rendered the Charter of Fundamental Rights as legally binding catalogue of civil, political, social and economic rights, thereby resolving an issue that had been left open since the Charter was initially drafted almost a decade earlier.

The legal and practical result is that the European Union institutions as well as other structures have to respect the rights enshrined in the Charter, which applies to the member states when they implement EU law.[108] In that sense, the Community and its institutions, bodies, offices and agencies, as well as the member states (when implementing EU law) are obliged to respect the rights defined in the Charter, observe

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[106] The initiative for inclusion of the mentioned article in the Constitutional Treaty was proposed by the Swedish representative on the Convention on the Future of EU. See: *Principles of Good Administration in the Member States of the European Union,* Swedish Agency for Public Management, 2005, p. 10; Credit should be given to the European Ombudsman, who highlighted the importance of introducing this article in the Treaty through his numerous speaking engagements. See: *Speech by the European Ombudsman, Mr Jacob Söderman, at the Round Table on the Future of Europe,* Lisbon, 18 November 2002, available at: http://www.ombudsman.europa.eu/en/activities/speech.faces/en/271/html.bookmark.

[107] On 12 December 2007 the Charter was proclaimed once more and signed by the Presidents of the European Parliament, the Council and the European Commission. The next day the Treaty of Lisbon was signed by representatives of the Member States governments in the Portuguese capital. It could be found , from political point of view, that the Charter is not incorporated in the body of the Treaty or even in its protocols because according to the emphasis of the Cologne Presidency Conclusions on making rights „more visible to the Union's citizens" [*supra* n. 120].

[108] Article 51 (2). Restrictions regarding the interpretation of the Charter contained in the Protocol (No) 30 encompass certain social rights and apply to Poland and United Kingdom. See more: D. Anderson and C. C. Murphy, *The Charter of Fundamental Rights,* in A. Biondi, P. Eeckhout and S. Ripley (eds) *EU Law after Lisbon,* Oxford University Press, Oxford, 2012, pp. 166 – 169.

its principles and promote its application.[109] Amendments to the Charter have not been made since its adaptation in 2007.[110] In order to have legal effect via the Treaties any amendment of the Charter would also require amendment to the Treaty of Lisbon (Article 6).[111]

[109] Article 51 (1). The Commission can, and is obliged to, intervene in the cases of breach of Charter provisions in the application of EU Law and it can instigate the process before the Court of Justice. Additional monitoring is carried out by the European Union Agency for Fundamental Rights (FRA) which was established in 2997, replacing the previous European Monitoring Centre on Racism and Xenophobia. The FRA should provide EU Institutions and its Member States when they implement EU law with assistance and expertise relating to the fundamental rights. It collects objective, reliable and comparable information on the development of the situation of fundamental rights.

[110] See: D. Anderson and C.C. Murphy, *op.cit.,* p. 159.

[111] *Ibidem*

1.2.4. Guarantees of the EU Charter of Fundamental Rights of the European Union

The EU Charter of Fundamental Rights, ten years after its proclamation by the EU institutions, was incorporated into European constitutional Law by the Treaty of Lisbon which gave it the legal force.[112] It represented an important step forwards integrating especially the right to good administration and the right of access to documents as well as all the other guarantees of the Charter into the existing Law of the Treaties.[113] Consequently, it could be seen as an illustration of the present trend towards the formalization of the European administrative law,[114] originally traced back in the Treaty of Maastricht and culminated in the Charter of Fundamental Rights which sought to "enshrine the very essence of European "acquis" regarding fundamental rights."[115]

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[112] For a discussion of the legal status of the EU Charter before the Treaty of Lisbon entered into force see, for example, P. Craig, *EU Administrative Law, op. cit.,* pp. 538 – 539; A. J. Menéndez, *Constituting rights on their own right. The Charter of Fundamental Rights of the European Union,* in *Rivista Italiana di Diritto Pubblico Comunitario,* 2-3/2002, pp. 407 – 413; G. De Búrca and J.B. Aschenbrenner, *European Constitutionalism and the Charter,* in S. Peers and A. Ward (eds), *The European Union Charter of Fundamental Rights,* Oxford/Portland Oregon, Hart Publishing, 2004. See also, L. Daniele, *Diritto dell'Unione europea. Sistema istituzionale – ordinamento – tutela giurisdizionale – competenze,* Giuffrè Editore, Milano, 2010.

It is worth noting that the European Courts, especially the General Court, have been already accepted the right to good administration (Article 41) as a point of reference in their judicial practice before the mentioned right became legally binding [see *supra* § 1.1.1]. Some national case-law also followed this trend. The first Spanish judicial decision referring to the Article 41 dates from 2004 in the case *Customs and Excise Commissioners v Pegasus Birds Ltd,* S.T.C. 262. This is noted by J. Ponce, *Good administration and Administrative Procedures,* in *Indiana Journal of Global Legal Studies,* Vol. 12, Issue 2, 2005, p. 559; Moreover, A. J. Menéndez points out that the Spanish Constitutional Court had shown deep interest for protection of fundamental rights even before the EU Charter was proclaimed in Nice. See: A. J. Menéndez, *op. cit.,* pp. 412 – 413.

[113] Transparency is a central aspect of the good administration, see S. Prechal and M. E. de Leeuw, *Dimensions of transparency: The Building Blocks for a New Legal Principle?,* in *Review of European Administrative Law,* 2007, p. 51 ff. In addition, numerous other rights have impact on administrative behaviour and structures such as the right to refer to European Ombudsman (Article 43), right to petition the European Parliament (Article 44), right to the protection of the personal data (Article 8), equality before the law (Article 20), non-discrimination (Article 21), right to cultural, religious and linguistic diversity in the European Union (Article 22), principle of equality between men and women (Article 23), access to services of general economic interest (Article 36), right to an effective remedy and fair trial (Article 47). See more: T. Fortsakis, *Principles Governing Good Administration,* in *European Public Law,* Vol. 11, No. 2, 2005, pp. 207 – 217.

[114] We are "in the midst of a period of enormous enthusiasm for rule-bound justice". See: C. R. Sustein, *Legal Reasoning and Political Conflict,* Oxford University Press, 1996, p. 3 ix, found in T. Tridimas, *op. cit.,* pp. 11.

[115] See: *Commission Communication on the Legal Nature of the draft Charter*, October 2000, Para. 1, available at: http://eur-lex.europa.eu.

In this section I will focus on right to the good administration and access to documents as guarantees for the good administrative behaviour of particular importance in the EU context.

1.2.4.1. The right to the good administration

In Title V, the Charter introduced "Citizen's Rights" which recognize the right to good administration under the Article 41:

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) The right of every person to be heard, prior to any individual measure which would affect him or her adversely being taken;
(b) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) The obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language."

The provision creates a "modern fundamental right"[116] which guarantees the good administration in the EU legal framework. This represents the first proclamation of the right to good administration in a human rights declaration[117] and, at the same time the first effort to create positive definition of the concept of the good administration (as opposite to the maladministration) at the supranational level.

1.2.4.1.1. Legal character

[116] See E. Nieto-Garrido and I.M. Delgrado, *European Administrative Law in the Constitutional Treaty,* Oxford, 2007, p. 65 ff.; D.–U. Galetta, *Inhalt und Bedeutung des europäischen Rechts auf eine gute Verwaltung,* in *Europarecht,* 1/2007, pp. 57 ff.

[117] Speech of the first European Ombudsman J. Söderman, *The Struggle for Openess in the European Union,* see *supra* n. 119.

The EU Charter transforms unwritten general principle of the good administration into fundamental citizen's right to the good administration. The background to such constitutionalisation through the jurisprudence of the European Courts, as it has been previously examined, is a rather complex one. The fact that there was a lack of protection of fundamental rights at the European level was affecting the acceptance of the Community law. Indeed it was seen as an argument against the acceptance of the supremacy of the Community law. The courts avoided the risk of such rejection by realizing that there were fundamental rights within the general law principles of the Community. The certain level of autonomy for the Community development in that field will be acquired by taking the inspiration from the defined sources.[118]

The good administration represents the EU fundamental value that the public administration must respect and actively promote. It was derived mainly from the national constitutional legal orders, since they establish the principal powers and functions of government, accommodated to the Community. Thus, in *Internationale* case the Court of Justice stressed that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[119] The judgement reflects the historical circumstances from seventies. The period of the first enlargement of membership and of expansions of the competences of the Community.[120]

Most of the Member States recognizes the good administration as fundamental constitutional principle dominant in the administrative law.[121] The Italian Constitution from 1947 under the title III "The Government" provides that "public offices are organized according to the law, so as to ensure *buon andamento* and

[118] The sources that inspired European Courts to draft the list of fundamental rights are the European Convention of Human Rights and fundamental Freedoms of 1950, its Protocols, the European Social Charter and the Common constitutional traditions of the Member States. See: A. J. Menéndez, *op. cit.,* p. 404.

[119] See: Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 125 para. 4. The jurisprudence od the seventies is based on recognition of fundamental rights as binding on the Community institutions althrough there were not explicit reference in the Treaty to the protection of such rights. See also Case 4/73 *Nold* [1974] ECR 491 and Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[120] See: D. Urwin, *The Community of Europe: a history of European integration since 1945,* Longman, London, 1991, chapters 10 (*Movement on all fronts*) and 11 (*The revival of ambition*).

[121] See: G. Vedel and P. Delvolvé, *Droit administratif,* Paris, Presses universitaires de France, 12th edn,1990, Chapter I.

impartiality of administration."[122] The current Spanish Constitution from 1978 states in part concerning fundamental rights and duties in Section II "Rights and duties of citizens" Article 31 (2) that "public expenditure shall be incurred in such a way that an equitable allocation of public resources may be achieved, and its planning and execution shall comply with criteria of efficiency and economy." Furthermore, in Part 4 titled "Government and administration" Article 103 provides that the public administration "serves the general interest with the objectivity […] and impartiality in the exercise of their duties."[123] The only EU Member State which included the "right" to the good administration in its Constitution is Finland. In the Section 21 under the title "Protection under the law" it is stressed that "everyone has the right to have his or her case dealt with appropriate and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. Provisions concerning the publicity of proceedings, the right to be heard, the right to receive an explained decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act."[124] This points out the fact that the Scandinavian countries have influenced the

[122] Article 97 (1) of the Italian Constitution. See: Costituzione della Repubblica Italiana [The Constitution of the Italian Republic], Gazzetta Ufficiale n. 298, from 27 December 1947 and Gazzetta Ufficiale n. 2 from 3 January 1948, modificated version. About *buon andamento* in Italian doctrine see, for example: M. S. Giannini, *Diritto amministrativo,* Volume primo, 3th Edizione, Milano, A. Giuffrè, 1993, pp. 89 – 92; R. Garofoli and G. Ferrari, *Manuale di diritto amministztrativo,* 3th Edizione, Roma, Neldiritto, 2010, pp. 467 – 468; F. Caringella, *Manuale di diritti amministrativo,* 3th Edizione, Roma, Dike giuridiche, 2010, pp. 907 – 909; D. Sorace, *Diritto delle amministrazioni pubbliche: una introduzione,* 5th Edizione, Bologna, il Mulino, 2010, pp. 67 – 70; G. Corso, *Manuale di diritto amministrativo,* 5th Edizione, Torino, G. Giappichelli, 2010, pp. 42 – 44; V. C. Irelli, *Lineamenti del diritto amministrativo,* 2th Edizione, Torino, G. Giappichelli, 2011, pp. 258 – 260; L. Pegoraro, A.Reposo, A. Rinella, R. Scarciglia and M. Volpi, *Diritto costituzionale e pubblico,* 3th Edizione, Torino, G. Giappichelli, 2009, p. 354.

[123] Article 103 of the Constitución Española de 1978 [Spanish Constitution]. The official version of the Constitution in English language is available at the web site of the Spanish Constitutional Court (http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx): „1. The Public Administration serves the general interest with objectivity and acts in accordance with the principles of efficiency, hierarchy, decentralisation, disconcentration and coordination, being fully subject to the justice and the law.

2. The organs of State Administration are created, directed and coordinated in accordance with the Law.

3. The Law shall regulate the status of civil servants, entry into the civil service in accordance with the principles of merit and ability, the special features of the exercise of their right to the union membership, the system of incompatibilities, and guarantees regarding impartiality in the exercise of their duties."

[124] The Constitution of Finland, 11 June 1999 (731/1999, amendments up to 802/2007 included), unofficial translation by the Finnish Ministry of Justice, available at: http://www.om.fi/en/Etusivu/Perussaannoksia/Perustuslaki; The Finnish Administrative Procedure Act (434/2003) regulates closely achieving and promoting of good administration and judicial review in administrative matters. See: P. Leino-Sandberg, *X. Minding the gap in European administrative law: on lacunae, fragtmentation and the prospect of a brighter future,* in *Workshop on EU administrative law: State of play and future prospects,* European Parliament, León – Spain, 2011, p. 266.

attribution of a legally binding, constitutional status to the principle of good administration.[125]

The Member States with the common-law tradition provide the more flexible approach to the good administration based upon the absence of codification in legal order. In the United Kingdom, for example, the Committee of the Justice, Non-governmental organization appointed by the House of Commons,[126] and the British Ombudsman recognized a set of principles of good administration as non-binding standards in order to guide administrative activity. Thus, in Report from 1988 the Committee of Justice included the Chapter on principles of the good administration in which their importance is highlighted and recommended that the British Ombudsman is to make a list of principles to guide administrative procedures.[127]

The reliance on the good administration as the protection of subjective public right is evident in the EU Charter, which sets out the basic criteria for standing in Article 41 dedicated to "every person" vis-à-vis the institution, bodies, offices and agencies of the Union. The subjective rights are the adherence to the objective principle of legality (rule of law) addresses to the requirement to administration to remain within the constraints set out by the law. The subjective rights could be public or private in character. Subjective private rights provide protection of the individual from illegal behaviour of other individuals.[128] A subjective public right could be defined as a legal situation by means of which the legal system protects an individual interest in relation to the public administration.[129] Subjective public rights enjoyed individuals vis-à-vis the administration in which the administration is *service* to the individuals. The constitutional protection of the right to good administration in the EU Charter

[125] The German and the French legal traditions have proved particularly influential in forming the general principles of the European administrative law. More about it see in the Chapter 1.

[126] The Justice Committee examine the expenditure, administration and policy of the Ministry of Justice and associated public bodies, and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office. See more about Justice Committee at http://www.parliament.uk.

[127] See more: J. Ponce, *op. cit.,* pp. 557 – 558. About British Ombudsman and maladministration see *supra* § 1.2.2.

[128] See: K. Kánska, *op. cit.,* p. 300.

[129] See: E. S. Musso, *Diritto costituzionale,* Padova, Cedam, 1992, p. 302. The subjective public rights have significant importance in the national constitutions of the Member States based on pluralistic democracy (such as the Italian Constitution). See: *Ibidem*; furthermore, the constitutional protection of subjective public rights does not eliminate collective interest (*interesse collettivo*) which is in this legal situation put to a subordinate position; vice-versa the protection of the collective interest is at the same time the protection of the individual interest. For detailed discussion about the connection between the individual and the ollective interest in the subjective public rights, see G. Jellinek, *System der subjektiven öffentlichen Rechte,* Tübingen, 1892.

guarantees effectiveness to the protection the individual from the illegal conduct of the EU administration.

In Italian doctrine the relationship between the individual and the public administration is often defined as relationship between *liberty* and *authority* which attributes supremacy over the first mentioned.[130] However, the Italian Constitution provides the model of administration based mainly on the "needs" of the public authority. The principle of good administration does not derive from the provisions which relate to the citizen and its liberties and rights, but is significant as positioned in Title III "Government" devoted to the public administration. Moreover, the administration is regulated as the execution of power rather than a service for citizens.[131] Certainly, the provisions need to be read in the context of the whole Constitution to take account of rights pertaining to the administration which is covered elsewhere which bring to conclusion that the public administration serves interest of citizens.[132]

The EU Chapter with respect to the subjective public right to the good administration explicitly dedicates the Character of the citizen's right. The concept of citizenship was introduced with the Treaty of Maastricht where it stresses that "citizenship of the Union is hereby established" thus "every person holding the nationality of a Member State shall be a citizen of the Union."[133] This "evolutionary achievement"[134] changed the nature of the European legal order in general which was initially a "contract" based upon economic reasons after the Second World War, and in 1992 with Treaty of Maastricht became "constitutional order" based upon the rights

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[130] In the terms of L. Perfetti *il diritto ad una buona amministrazione si colloca come clausola riassuntiva sul versante della relazione tra cittadini ed amministrazione (ovvero, tra libertà ed autorità*. See: L. Perfetti, *Diritto ad una buona amministrazione, determinazione dell'interesse pubblico ed equità,* in *Rivista Italiana di Diritto Pubblico Comunitario,* 3-4/2010, p. 791.

[131] Article 97 of the Italian Constitution (see *supra* in this Section).

[132] As osserved by A. Zito *certamente la nostra Costituzione contiene in sé, se ci si rivolge alla sua ispirazione complessiva, tutte le premesse perché il rapporto tra cittadini e pubblica amministrazione si atteggi e sia ricostruito in modo tale da collocare il primo al centro della scena e la seconda in posizione servente. E, a ben guardare, in questa direzione si è mossa la dottrina costituzionalistica ed amministrativistica sino a giungere ad esiti ricostrittivi che esaltano, nell'ambito dell'esercizio della funzione amministrativa, la dimensione del servizio anziché quella del potere*, tuttavia, *l'impostazione tradizionale, nonostante le acquisizioni della dotrina, sembra da noi resistere oltre (forse) ogni ragionevole misura* sia a livello legislativo che a quello della giurisprudenza e dottrina dominante. See: A. Zito, *Il „diritto ad una buona ammoistrazione" nella carta dei diritti fondamentali dell'Unione europea e nell'ordinamento interno*, in *Rivista Italian di Diritto Pubblico Communitario,* 2-3/2002, pp. 432 – 433.

[133] Article 8, the Treaty of Maastricht.

[134] In terms of M. La Torre: „By *evolutionary achievement* [...] I mean rather that, once a certain developments in a legal structure have taken place, legal scientists and lawyers cannot remain blind to them and perpetue a discourse which is no longer coherent with the facts they have to interpret." See: M. La Torre, *Legal Pluralism as an Evolutionary Achievement of Community Law,* in *The europeanisation of law: the legal effects of European integration*, European University Institute, Hart Publishing, Oxford and Portland, Oregon, 2000, pp. 125.

and values.[135] The concept of citizenship reinforced the relationship between individual and public administration bringing the citizens closer to the European institutions. Consequently, the expansion from citizens' vis-à-vis national authorities to citizens' vis-à-vis European authorities demonstrates the trend of strengthening of institutional powers of the Community.[136]

An extra burden was placed on the public authorities to justify any restrictions upon the good administration. This happened once when the good administration was classified as a fundamental, subjective and a citizen's right.[137] As pointed by T. Tridimas "[t]he individual has, to use Dworkinian often quoted terminology, "a trump card" against the public authorities given to him by the Community law."[138]

1.2.4.1.2. Content

The right to the good administration includes fair and impartial administrative procedures within a reasonable time. The specific elements of proceedings under the rule of law include further right to be heard, right of access to one's file and obligation on the administration to give reason for its decisions. The latter obligation has an equivalent in the Article 296 (2) of the Treaty of Lisbon: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties." The right to the good administration includes also a right to claim damages which is in accord with the non-contractual liability of the Union for any damage caused by its institutions or by its servants stipulated in Article 340 (2) of the Lisbon Treaty: "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." Finally, good administration stipulates every person's right to communicate with the institutions of the Union in an official EU language of choice.

Expressed reference to the right to good administration stipulates "certain new rights which already exist but have not yet been explicitly protected as fundamental

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[135] See more: A. J. Menéndez, *op. cit.,* p. 406. For detailed discussion about the concept of citizenship, see C. Closa, *The concept of citizenship in the Treaty of the European Union,* in *Common Market Law Review,* 29/1992, pp. 1137 – 1169.

[136] See: K. Kańska, *op. cit.,* p. 303.

[137] See: T. Tridimas, *op. cit.,* p. 310.

[138] *Ibidem* See: R. Dworkin, *A Matter of Principle,* Cambridge, Mass.: Harvard University Press, 1985, p. 198.

rights, notwithstanding the values they are intended to protect, such as the protection of personal data and the principles of bioethics or the right to good administration."[139] However, the mentioned points to the fact that although the declaration of the good administration was innovative, the specific elements of the right were found in existing legal sources.[140]

The right to the good administration encompasses some independent rights, such as the right to a hearing and obligation to give reason, and templates of procedural requirements laid down in the jurisprudence of the European Courts. The EU Charter intends to reflect these rights but in some aspects, it goes further such as the expressed reference to the right of access to one's file.[141] Leaving aside the analyse of previously mentioned rights, which was detailed done in the Section [1.1.2], herein the focus will be on the right of access's to one's file.

According to the Article 41 (2) of the EU Charter the right to the access to one's file is the right of every person to have the access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. The narrow interpretation of the provision excludes the possibility to access to files of other parties in an administrative proceeding. Access to the file relates to both the period before and after the decision was made by the administration in the case of judicial review.[142] It also guarantees the legitimacy of administrative actions in the Community. For example, the Commission could not base its decision upon the documents to which the party has not be enabled to have access to.[143] The limits of the

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[139] See: *Commission Communication on the Charter of Fundamental Rights of the European Union*, COM (2000) 559, Brussels, 13 September 2000, Para. 9.

[140] The task of the draft makers of the Charter was not to provide a foundation for new rights, but to make a survey of existing ones, having regard to the constitutional traditions common to the Member States that result in giving a foundation for more solid rules that the jurisprudence used with greater range (see: F. Trimarchi Banfi, *Il diritto ad una buona amministrazione,* in M. P. Chiti and G. Greco, *Trattato di Diritto Amministrativo Europeo,* Tomo I, Milano, Giuffrè,2007., p. 49); *Il mandato assegnato alla Convenzione – e, quindi, ai redatori della Carta – non era né quello di innovare, né quelli di prevedere nuovi diritti. SI trattava, piuttosto, di operare una ricogniyione dei diritti già esistenti e pacificamente riconosciuti neel'ordinamento communitario e consolidarli a livello costituzionale* See: *Carta Europea dei diritti: art. II.101 e il diritto ad una buona amministrazione nella Costituzione Europea, evoluzione della legislazione, op. cit.*, p. 73.

[141] It was noted by T. Tridimas, see: T. Tridimas, *op. cit.,* p. 411.

[142] P. Craig, *op. cit.,* p. 365.

[143] "The right of the defence is a fundamental principle of the Community law which the Commission must observe in administrative procedures which may lead to the imposition of penalties under the rules of competition laid down in the Treaty. Its observance requires inter alia that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegation of an infringement." See: Case *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 4261 p. 3498.

right exist in respect to the legitimate interests of confidentiality and of professional and business secrecy.[144]

Origins of the right could be found in the jurisprudence of the European Courts. In the *Limburgse Vinyl Maatschappij NV and Others* [145] case the Court treated the right of access to the file as sine qua non of the rights of defence. It held that "access to the file […] is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections." Thus, the Access to the file is one of the procedural guarantees intended to protect the rights of the defence and ensure the exercise of the right to be heard. Today, it is independent fundamental right proclaimed by the EU Charter as citizen's right to have the access to his or her file even in cases where this is not required "by a strict application of the right to be heard."[146]

The right to access to one's file has to be distinguished from the right to access to documents. The latter derives from the principle of transparency as the core principle of democracy, which serves to bring about open government and accountability. On the other hand, the right to access to one's file is procedural administrative right which aims to ensure "the equality of arms" in the administrative procedure.[147]

Among the Member States the right to access to one's file is widely spread. In the Spanish Constitution, for example, the Article 105 (b) states that "the access of citizens to administrative files and records, except as they may concern the security and

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[144] "With regard to the correspondence with third-party undertakings and the answer to a request for information, it must be recognized that as an undertaking holding a dominant position on the market might adopt retaliatory measures against competitors, suppliers or customers who have collaborated in the investigation carried out by the Commission. That being so, it is clear that third-party undertakings which submit documents to the Commission in the course of its investigations and consider that reprisals, might also be taken against them, and consequently they could do so only if they know that account will be taken on their request for confidentiality. The Court of First Instance was therefore right to consider that the Commission was entitled to refuse access to such documents on the ground that they were confidential." Case C 310/93 P *BPB Industries plc and British Gypsum Ltd v Commission* [1994] ECR I-685 paras. 26, 27.

[145] See: Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV and Others* [1999] ECR I-931 Para. 315; See also:Case C 310/93 P *BPB Industries plc and British Gypsum Ltd v Commission, op. cit.,* para. 15; Joined Cases T-10/92, T-ll/92 and T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR 11-2667 Para. 38; See also, Cases T-30/91 [1995] ECR II-1775, T-31/91 [1995] ECR II-1821, T-32/91 [1995] ECR II-1825 *Solvay v Commission* and Cases: T-36/91 [1995] ECR II-1847, T-37/91 [1995] ECR II-1901; Cases T-13/89 [1992] ECR II-1021 and T 36/91 [1995] ECR i-1847 *ICI v Commission.*

[146] T. Tridimas, *op. cit.,* p. 412.

[147] See: H. P. Nehl, *Principles of Administrative Procedure in EC Law, op. cit.,* pp. 51 – 60; For detailed analyse of the right to access to documents see *supra* § 1.2.4.2.

defence of the State, the investigation of crimes and the privacy of individuals."[148] In a similar way, as in the EU Charter, the right to access to one's file is supplementing the right of access to personal data.[149]

The advanced solution of the right could be found in the Italian Administrative Procedure Act no. 241/1990 under the Article 7 which accords the right to access to file to "the parties who will be directly affected by the final measure and to those who are required by law to intervene", likewise, "the authority shall have the duty to inform them […] of the beginning of the procedure."[150]

In some Member States, such as Slovenia, this right is directed to a wider public as to have the access to the files in proceedings. According to the Article 82 (2) of the General Administrative Procedure Act[151] the right to access to documents in administrative matters stretches not only to the target parties but also "any person credibly showing his/her legal interest to inspect the documents." The United Kingdom, by contrast, has absentia of the right to access the file, both prior and post the decision being taken. The individual must apply for access to the file from the Public body and the National courts have placed strict limitations as to when this will be ordered.[152]

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[148] The Spanish Constitution, *op. cit.,* see *supra* n. 140.

[149] The Spanish Constitution guarantees the personal data protection in the Article 18 (4): "The law shall limit the use of data processing in order to guarantee the honor and personal and family privacy of citizens and the full exercise of their rights." This provision was further developed by the Organic Law 5/1992 on the Regulation of the Automatic Processing of Personal Data. The Law 5/1992 was subsequently amended by the Organic Law 15/1999 on the Protection of Personal Data. Organic Law 15/1999 implemented into the Spanish Law Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

In the EU Charter the right of access to personal data is provided under the Title "Freedoms" in the Article 8: "1. Everyone has the right to the protection of personal data concerning him/her; 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by the Law. Everyone has the right of access to data which has been collected concerning him/her, and the right to have it rectified."

[150] Legge 7 agosto 1990, n. 241 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, come modificata ed integrata dalla Legge 11 febbraio 2005 n. 15 (G.U. n. 42 del 21/2/05) e dal D.L. 14 marzo 2005, n. 35 convertito con modificazioni dalla Legge del 14 maggio 2005, n. 80 (G.U. n. 111 del 14/5/05, S.O.).

[151] Zakon o splošnem upravnem postopku, Uradni list RS, št. 22/2005 [General Procedural Administrative Act].

[152] See more: P. Craig, *Administrative Law,* Sweet & Maxwell, London, 5th ed., 2003, Chapter 23.

1.2.4.1.3. Scope of application

The right to the good administration applies primarily to the institutions, bodies, offices and agencies of the Union.[153] The EU institutions, as defined in the Treaty of Lisbon, are the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of EU, the European Central Bank, the Court of Auditors.[154] "Bodies, offices and agencies" is a comprehensive formulation, used in the Treaties as to refer to all the authorities set up by the Treaties or by secondary legislation.[155] The question may arise as what is the objective of the right to the good administration in relation to the Member States?

According to the general provisions governing the interpretation and application of the EU Charter "the provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiary and to the Member States only when they are implementing the Union law", in which case "they shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."[156]

In relation to the above provision at least two points deserve particular attention. First, it makes clear that the Community law provisions on fundamental rights apply only to the EU institutions, bodies, offices and agencies themselves. In relation to the Member States they extent only when they are implementing the Community law. This represents an exception of a general rule that National constitutional law keeps on binding the Member States. However, there could be found similarity between the protection of fundamental rights in the National Constitutions and the EU Charter. Two facts will be added herby. On the one hand the draft makers of the Charter, as it was pointed previously, tended to merge the existing law and to build the code of fundamental rights at the EU level.[157] Further, the European Courts developed fundamental rights mainly from the constitutional legal traditions of the Member States. Clearly, the level of protections and balance between the fundamental

[153] Article 41 (1) of the Charter.
[154] Article 13 (1).
[155] The use of the same formulation in Articles 15 and 16 of Treaty of Lisbon.
[156] Article 51 (1) of the EU Charter. For a discussion of the drafting of this clause, see: P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question,* in *CML Rev* 945, 39 (2002), p. 954.
[157] The inclusion of the EU Charter within the primary law of the European Union has "an impact on the division of competencies between the Union and the Member States", see A. J. Menéndez, *op. cit.,* p. 415.

rights could be different in different legal systems. Still, it reduced the possible conflict between them. Second, in comparison with the jurisprudence of the European Courts the scope of application of the fundamental rights is provided much narrower in the EU Charter. In the *ERT*[158] case, for example, the Court of Justice held that the requirement to respect fundamental rights as defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.[159] Furthermore, in the *Kjell Karlsson*[160] case the Court of Justice stresses that "the requirements flowing from the protection of fundamental rights in the Community legal system are also binding on Member States when they implement Community rules." According to the quoted, the Member States are bound to respect fundamental rights not only when they implement the Community law but also when they act within its scope of application.

Unlike the general scope of application of most EU Charter's rights, the narrowing interpretation of the Article 41 "the right to good administration" makes exception and refers only to the Community administrative activities. Indeed, one can see also the whole jurisprudence of the European Courts on the principle of good administration as evidence of that.[161] This divergence of the EU Charter could be found disappointing at least for three reasons. First, most national legal systems have been coping with the protection of an individual vis-à-vis the public administration as fundamental value for many years. Experience seems to indicate that overlapping is conducive to reinforcement their protection, not to its debilitation.[162] Second, the right to the good administration has been derived by European Courts from the constitutional traditions common to the Member States which further inspired the codification of fundamental rights in the EU Charter with a final goal to strengthen the

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[158] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925.

[159] This approach of the European Courts is confirmed also in Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609; Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presicente Regione Lazio* [1997] ECR I-7493. See the explanation of Article 51 in the *Explanations relating to the Charter of Fundamental Rights, op. cit.,* p. 32.

[160] Case C-292/97 *Kjell Karlsson and Others* [2000] ECr I-2737 para. 37.

[161] In the conclusion of the comprehensive analyse of the principle of the good administration in the Community case-law, A. Serio concluded that *il principio di buona amministrazione si innestasse tanto nelle relazioni dei cittadini europei con l'amministrazione comunitaria, quanto nelle relazioni tra quest'ultima e gli Stati membri.* See: A. Serio, *op. cit.,* p. 301.

[162] An example could be found in the relationship between the national constitutions and the Universal Declaration of Human Rights. Spain and Portugal have made it an integral part of their Constitutions putting the interpretation of all norms related to the fundamental rights in conformity with the text. See: The Article 10 (2) of the Spanish Constitution and the Article 16 (2) of the Portuguese Constitution.

European integrations.[163] Finally, it undoubtedly leads to various treatment of an individual depending upon the national administration proceeding stipulated in that country (which was not the original idea).

1.2.4.1.4. Procedural protection: Judicial review

Procedural guarantees in the administrative process and judicial review, a possibility to go to court to vindicate those guarantees, are essential for the protection of the right to the good administration. The fundamental rights "are only truly respected when the legal order concerned makes them enforceable against those who have breached them."[164]

The main provisions governing the principles of the judicial review of administrative procedure in the EU are Articles 263 and 267 of the Treaty of Lisbon. The Article 263 (2) enables direct review of legality on four grounds of action to annul an administrative action: the lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, and misuse of powers.[165] Review of legality in indirect way is guaranteed by Article 267 by providing the jurisdiction of the Court of Justice to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

The Court exams the use of procedural powers with the aim to ensure their strict observance for the benefit of individuals or relevant institutions. Nonetheless, it does not encroach into the discretion of the administrative authorities to interfere with the substantive decision.[166] The facts upon which the administrative decision is based

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[163] In the Article 52 (4) of the EU Charter dedicated to scope and interpretation of rights and principles states: "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[164] See: W. Van Gerven, *Remedies for Infringements of Fundamental Rights,* in *European Public Law,* Vol. 10, No. 2/2004, p. 261. With regard to the procedural guarantees in administrative procedure Cassese pointed that *[n]on si tratta, in questo caso, di garantire che vi siano un giudice e un giudizio in tutti i casi in cui qualcuno assuma di essere stato leso in un proprio diritto da un determinato precedimento o atto del potere pubblico. Si tratta, piuttosto, di dare una tutela contro i ritardi, le inadempienze, le malversazioni perpretati nei confronti del singolo.*See: S. Cassese, *Diritto amministrativo europeo. Principi e istituti,* a cura di G. della Cananea, terza edizione, Giuffrè Editore, Milano, 2011, p.45.

[165] "The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights." See: Case C-50/00 *Unión de Pequeños Agricultores v Council* [2000] ECR I-6677 Para. 38.

[166] See: J. Wakefield, *op. cit.,* p. 130. In that sense the Court held that "in order to be able to choose, it was necessary for the High Authority to make an appraisal of all the actual circumstances of the case, a discretionary operation which does not however preclude review of possible illegalities; on the other

and the correct application of rules derives from treaties are the subject of the judicial review. The Article 263 (4) explicitly states that any natural or legal entity may institute proceedings against an act addressed to that entity or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. The novelty of the provision, seen as "liberalization", is that individuals concerns do not have to be shown for regulatory acts that are of direct concern to them and does not entail implementing measures.[167]

The right to the good administration requires fair and impartial administrative procedures within reasonable time and sets out certain more specific rights: the right to be heard, the right of access to one's file, the right to acquire explained decision, the right to compensation for damage and the right to official correspondences in one's native language (Art. 41). In the case of their infringement the individual has the right for remedy. The Article 47 (1) of the Charter stipulates such the right to an effective remedy thus "everyone whose right and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article." Standing rules are not explicitly mentioned in either article. It would be open to the European Courts to regard these provisions as the basis for expanding the existing standing rules. They are, however, unlikely to do so give that their approach to standing hitherto. This is especially so given in the Explanations on the Article 47 that there was no intent for this provision to make any change to the rules on standing other than those embodied in particular in the Article 263 (4) of the Treaty of Lisbon.[168]

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hand, once the appraisal was carried out, the High Authority was bound to deduce all the legal consequences there from." See: Case 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v High Authority of the European Coal and Steel Community* [1962] ECR 253 p. 261.

[167] See: P. Craig, *The Lisbon Treaty: Law, Plitics, and Treaty reform, op. cit.,* p. 130; Compare ex Article 230 (4) of the Treaty establishing the European Community (Nice consolidated version) states: "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."

[168] See: *Explanations of the Charter of the Fundamental Right, op. cit.,* p. 29. For a detailed reading about good administration area of administrative acts see I. Sigismondi, *Il principio del buon andamento tra politica e amministrazione,* Jovene Editore, Napoli, 2011, chapter four.

1.2.4.2. Principle of transparency: Access to documents

The inclusion of the right to the good administration in the EU Charter "meets the strong and legitimate contemporary demand for transparency and impartiality in the operation of the Community administration."[169] The right to the good administration as set out in the Charter seems merely indicative, but certainly, upon the reading of whole Chapter it seems as necessary to reconsider the rights pertaining to the administration which are defined elsewhere.[170] The most important of the mentioned hereby is the right of access to the documents provided in the Article 42 of the Charter which represents the most developed legal dimension of transparency and will be the principal focus of the subsequent discussion.[171] In particular, I will ask what is the concept of the right of access to document in the EU, how it is implementing and what is its scope of application.

1.2.4.2.1. Background: Nordic legal tradition

The Charter of Fundamental Rights builds up the existing national and international models and jurisprudential materials on protection of fundamental rights and creates the EU model.

The idea of codification of the concept of good and open administration is not new in Europe. The first traces could be found in Finland, at that time still part of the Kingdom of Sweden. On December 1766, Anders Chydenius, popularly known as "father of freedom of information",[172] in his report on freedom of expression stresses:

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[169] See: *Commission Communication on the Legal Nature of the Charter of Fundamental Rights of the European Union,* COM (2000) 644, Brussels, 11 October 2000, p. 2.

[170] See: J. Wakefield, *op. cit.,* p. 82. for a detailed reading about the evolution of the right to access to documents in the EU context, see M. Starita, *I principi democratici nel diritto dell'Unione europea,* Giappichelli Editore, Torino, 2011.

[171] See: S. Prechal and M. E. de Leeuw, *Dimensions of Transparency: The Building Blocks for a New Legal Principle?, op. cit.*, p. 51 ff; The notion of transparency is very wide and includes different aspects, such as the holding of meetings in public, the provision of information, the right of access to documents. See: P. Craig, *The EU Administrative Law, op. cit.,* p. 351; Principle of transparency in public administration is two-sided. First, it is regulated with provisions which regulate administrative proceeding with the end to provide *ex aequo et bono* decision-making process. In this sense, it includes access to all relevant documents in possess of public authorities in individual case accompanied by a statement of reasons. Second, it includes "right to know" (See: I. Harden, *Citizenship and Information,* in *European Public Law,* 2001, pp. 165 – 193). It means that every person have access to every document in possession of public administration. Found in: S. Lilić (u saradnji sa K. Golubović), *Evropsko upravno pravo* [*European Administrative Law*], Pravni fakultet Univerziteta u Beogradu, Beograd, 2011, pp.74 - 75.

[172] Anders Chydenius was Finnish priest, Member of Parliament and the most famous Finnish social thinker of the eighteenth century. See more: J. Mustonen (ed), *The World's First Freedom of Information ACt. Anders Chydenius' Legalicy Today,* Anders Chydenius Foundation Publications, Kokkola, 2006, pp. 98 - 101 (available at: http://www.access-info.org).

"No evidence should be needed that a certain freedom of writing and printing is one of the strongest bulwarks of a free organisation of the state, as without it, the estates would not have sufficient information for the drafting of good laws, and those dispensing justice would not be monitored, nor would the subjects know the requirements of the law, the limits of the rights of government, and their own responsibilities. Education and good conduct would be crushed; coarseness in thought, speech, and manners would prevail, and dimness would darken the entire sky of our freedom in a few years."[173]

The same year Sweden's King Adolphus Frederik issued His Majesty's gracious Ordinance Relating to Freedom of Writing and of the Press. The King declared that having considered "greater opportunities to each of our loyal subjects to gain improved knowledge and appreciation of a wisely ordered system of government" thus "our gracious will and command that all our loyal subjects may possess and make use of a complete and unrestricted freedom to make generally public in print everything that is not found to be expressly prohibited in the first three paragraphs or otherwise in this gracious ordinance."[174]

The historical importance of the Ordinance lies in the first recognition of the principle of transparency and public access to governmental documents in the world. The Swedish example was later followed by the United States Constitution. The right to freedom of expression entered into the Constitution with the First Amendment in 1789. The focus was, however, rather on the freedom of press than on access to public information as a citizens' right. The US Freedom of Information Act was introduced in 1966.

Meanwhile the rest of Europe shows major resistance to open and transparent government. The first approach was taken in the nineties when in 1997 the Amsterdam Treaty embedded the right of access to information by providing in Article 255 the right of access to documents of the European Parliament, Council and Commission to

[173] See: J. Luoma, *Self-censorship has always encouraged censorship, Finn Anders Chydenius saw limits of "the state" in the 18th century,* Available at: http://www.hs.fi/english/article/Self-censorship+has+always+encouraged+censorship/1135218861212.

[174] The first three paragraphs considered, among others, prohibition to write or publish in print anything that is contrary to the Evangelical doctrine and Royal house. See the whole text of His Majesty's Gracious Ordinance Relating to Freedom of Writing and of Press (1766), translated by Peter Hogg, in J. Mustonen (ed), *The World's First Freedom of Information ACt. Anders Chydenius' Legalicy Today,* Anders Chydenius Foundation Publications, Kokkola, 2006.

all natural and legal persons residing or having their registered office in one of the Member States.[175] However, the provision proclamation of the access to documents of the European Parliament, the Council and the Commission was small part of such fundamental concept.[176]

A significant step forward was the Charter of Fundamental Rights of the European Union in 2000. The Charter includes both freedom of expression and the right of access to documents. In 2001 the first regulation on access to documents was adopted. The approach adopted in Regulation No 1049/2001 corresponds to the Nordic concept of public access to documents. Every natural or legal person resident or established in the EU enjoys the right to request access to documents held by an EU institution without the need to specify any reason.[177]

Finally, the Treaty of Lisbon recognized the right to access to documents as legally binding fundamental right of the EU. The present Article 15 (ex Article 255) of the Treaty under the title "Provisions having general application" reflects changes in the case-law and an extension of the principle beyond the EU institutions to cover other "bodies, offices and agencies."[178] A specific link is made between the principle of transparency and the idea of good governance in the opening sentence of the provision, which states that "in order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible."[179] It is worth noting that the importance of transparency is not fully recognized as a legitimizing principle of the EU system of governance.[180]

This duty of openness is further reiterated in a new article, Article 298, which is located within the section of the Treaty entitled "Legal Acts of the Union." This article states that "in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient, and independent European administration."

The Nordic countries are internationally regarded as forerunners in regards to transparency and access to public documents. Therefore it is only logical for the

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[175] See more *infra* 1.2.3.

[176] See: A. Tomkins, *Transparancy and the Emergence of a European Administrative Law,* in *Yearbook of European Law,* Vol. 19, Issue 1, p. 219.

[177] For detailed analyse of the Regulation 1049/2001 see *supra* 1.2.4.2.2.

[178] Article 15 (ex 255) states: "3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph."

[179] Article 15 (1) of the Treaty of Lisbon.

[180] See: M. Smith, *Developing Administrative Principles in the EU: A Foundation Model of Legitimacy?,* in *European Law Journal,* Vol. 18, 2/2012, p. 279.

Danish Presidency of the European Union in 2012 to put special emphasis on the transparency of the EU. Public discussion is largely focused on reform of the rules that govern public access to the EU documents. However, in the present moment the European Commission with support of a majority of the Member States (particularly large countries including France and Germany) is pressing for transparency-reducing amendments to the Regulation No 1049/2001 that would exclude the entire classes of information or narrow the definition of a document.[181]

In conclusion, we can only hope the Commission will withdraw the file because right to access one's documents and the principle of transparency are the core principles of democracy. Governments must abide by these same principles if they are to keep close relations with their citizens. Finally, "if a government does not trust its citizens, how can one expect the citizens to trust their government?"[182]

1.2.4.2.2. Regulation No 1049/2001/EC

The right of access to documents has been implemented in Regulation No 1049/2001 of the European Parliament and of the Council [hereafter the Regulation].[183] The Preamble establishes its purpose "to give the fullest possible effect to the right of public access to documents", and in so doing, "to strengthening the principles of democracy and respect for fundamental rights."

Any citizen of the Union and any natural or legal person has a right to request access to documents drawn up or received by an institution and in its possession in all areas of the Union, without stating his or her reasons.[184] The right is not absolute and does not imply that all documents must be made public. The Regulation provides a list of exceptions which may justify restraining access to documents. The exceptions to access should be made when the disclosure would

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[181] The term "present moment" refers to the 20 June 2012 when is published on line this information. See more on web site http://www.access-info.org/en/european-union/262-denmark-drops-reform-1049.

[182] See: L.Luhtanen, *Transparency at the core of democracy,* in J. Mustonen (ed), *The World's First Freedom of Information ACt. Anders Chydenius' Legalicy Today,* Anders Chydenius Foundation Publications, Kokkola, 2006, p. 57.

[183] *Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001, Regarding Public Access to European Parliament,* Council and Commission documents Official Journal 2001 L 145/43. available at: http://www.europarl.europa.eu; the Regulation replaced earlier Decisions adopted by the Council and the Commission in attempt to achieve greater transparency of activity: Decision 93/731 on Public Access to Council Documents Official Journal 1993 L 340/43 and Decision 94/90 on public access to Commission documents official Journal 1994 L 46/58. See more: J. Wakefield, *op. cit.,* p. 83.

[184] Article 2 (1) of the Regulation. In paragraph 2 of the same Article states that the institutions *may* grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

undermine the protection of the public interest (public security; defence and military matters; international relations; the financial monetary or economic policy of the Community or a Member State); privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data; commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice and the purpose of inspections, investigations and audits.[185]

The Regulation use term "document" to define any content whatever its medium concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.[186] Such document is accessible to the public either following a written application or directly in electronic form or through a register.[187] In 2008 the Commission proposed changes of such "wide definition" by stipulating that document needs to be "formally transmitted to one or more recipients or circulated within the institution or otherwise recorded."[188] This narrow stipulation of the definition seems to be contrary to the Preamble's general purpose of fullest possible access to documents. Nonetheless, the new definition excludes documents meant for internal communication in turn it greatly limits access to one's documents regardless of the document's purpose of function.[189] In addition, the proposal goes further by dealing that the definition of "document" should include data contained in electronic systems insofar as these can be extracted in readable form. Such exclusion of databases could seriously constrict the access to an entire database or even to part of it if the "tools" are not available. The Commission's restrictive policy in this issue could be found as a "retaliatory response" to the jurisprudence of the European Courts relating to the Regulation 1049/2001.[190]

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[185] Article 4 (2) and (3) of the Regulation.

[186] Article 3 (a) of the Regulation.

[187] Article 2 (4) of the Regulation.

[188] See: *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament*, Council and Commission documents, Commission of the European Communities, COM(2008) 229 final, 2008/0090 (COD), Brussels, 30 April 2008, p. 8; After launching the European Transparency Initiative in 2005, the Commission adopted its Green Paper (See: *Green Paper: Public Access to Documents held by institutions of the European Community, A review,* COM (2007) 185 final, Brussel, 18 April 2007).[188] On 30 April 2008 the Commission proposed a series of amendments to the Regulation on access to EU documents (1049/2001). The measure should be adopted under co-decision whereby the Council of the European Union (the 27 governments) and the European Parliament have to agree on any changes.

[189] See: M. Augustyn and C. Monda, *Transparency and Access to Documents in the EU: Ten years on from the Adoption of Regulation 1049/2001,* p. 18 (available at: http://www.eipa.eu).

[190] *Ibidem*

The Regulation applies to the EU institutions. It provides that application for access should be done in a sufficiently precise manner to enable the institution to identify the document, additionally the institution is obliged to request clarification if necessary.[191] It is worth noting that legislative documents, usually not accessible in the national legislation, are directly accessible in the EU.[192]

In relation to the Member States the Regulation is directly applicable.[193] Upon the request for a document in its possession a Member State, unless it is clear that the document should or should not be disclosed, consults the institution concerned in order to take decision that does not jeopardise the attainment of the objectives of the Regulation.[194] The Member State may instead refer the request to the institution.[195] Furthermore, a Member State may request an institution not to disclose a document without its prior agreement.[196] In the *Isabella Scippacercola*[197] case the General Court held that a Member State "with regard to documents originating from a Member State which are in the possession of an institution, the Member State has the right to request that institution not to disclose them. That Member State is not obliged to state reasons for its request under Article 4(5) and it is not for the institution to examine whether non-disclosure of the document in question is justified, inter alia, in the public interest." Thus, the ruling of the General Court in this case recognised Article 4 (5) of the Regulation. The effect of this provision could be that national legislations on secrecy and confidentiality may be extended by the Member state to its dealings with the European institutions. The same interpretation of Article 4 (5) of the Regulation

[191] Article 6 (1) and (2) of the Regulation.

[192] See: Artt. 2 (4) and 12 (2) of the Regulation.

[193] Although the purpose of Regulation is not to amend national legislation on public access to documents, it is stated that Member States should take care not to hamper the proper application of the Regulation, see Preamble of the Regulation para. 15. As explained by the Court "the power conferred on Member States by Article 4(5) of Regulation No 1049/2001 is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents", see Case T-76/02 *Mara Messina v Commission* [2003] ECR II-3203 para. 41.

[194] Article 5 (1) of the Regulation

[195] Article 5 (2) of the Regulation

[196] Article 4 (5) of the Regulation; Sometimes appears the problem of "mixed administration" when national administrations are so closely entwined with the EU administration which lead to perplexedly situation and impossibility to distinguish one from other, see J.H. Jans, S. Prechal, R. de Lange and R. Widdershoven, Europeanisation of Public Law, Europa Law Publishing, Groningen, 2007, pp. 29 – 32; The European Ombudsman stated that „on the one hand, the exercise of public authority closely connects the national and Union levels. On the other hand, there is a rigid separation of those levels when it comes to the legal framework of transparency", see Response of the European *Ombudsman, P. Nikiforos Diamandouros,* to the Commission's green paper "Public Access to Documents held by institutions of the European Community: a review", 11 July 2007, available at: http://www.ombudsman.europa.eu/resources/otherdocument.faces/en/3892/html.bookmark.

[197] Case T-187/03 *Isabella Scippacercola v Commission* [2005] at p. II-1031.

was held by the General Court in *IFAW* case.[198] However, such ruling of the Court was refused by Advocate General Maduro in his Opinion in *Sweden*[199] case where he interpreted the mentioned Article in context of the fundamental right of access to documents and concluded that the first cannot be recognized as a right of veto for the Member States.[200]

In the *Sweden* case the Court stated that the institution is itself obliged to give reasons for a decision to refuse a request for access to a document.[201] That information will allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review.[202]

In 2008, on the base of the *Sweden* case, the Commission proposed that Member State should give a reason in the case of non-disclosing the requested document, based on Regulation No 1049/2001 or on relevant similar and specific rules in its national legislation, in which case the institution will deny access to the document.[203] This could raise the question regarding the application of the Regulation in the Member States in particular in those which have non-existent or weak access to information laws.[204]

In majority of the Member States the right of access to documents is considered a fundamental right, and it is therefore constitutionally guaranteed as a principle of transparency. The Constitution of Finland, for example, provides that "documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone

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198 See: Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135.

199 Case C-64/05 P *Sweden v Commission,* judgement of 18 December 2007.

200 See: S. Prechal and M. E. de Leeuw, *Transparency: A General Principle of EU Law?,* in U. Bernitz, J. Nergelius and C. Cardner (eds), *General Principles of EC Law in a Process of Development,* Kluwer Law International, 2008, p. 212; In relation to the Case *IFAW* P. Craig underscore that was so "notwithstanding the wording of Article 4 (5), which was not framed in mandatory terms and did not naturally suggest that the Member State possessed a veto in this regard. If the Community legislator had intended the Member Sattes to have a veto power this could be simply and clearly expressed in terms comparable to Article 9 (30) of the Regulation, which states that sensitive documents shall be released inly with the consent of the originator." See: P. Craig, *EU Administrative Law, op. cit.,* p. 357.

201 Artt. 7 and 8 of the Regulation

202 Case C-64/05 P *Sweden v Commission, op. cit.,* para. 89; The arguments of the parties in this case were opinion of three Nordic countries (the Kingdom of Sweden, the Kingdom of Denmark and the Republic of Finland) about these issue. All of them consider that a Member State which opposes disclosure of a document should give reasons for its position, so as to enable the institution concerned to make sure that the reasons put forward are capable of justifying a refusal to grant access and to comply with its obligation to state reasons if it takes a decision to that effect. *Ibid.,* paras. 23, 35 and 36.

203 See point 3.4 of the *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, op, cit.,* at p. 8.

204 For example, Luxembourg, Cyprus, Malta and Spain do not have access to informations acts. See: http://www.access-info.org/en/european-union/139-proposed-amendments-to-eu-access-to-docs.

has the right of access to public documents and recordings."[205] In the Italian legal order the right of access to documents is comprehensive regulated in Administrative Procedure Act n. 241/1990 Chapter V under the title *Accesso ai documenti amministrativi*.[206] In consideration of its important public interest objectives the Act states that *l'accesso ai documenti amministrativi costituisce principio generale dell'attività amministrativa al fine di favorire la partecipazione e di assicurarne l'imparzialità e la trasparenza*.[207] It provides that all administrative acts are accessible with the exceptions provided by law.[208] An essential part of the right of access to documents is that its request must contain a statement of reason.[209] The examination of documents is free.[210] In Finland, on contrary, handing out a copy of a document may be subject to a charge.[211]

The European Union's approach to the right of access to documents and principle of transparency is developed in four important phases. First, adoption of the Article 255 of the Treaty of Amsterdam was the first recognition of the right of access to documents. Second was the implementation of the Regulation 1049/2001 as a first EU legal act that in an exhaustive manner regulates this material. The Charter of Fundamental Rights, as a third phase, proclaimed access to documents as fundamental right in the EU. Finally, with the adoption of the Treaty of Lisbon the fundamental right of access to documents became legally binding in EU. Nonetheless, the new Article 298 of the Treaty of Lisbon proposes legal basis for the adoption of a binding administrative code vis-à-vis the institutions. Will the EU finally interrupted the historical resistance to the openness of administration and adopted administrative code is very doubtful in the present moment.[212]

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[205] Section 12 of the Constitution of Finland.

[206] The Chapter V is divided into 6 sub-sections: 1. Definizioni e principi in mateira di accesso; 2. Ambito di applicazione del diritto di accesso; 3. Esclusione dal diritto di accesso; 4. Modàlità di esercizio del diritto di accesso e ricorsi; 5. Obbligo di publicazione; 6. Commissione per l'accesso ai documenti amministrativi.

[207] Article 22 (2) of the Italian Administrative Procedure Act, *op. cit.*

[208] The list of exception is provided in Article 24 of the Act.

[209] Article 25 (3)

[210] Article 25 (1)

[211] Section 34 of the Act of Openness of Government Activities

[212] The foundation of „Right to Know", as a fundamental right in the EU was contributed also to great extend to the activity of the EU member states within the European Council (as a regional organization where all EU state members have the status of a member). Within the framework of the European Council, a string of recommendations was brought forth, the most known are the Recommendation of the European Council no. R (81) 19, relating to the access on information possessed by public organs; and the Recommendation of the European Council no. R (2002) 2 relating to the access to official documents. Whereas, within this organization, the right to have to information access was for the first time approved in 2009 as a human right in practice of the European court for human rights in two cases: *Társaság a Szabadságjogokért v Hungary* and *Kenedi v Hungary* [Case *Társaság a Szabadságjogokért v Hungary* (Appl. no. 37374/05) judgment from 14 April 2009; Case *Kenedi v Hungary* (Appl. no. 31475/05) judgment from 26 May 2009. In the first case, Hungary violated the right for the free access

1.3. European ombudsman and good administration

The European Ombudsman is the cornerstone of institutional EU administrative law. In considering its achievements in dealing with protection of good administration, several questions arise: What are the hallmarks of good administration under the Ombudsman's Code of good administrative behaviour?, How is established the scope of the protection of good administration under the mentioned Code? and How is applied good administration in the practise of the European Ombudsman?

The following section will focus on the Code of good administrative behaviour in order to respond to previously raised questions.

1.3.1. European Code of good administrative behaviour

The European Code of Good Administrative Behaviour [hereafter, the Code] was adopted by the Ombudsman on 28 July 1999.[213] As explained in it, the Code

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to information as its courts (Constitutional court and thereinafter in the proceedings of protection the District court) did not enable the insight to the lodged claim for the estimation of constitutionism of the provisions of criminal law relating to consumption of drugs as submitted to Constitutional court by the Hungary parliament member. In the other case, the Ministry of Interior of Hungary did not act as per the resolution of the Court relating to the permission to access history documents from which the designation of secrecy was abolished, which were in possession of Hungary secret services in the sixties of XX century. The right to access information in both cases was recognized as per the freedom of expression as stipulated by Article 10 of the European Convention on the Human Rights and Fundamental Freedoms. For the introduction of administrative transparency in state members of the European Council, by favor of this organization the first international document was accepted that directly and exclusively relates to the right to free access to information – Convention on Access to Official Documents (Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies). So far 12 countries have signed it. See: S. Lilić (u saradnji sa K. Golubović), *Evropsko upravno pravo* [*European Administrative Law*], *op. cit.*, pp.76.

[213] *The European Code of Good Administrative Behaviour*, Luxembourg, Office for Official Publications of the European Communities, 2005. In 1998 Roy Perry MEP proposed the „codification" of the standards of good administration. The first European Ombudsman Jacob Söderman (1995-2003), drafted the text and presented to the European Parliament as a special report in 1999. He accentuated the importance of good administration for the democratic and legitimate governance (good government) and also expressed the need to include the right to good administration in the catalogue of the fundamental rights. „To include (the right to good administration) in the Charter of Fundamental Rights could have a broad impact on all existing and future Member States, helping make the 21st century the century of

"takes account of the principles of European administrative law contained in the case law of the Court of Justice and also draws inspiration from national laws."[214] This could be interpreted in a way such that the Code describes good administration in legal terms and does not necessarily reflect the Ombudsman's interpretation of good administration. Almost simultaneously, the right to good administration was legally introduced by Article 41 of the Charter of Fundamental Rights, together with the right which grants any person to refer to the European Ombudsman the cases of maladministration in the activities of the European administration.[215] This points to the fact that the Code is intended to elucidate what the Charter's right to good administration should mean in practice.

In 2001 the European Parliament approved the Code and enhanced its political legitimacy by calling the Ombudsman "to apply it in examining whether there is maladministration, so as to give effect to the citizen's right to good administration in Article 41 of the Charter of Fundamental Rights."[216] The Code applies to all officials and other servants to whom the Staff regulations and Conditions of employment of other servants apply, but also on other employment schemes such as persons employed under private law contracts, experts on secondment from national civil service and trainees.[217] It is intended to serve as a guideline for their interaction with the public and citizens, business, civil sectors organisations, regardless of their citizenship or state origin.[218] The material scope of the Code encompasses general principles of good administrative behaviour which apply to all relations of the institutions and their administration with the public, unless specific provision imposes additional quality or greater legal power of specific provision.[219] The Code's provisions create an amalgam of different principles, standards, procedural and substantive rules evolved in administrative practice and jurisprudence of the EU and its Member States. However,

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good administration." See: J. Söderman, *How to be a good ombudsman*, Conference of European Ombudsmen in Higher Education, Madrid 12 – 13 January 2004, available at http://www.jacobsoderman.fi); Seven years later Söderman stated that "a modern EU law on good administration would surely be seen as the Union reaching out to its citizens and leaving its bureaucratic past behind" (J. Söderman, *Good administration as a Fundamental Right in the EU*, 2007, p. 3, available at http://www.jacobsoderman.fi).

214 The Code of good administrative behaviour, *op. cit.*, p. 6.

215 Article 43 of the EU Charter. The right is also guaranteed by the Treaty of Lisbon in Article 20 (2, lett. d): "the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language."

216 The European Code of Good Administrative Behaviour, op. cit., p. 8.

217 Article 2, paras. 1 and 2 of the Code.

218 In this respect, the fair treatment is granted also to non-EU citizens and firms (Article 3 (3) of the Code of good administrative behaviour).

219 Article 3 of the Code of good administrative behaviour.

the Code is lacking any kind of categorization for these principles, standards and rules.[220] For the purpose of this inquiry this section will focus on the objectives and guiding principles of good administrative behaviour.

1.3.1.1. The objectives and guiding principles of good administrative behaviour

The central aspects of the Code are the principle of lawfulness and protection of citizen's subjective rights.[221] Although a large number of these rights are provided in the EU Charter and other EU legal sources, the subsequent analysis intend to demonstrate that many of the Code's provisions are not merely restatements. Primary focus of this section are the Code's principles that correspond to the "umbrella" right to good administration. Their legal formulation and meaning through the practice of the European Ombudsman will be examined further.[222]

A) Lawfulness

According to Article 4 (1), the officials must act according to law and apply the rules and procedures laid down in Community legislation. Thus, the Code confirms that the right to good administration is based on the rule of law. An essential guarantee of lawfulness is the requirement stated in paragraph 2 of the mentioned Article that an official should take care that decisions which affect the rights of interests of individuals have a basis in law and their content complies with the law. Such a broad definition of the lawfulness places a strong emphasis on protection of the individual's vis-à-vis the administration.

B) Impartiality and independence

The requirement of impartial administrative behaviour is guaranteed under Article 8 of the Code together with independence. According to the Code, the

[220] The Code contains 27 articles, including 24 articles devoted to the different principles of good administrative behaviour.

[221] This confirms that Code follows the Scandinavian/Dutch interpretation of good administration as noted by M. Soria in *Die Kodizes für gute Verwaltungspraxis,* in *Europarecht,* 5/2001, pp. 685 – 688.

[222] This part of work is based on the research and cases selected by M. Davinić in: M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

individual has right to an impartial and independent official who abstains from any arbitrariness and preferential treatment in performance of its administrative functions.[223] This points, at least, to the two facts. First, unlike the EU Charter the Code explains the meaning of impartiality and independence as a duty of staff of Community institutions to avoid any action which could lead to arbitrary action or preferential treatment. Second, as every official has duty of impartiality and objective manner of behaviour in its relationship with the individuals than, using the analogous interpretation a minori ad maius, this will be reflected also to every Community institution. An important guarantee of impartial and independent treatment is further ruled in paragraph 2 of the mentioned Article that an official in taking its action should avoid conflict of interests.

The principles of impartiality and independence mostly refer to the latter in the Ombudsman's practice. In the complaint 3296/2005/ID, for example, the Ombudsman dealt with a potential conflict of interest in a tender procedure for award of a contract for a project under the Tacis Programme. He concludes, among others, that when "Evaluation Committee deals with the potential conflict of interest on the part of one of its members, the member in question cannot, in accordance with the principles of good administration, participate in the Committee's consideration of and decision on the matter."[224] Clearly, one cannot be a judge in his own case.[225]

The impartiality is also mentioned in Article 11 of the Code with regard to the official acts. It states that the official is obliged to act impartially, fairly and reasonably. Unlike the impartiality the concepts of fairness and reasonableness remain undefined in the Code. However, they were identified through the Ombudsman's practice.

A large number of complaints in which there was an issue of unfair treatment by institutions, concerned the process of awarding grants and subventions, and their distribution within the various projects organized within the EU. Thus, in the case 866/2006/SAB the complainant alleged that the Commission failed to properly handle its pre-proposals. The Commission wrongfully concluded that the pre-proposal was sent after the deadline (1 November 2005). The pre-proposal was deemed ineligible

[223] Article 8 (1) of the Code.

[224] See Case 3296/2005/ID in The European Ombudsman, *Follow-up critical and further remarks, how the EU institutions responded to the Ombudsman's recommendations in 2007*, Strasbourg, 2007, pp. 22 -23.

[225] M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

because the dates present on the airway bills of the express mail company DHL which delivered the pre-proposal to the Commission showed 2 November 2005 which was a day late. The Ombudsman's inquiry revealed that the distribution and delivery of the pre-proposal was handled by two companies. The Ombudsman noted that DHL, the express mail delivery service, received the package from another company called SPEEDEX and not by the complainant. In this situation, the Ombudsman concluded that the Commission failed to properly handle the complainant's pre-proposals in question, which in turn led to their exclusion. He concluded in this case an instance of maladministration.[226] Unfair acting by European officials could be found also in the field of tenders,[227] unpaid cash earnings,[228] violating the confidentiality of the relationship between doctor and patient by the Commission staff,[229] etc.

The lack of the requirement of reasonable acting of the Community officials, as pointed out by M. Davinić, usually reflects as negligence in performing their duties. The Ombudsman's practice about this issue deals mostly in the case of delay in payments. For example, in compliant 902/2002/ME the complainant informed the Ombudsman that she did not receive full payment from the Commission, for funeral costs, six months after the death of her son who had been a Commission official. The Commission explained that the delay was because the complainant gave them two bank accounts and the Commission needed a confirmation from her bank to make sure that both bank accounts belonged to her. The complainant commented that after Ombudsman's intervention the Commission asked her to confirm the bank accounts and after the confirmation the Commission paid all costs. Thus, the Commission's negligence has led to non-reasonable delay of payment.[230]

C) Reasonable time-limit for taking decisions

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[226] See Complaint 866/2006/SAB European Ombudsman Annual Report [hereafter EOAR] 2006, in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

[227] Complaint 1081/2001/SM, EOAR 2002, in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

[228] Complaint 81/2000/ADB, EOAR 2001, in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

[229] Complaint 819/19.8.96/GV/I/VK, EOAR 1998, in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

[230] Se more in: M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

The significant innovation in respect to the principle of good administration is providing the precise term of duration of administrative proceedings. Article 17 (1) of the Code lays down that official is obliged that "a decision on every request or complaint to the institution is taken within the reasonable time-limit, without delay, and in any case no later than two months from the date of receipt." The same rule applies for written answer from Community staff and for answer to administrative notes. Such progressive solution is welcomed. However, this rule is not absolute. Article 17 (2) allows prolongation in the case of the complexity of the issue when the matter cannot be decided upon within a reasonable time-limit, the officials should inform the citizen thereof as soon as possible. It is also worth noting that the duty of reasonable time-limits refers only to "decisions on […] *request or complaint* to the Institutions" and "answering letters […] and for answer to administrative notes." (emphasis added)

In the Ombudsman's practise the reference to the principle of good administration of the duty of reasonable time-limit for taking decisions is mostly considered in relation to the public access to documents. In the complaint 1798/2004/PB, for example, the complainant alleged that there were unjustified delays in the Commission's reply under Regulation 1049/2001. After intervention of the Ombudsman the Commission made an apology for the delays and explained that they were due to a heavy workload. In addition, the Commission stated that they decided to provide a more systematic feedback process to citizens in all cases. With this new process there is a risk that information replies may not be sent within the deadline due to a sudden inflow of questions or because of complexity of other cases.[231]

D) Access to documents

The principle of good administration of public access to documents imposes upon the officials two responsibilities. First, when the staff of the Community deals with requests for access to documents they should apply the rules adopted by the institutions and in accordance with the general principles and limits laid down in Regulation No 1049/2001.[232] Furthermore, if the officials could not comply with an

[231] Complaint 1798/2004/PB, EOAR 2005, See more in in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), *op. cit*.
[232] Article 23 (1) of the Code.

oral request for access to documents, the citizen shall be advised to formulate it in writing.[233]-

Among the complaints that the Ombudsman receives the most numerous complaints are still, as pointed by M. Davinić, about the breach of principle of good administration in relation to public access to documents. This concerns, for example, complaints about the lack of providing the requested information or providing the wrong information. In case 493/15.3.96/HMT/DE the German citizen lodged a complaint against the European Commission because he did not receive any reply on his question regards his right to free movement. The Commission apologized for the delay in replying and immediately replied to the complainant. The Ombudsman closed the case since there was no need to pursue the matter any further.[234]

In a number of complaints the norm in context, access to documents, has been refused in the disclosure of the reasons for rejecting a candidate. For example, in complaint 46/27.07.95/FVK/PD the complainant alleged that she had not been given reasons why she had failed in a selection procedure organized by the European Environment Agency for filling a position of project manager. She also stated that her written requests addressed to the Agency had not been answered. However, the Environment Agency stated that the criteria used by the selection committee as well as the qualification profile of the person who obtained the post could not be published. Authorities responsible for the selection process of candidates are required to give reasons for their decisions; this is in accordance with the case law of the European Court of Justice. After having attempted to achieve a friendly solution, the Ombudsman made the recommendation and left the Environmental Agency 3 months to accept it. The Agency accepted the recommendation and disclosed the reasons to the candidate.[235]

E) Right to be heard and to make statements

Right to be heard is guaranteed in the Article 16 of the Code and is treated together with the requirement of making statements. Under the Code, the individual

[233] Article 23 (2) of the Code.
[234] Complaint 493/15.3.96/HMT/DE, EOAR 1996 in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration),*op. cit.*
[235] Complaint 46/27.07.95/FVK/PD, EOAR 1996, in in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), *op. cit.*

has a right of defence at every stage in the decision making procedure where its rights or interests are involved. Such wide formulation of the right of defence (right to be heard and to make statement) could be found similar to the approach taken by the Court of Justice in relation to the right to be heard in the case *Transocean Marine Paint Association*. In this case the right to be heard was recognized to a person "whose interests are perceptibly affected".[236] However, such broad formulation of the right to be heard was not accepted by the latter jurisprudence of the European Courts.[237] Actually, the Courts took restrictive formulation by recognizing the right to be heard only to persons "adversely affected by the decision".[238] In addition, the Code's right of defence is guaranteed "at every stage" in the decision making procedure. This confirms once again the Ombudsman's contribution to wider and stronger protection of the right to good administration permeates the entire Code. An essential guarantee of right to defence is the rule stated in Article 16 (2) that "every member of the public" has right to submit written comments and oral observations before the decision is taken.

Further, M. Davinić pointed out that in dealing with the right to defence the Ombudsman founded that the right of defence constitutes a general principle of Community law, which must be respected even in the lack of an explicit provision. In the complaint 620/2004/PB, for example, the complainant claimed that the Commission, among other things, had breached his right to a defence. A harassment complaint lodged by a Commission official against the complainant who is also a Commission official lead the Commission to set up a team to conduct an administrative inquiry into the allegations. The team of investigators conducted and concluded their inquiry without giving the complainant the chance to defend himself. The inquiry report stated that there was evidence indicating harassment and a proposal was made for the issuance of a warning to the complainant. Unfortunately the investigating team had finalised the report and forwarded it to the relevant bodies without informing the complainant and without giving him a reasonable opportunity to comment on. The Ombudsman pointed out that "respect for the right of defence constitutes a general

[236] Case 17/74 *Transocean Marine Paint Association v Commission op. cit.,*see *infra* 1.1.2 at p. 13.

[237] It was also noting by J. Mendes, *op. cit.,* p. 8.

[238] Noting also such formulation of the right to be heard in the European case –law, K. Kanská, *op. cit.,* p. 318. "It must be stressed in this respect that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure [...]" See: Case C- 135/92 *Fiskano AB v Commission* ECR [1994] I-2885 para. 39.

principle of Community law, which must be observed even in the absence of an express provision."[239]

F) *Duty to state the grounds of decisions*

The right to reasoned decision is provided in Article 18 of the Code as a duty of the Institution to state the grounds of every decision which adversely affects the rights or interests of a private person. The meaning of stating of grounds is explained as "indicating clearly the relevant facts and the legal basis of the decision". It could be noted that referring the duty only to the decisions which "adversely affects the rights or interests" of individual person narrows the scope of its application.[240]

Majority of the complaints about breaching the right to state the decisions refer to the employment hiring process. In the joined complaints 1260/98/(OV)BB and 1305/98/(OV)BB the complainants protested against the refusal of the Parliament to allow them to take part as candidates for the administrator position which required the knowledge of the Greek language. The Parliament informed the complainants that their applications were excluded because they didn't have enough professional experience; in this case the minimum was two years. The Ombudsman concluded that, from the information submitted by the complainants and by the Parliament, this institution had the right to refuse the complainants applications because they did not fulfil the requirement requested. However, according to the Ombudsman the standard replies sent out by the Selection Board did not contain enough details for the complainants to understand the reasons on which the Board's decision had been based. The replies failed to provide ample reasons for the rejection of the candidates' applications. In this case, the Selection Board of the Parliament breached the principle of good administrative behaviour.[241]

A number of complaints refer to the lack of reasoned decision in relation to the refusal for public access to documents. Thus, in complaint 573/2001/IJH the complainant contested the Ministers of Council's refusal to access to certain document.

[239] See more Complaint 620/2004/PB EOAR 2005 in in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), Beograd, 2008.
[240] Noting also the narrow formulation of the provision, K. Kanská, *op. cit.,* p. 320.
[241] Joined complaints 1260/98/(OV)BB and 1305/98/(OV)BB, EOAR 2000, in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008,*op. cit.*

According to the Ombudsman, a breach of good administration occurred because the Council decided to refuse access and additionally they did not provide any reasons or explanations with regards to the confidentiality with respect to the document in question. The Council did not in any way demonstrate that the disclosure of the document would seriously affect the Councils decision-making process. Moreover, the Council gave access to a similar document in the earlier period. The Ombudsman's draft recommendation to the Council to reconsider the application in accordance with Regulation 1049/2001. According to the recommendation the Council gave access to almost the whole document and for the non-disclosed parts of documents the Council reasonably justified non-disclosure.[242]

G) Reply to letters in the language of the citizens

The right of every citizen of the Union or any member of the public to write to the institutions in one of the languages of the Treaty and to have answer in the same language is guaranteed in Article 13 of the Code. The scope ratione personae of this right is expanded in paragraph 2 of the same Article as possibility to apply it to legal persons such as associations (NGOs) and companies "as far as possible".

The Ombudsman usually receives the complaints for the breaching of Article 13 of the Code as a consequence of negligence by the Community institutions. In complaint 1841/2005/BM, for example, the reply to a job application had been delivered in a different language because of negligence of the officials. The complainant applied for a job, in Spanish, with the Representation of the European Commission in Barcelona ("the Representation") but the Commission sent him an e-mail in Catalan which informed him that he had not been shortlisted for that position. The complainant claimed that the Commission had not complied with Article 21 of the EC Treaty and Article 13 of the Code because they did not reply to him in the same language as the one in his original application and additionally Catalan was not foreseen in the EC Treaty. The Representation generally uses the two official languages of the region, as established in the Spanish Constitution. All non-selected candidates received an e-mail in Catalan and the Commission regretted this mistake explaining that a

[242] See more Complaint 573/2001/IJH, EOAR 2003 in in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), [European Ombudsman and maladministration (Maladministration)], doktorska teza, Beograd, 2008.

Spanish version of the e-mail and an apology were sent to all non-selected candidates. The complainant was satisfied with the outcome and thanked the Ombudsman and his services for the help.[243]

H) Others principles

Other provisions which guarantee good administrative behaviour in the Code include: the principle of proportionality; legitimate expectations, consistency and advice; absence of discrimination and of abuse of power; principle of objective truth; the right to an acknowledgement of receipt and indication of the competent official; and transfer of the file *ex officio* to the competent service. These principles are connected with the previously analysed rules and all together build requirements for good administration.

In conclusion, the Code of Good administrative behaviour is a critical reference because it is relevant Code for all the EU institutions and additionally it is considered the basis of the definition of good administration by the Ombudsman.[244] Furthermore, as the Professor Diamandouros, in the course of our conversation point out (see Annexes), the provisions of the Code are not merely a restatement of existing legal rules. Finally, the Code is an excellent example which shows that unlike the relevant legal norms (primarily the EU Charter), the Ombudsman's principles of good administration require much more from the administration. The lawful behaviour and the proper behaviour are not synonyms.[245]

[243] Complaint 1841/2005/BM, EOAR 2006, in in M. Davinić, Evropski Ombudsman i loša uprava (Maladministration), *op. cit.*

[244] See: M. Smith, *op. cit.,* p. 278.

[245] See: M. E. de Leeuw, *op. cit.,* p. 30. "The judge focuses on legality. But the ombudsman's focus reaches beyond legality" , see A. Brenninkmeijer, (national Ombudsman of the Netherlands), *Fair governance: a question of lawfulness and proper conduct,* in *Rethinking good administration in the European Union,* Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries, Strasbourg, 14 – 16 October 2007, p. 29, available at: http://ftp.infoeuropa.eurocid.pt.

2. Conclusion

The evolution of good administration in the EU has revealed a steady and gradually trend. In the case-law of the European Courts, good administration was placed in the general principles of the EU legal order. Further, the principle of good administration became the fundamental right of the EU by its inclusion in the Charter of Fundamental rights in 2000. Finally, the fundamental right to good administration received the legal binding value with adoption of the Treaty of Lisbon in 2009. Without a doubt, the EU process of formalisation of good administration underlines a crucial role of the European Courts in developing the principles of good administration in the EU legal order and in establishing the groundwork for right based protection.[246] This trend was reiterated by the adoption of the EU Charter of Fundamental Rights which sought to enshrine "the very essence of European *acquis* regarding fundamental rights."[247] However, the EU strategy to build its own "bill of rights" could be seen as two sides of the same coin. On the one hand, the inclusion demonstrated that the EU recognised the importance of the protection of the fundamental rights and expressed the EU aspire to full protection of these rights which are sine qua non of the Union legitimacy. It was seen also as an effort to bring the fundamental rights home, in European Union legal order, and to enshrine the visibility of fundamental rights for the benefit of the citizens.[248] On the other, the EU was not ready yet to give the full potentials to the protection of fundamental rights. The lack of the political will could be seen as the main obstacle in the process of formalisation of the fundamental rights by not giving them the legal binding value.[249] It was reflected on the process of European integration and slowed it.

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[246] As noted by S. Ninatti *non si puo' evitare l'impressione di una aprticolare vivacita' di dialoge tra la Corte di giustizia e il legislatore communitario: un dialogo che, in tempi piu' o meno lunghi, sfocia poi nell'espressa codificazione dei risultati consequiti nelle aule dei tribunali. Quanto detto conferma non solo il ruolo della Corte di motore di integrazione europea, ma anche la natura stessa di tale integrazione che si characterizza pe ressere un sistema a forte matrice giurisprudenziale.* See: S: Ninatti, *Giudicare la democrazia? Processo politico e ideale democratico nella giurisprudenza della Corte di giustizia europea,* Giuffrè Editore, Milano, 2004, p. 7.

[247] See: Commission Communication on the Legal Nature of the draft Charter, *op. cit.,* para. 1.

[248] See: T. Tridimas, *op. cit.,* p. 357.

[249] Some commentators has been noted that the Member States played a Machiavellian role in the issue about legally binding character of the Charter, see P. Craig, *The Lisbon Treaty: law, politics, and treaty reforms, op. cit.,* p. 197.The drafting of the charter represented „the political process taking back into its own hands the definition of the system and catalogue of fundamental rights in the EU", see P. Craig, *The Lisbon Treaty: law, politics, and treaty reforms, op. cit.,* p. 197, see M. Maduro, *The Double COnstitutional Life of the Charter of Fundamental Rights of the European Union,* in T. Hervey and J. Kenner (eds), *Economic*

In the nine years separating the EU Charter and the Treaty of Lisbon, the EU Charter has been used by the European Courts only to support and reinforce a result that would have been reached even in its absence. The analysis of the case-law demonstrated that the General Court was much more active in recognizing the right to good administration under the Article 41 of the EU Charter.

The Lisbon amendments, finally, gave constitutional legitimacy to the right to good administration and reinforced "the role played by administrative mechanisms in the battle for institutional legitimacy in the EU."[250]

The most relevant innovation in the EU Charter of Fundamental Rights with respect to the administrative rights is the proclamation of the right to good administration under Article 41. The Preamble of the EU Charter contained an explanation that the Charter "reaffirms [...] the rights as they result, in particular, from constitutional traditions and international obligations common to the Member States [...]."[251] Furthermore, in the explanations on the Charter's Article 41 is explicitly stated that "the right to good administration is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia good administration as a general principle of law."[252]

The EU Charter, as has been argued already, *builds up* and *does not substitute* the existing sources and systems of protection of the right to good administration in the EU. With respect to this, the EU Charter is used as a legal mean to reinforce and supplement the existing principles and rights, and to contribute towards further developing and entrenching of the right to good administration.

The right to good administration is explained as the right of an individual to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. The right is further composed of five separate rights: the right to be heard, the right of access to one's file, the right to a reasoned decision, the right to compensation for damage done by the Community and the right to official correspondence in one's language. Article 41 is not a complete illustration of the principles developed in this field by the European Courts. The jurisprudence has been particular active in the imposition of a non-exhaustive list of principles to guide the behaviour of European administration. Even if Article 41 in

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and Social Rights under the EU Charter of Fundamental RIghts: A Legal Perspective, Hart publishing, Oxford, 2003, p 269.

[250] M. Smith, *op. cit.,* pp. 287 – 288.

[251] Charter of Fundamental RIghts of the European Union, *op. cit.,* p. 1.

[252] *Explanations relating to the Chapter of Fundamental Rights*, *op. cit.*, p. 28.

some aspects, it was argued before, goes further such as the expressed reference to the right of access to one's file as requirement of good administration, it is submitted that Article 41 is silent about the right of the public access to documents, one the of most important aspects of good administration. The Charter resolved this concern by proclamation of the right of access to documents in the Article 42. In regards to Article 41 it should also be noted that it does not further advance the effectiveness. It provides only the right to a reasonable time handling of one's affair that addresses the issue of administrative efficiency. The effectiveness has particular importance, it was argued before, in the process of the EU enlargement in relation to the Copenhagen criteria.

The EU, in order to bring administrative legitimacy across the institutions, created the European Ombudsman, as a classic model Ombudsman. It is submitted that it will only serve as supervisor of the European administration without the power to enforce any tangible redress for the complaint. In 2001 the European Ombudsman adopted the soft-law Code of good administrative behaviour which has been an inspiration for the further adoption of the codes of the European institutions and bodies aimed to improve standards of good administration in their daily contact with the public. The overview on the Code's norms indicates that it is not merely a restatement of existing legal rules. It contains a deeply intertwined list of general principles, rights and non-legal rules which, unlike the relevant Article 41, require much more from the administration.

The EU model of good administration has hard law and soft law dimensions. The first refers to Articles 41 and 42 of the EU Charter which set down the boundaries of good administration as a public subjective right. The soft law dimension, contained in the Ombudsman's Code, states that the administration should work to advance various facets of good administrative practice that are not covered by the strict legal realm.

The process of the constitutionalisation of the right to good administration came to its end by adopting the Treaty of Lisbon in 2009. The right to good administration is fundamental, subjective, procedural and citizen's right in the European constitutional law. The individualistic approach of the EU Charter is evident and in accordance with its nature as a human rights document. The good administration imposed a set of requirements for behaviour of the Community institutions, in particular from the Commission as "the supranational nerve centre of

the Community system",[253] with the aim to protect individuals. It is a one-sided right orientated to protect the individual vis-á-vis the administration. The Code of good administrative behaviour also follows the same approach. However, the main concern is the lack of public interest in the EU Charter. The Community institutions have a duty to serve to the Community interest and, in so doing, the public interest. This is explicitly stated in the Article 13 of the Treaty of Lisbon under the title "Provisions on the institutions" that the Union should have an institutional framework "which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions." It could be noted that the Treaty has recognized the public interest before the citizen's one. Furthermore, Article 17 of the Treaty provides, among others, the duty of the Commission to "promote the general interest of the Union and take appropriate initiatives to that end." The Commission acts in the interest of the Community and its performances are to be measured in the pursuit of that objective which does not exclude the individual interest. This is a consequence of adoption of the Monnet model[254] of administration where the administrative actions are aimed to safeguard the public interest. It demonstrates the existing of the two visions of the good administration in the EU. However, the Charter fails to address this concern in the process of the constitutionalisation of the right to good administration.

The right to good administration in the EU Charter of Fundamental Rights contains the necessary foundational concept which should lead the further search towards better administration in order to effectively protect and promote individual fundamental rights. Such a model of administration is one of the main requirements in the EU process of integration. The Charter, as pointed Professor Maduro in the course of our conversation (see Interviews), is one more instrument of the European integration.

[253] A. S. Sweet and T. Brunell, *Constructing a Supranational Constitution,* in A. S. Sweet, *The Judicial Construction of Europe,* Oxford, 2004, p. 47.
[254] J. Wakefield, *op. cit.,* p. 11.

Chapter 2 - Good administration in regional context

The European Union represents a complex entity which could be regionally identified in various aspects such as, for example, the Alpine countries, the Baltic States, the Benelux or the Low Countries, the Mediterranean region, the Nordic countries and the Visegrad group. The very particular region in Europe is the one ensued after the dissolution of the Socialist Federal Republic of Yugoslavia in the Nineties which are now new created states: Bosnia and Herzegovina, Croatia, Montenegro, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia. These countries make for an interesting field of study for scholars of comparative public law. Driven by the European conditionality, they are undertaking a significant modification of their own legal order aimed to meet the Copenhagen criteria for membership.[1] The analysis which follows will show that some of these countries have managed to achieve tangible results while many of them are still grappling with the heritage of the past.

The first section of the Chapter will review the legal background of the constitutional and administrative development of the Yugoslav State with particular focus on the rule of law, efficiency, transparency and judicial review issues. The discussion further will move on to analyse the EU instruments of assistance and supervision in the accession process of the ex-Yugoslav countries as an integral part of the Western Balkans region.[2] The third section will focus on the interaction between the heritage and tradition to understand the contemporary administrative transition in the quoted above countries.

[1] With exception of Slovenia which joined the European Union on May 1, 2004.

[2] The term „Western Balkans" refers to the region comprised of South Eastern European countries involved in the European Union's Stabilization and Association Process: Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia (Kosovo under UN Security Council Resolution 1244), and the Former Yugoslav Republic of Macedonia.

1. Legal background: Journey to ex-Yugoslavia*

The historical knowledge of the constitutional and administrative evolution in protection of individual's vis-à-vis public administration in the Yugoslav state is the integral part of this comparative study. An attempt is made to understand its features which are to be used as groundwork for further examination of good administration in the case studies of Croatia and Serbia.[3]

The turning points in the institutional life of the Yugoslav state represent the Second World War and the Cold War. Relating to the section hereto it is divided in three parts: the creation of the Kingdom of Yugoslavia (1918 - 1941), the Yugoslav State from the end of the Second World War to the dissolution of the Socialist Federative Republic of Yugoslavia (1946 - 1991), and the last Yugoslav State (1992 - 2003).

1.1. Creation of the Kingdom of Yugoslavia (1918 - 1941)

On 20 July 1917, in Greece, the representatives of the Kingdom of Serbia and of the Yugoslav Committee (Croats, Slovenes and Serbs living in the Austro-Hungarian Monarchy), signed the Corfu Declaration. The Declaration represented a political agreement at the sunset of the First World War, openly proclaimed the will of the Croats, Slovenes and Serbs to the national unity based upon their "common history",

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* The term „journey to ex-Yugoslavia" has been inspired by the book „Journey to Portugal" of J. Saramago. In particular by following words:

Bisogna vedere quel che non si è visto, vedere di nuovo quel che si è già visto, vedere in primavera quel che si è visto in estate, vedere di giorno quel che si è visto di notte, con il sole dove la prima volta pioveva, vedere le messi verdi, il frutto maturo, la pietra che ha cambiato posto, l'ombra che non c'era.

See: J. Saramago, *Viaggio in Portogalo,* translated in Italian by R. Desti, Torino, Einaudi, 1999, p. 507.

[3] The importance of historical approach within the methodological procedure is widely accepted by the scholars occupying the comparative public law. In terms of R. Scarciglia *la conoscenza diretta dei luoghi, della storia e della cultura di un paese rappresenti una conditio sine qua non per far avanzare la ricerca dalla fase di conoscenza a quella di comprensione e di comparazione che caratterizano il procedimento metodologico*, see R. Scarciglia, *Diritto amministrativo nei Balcani e metodologia comparatistica,* in L. Montanari, R. Toniatti and J. Woelk (eds), *Il pluralismo nella transizione costituzionale dei Balkani: diritti e garanzie,* Università degli Studi di Trento, Litotipografia Alcione S.r.l. – Lavis, Trento, 2010, p. 255; D. Rueshemeyer and P. B. Evans stated that „the historical character of a bureaucratic apparatus must be taken into account in any attempt to explain its capacity, or lack of capacity to intervene ",see: D. Rueshemeyer and P. B. Evans, *The State and Economic Transformation: Towards an Analysis of the Conditions Underlying Effective Intervention,* in P. B. Evans, D. Rueshemeyer and T. Skocpol (eds.), *Bringing the State Back In,* Cambridge, Cambridge University Press, 1985, p. 59; Similar, P. Harris pointed to the fact that "without detailed case studies and historical knowledge the technique of painting with a "broad brush" may be far to general to be of much value", see: P. Harris, *Foundations of Public Administration: A Comparative Approach*, Hong Kong, Hong Kong University Press, p. 116.

thus, "three nations are one and the same: by blood line, language, common vital interests of their national existence, and comprehensive development of their moral and material life."[4] It has been understood as the first step towards the creation of a new state that "will be a guarantee of their national independence [...] and will be based upon modern and democratic principles."[5]

On 1st December 1918 the three national representatives that had signed the Corfu Declaration in 1917, created the Kingdom of Serbs, Croats and Slovenes. The new Kingdom was composed of six legal areas[6] which had never enjoyed a common government and which for centuries have been under the domination of different foreign powers with various cultures, religions, government types and interests.[7]

The Constituent Parliament passed on 28 June 1921, the first Constitution of the new-born Kingdom, the so-called *Vidovdanski* Constitution.[8]

The *Vidovdanski* Constitution, which took the Weimar Constitution of the Republic of Germany as a model, proclaimed the Kingdom of Serbs, Croats and Slovenes as constitutional, parliamentary and hereditary Monarchy.[9] It could be seen as the historical effort to guarantee and protect some fundamental individual rights. Thus, in Title II "Fundamental citizen's rights and duties" the Constitution had recognized

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[4] *Krfska deklaracija,* [The Corf Declaration], see full text of the Declaration in F. Šišić, *Jadransko pitanje na konferenciji mira u Parizu: zbirka akata i dokumenata* [The Issue of the Adriatic Region at the Paris Peace Conference: collection of acts and documents], Matica hrvatska, Zagreb, 1920, p. 10.

[5] *Ibid.,* p. 11.

[6] The Kingdom of Serbs, Croats and Slovenes was composed of following entities: Serbia, Montenegro, Bosnia and Herzegovina, Croatia, Dalmatia and Slovenia as the Austrian legal area, and Banat, Bačka, and Baranja as the Hungarian legal area. The territory of the Former Yugoslav Republic of Macedonia was a part of Serbia under the name *Vardarska banovina.*

[7] Croatia was within the Hungarian Kingdom from 1527 to 1918. Serbia was a part of the Ottoman Empire from 1459 to the Congress of Berlin in 1878, when it gained international recognition. Also Montenegro was recognized in 1878 in Berlin but as a separate government under Russian tutelage. The Ottoman forces conquered independent Bosnia in 1463 and Herzegovina in 1483. In 1878 the Bosnia and Herzegovina became part of Austro-Hungarian Monarchy. The Slovenes lost their independence in the eighth century and were part of the Hapsburg Monarchy by the fourteenth century. Finally, Macedonia did not enjoy independence during the medieval era and fell under the Byzantine, Bulgarian, Ottoman and Serbian rule in the period before First World War. Some commentators have pointed out that "the decline of the Ottomans and the Hapsburgs set an agenda that did not favour the emergence of democratic institutions following World War I [...]", see: M. Baskin and P. Pickering, *Former Yugoslavia and Its Successors,* in S.L. Wolchik and J.L. Curry (eds.), *Central & East European Politics: from communism to democracy,* Rowman & Littlefield Publishers Inc., United Kingdom, 2011, p. 279.

[8] *Ustav Kraljevine Srba, Hrvata i Slovenaca* [The Constitution of the Kingdom of Serbs, Croats and Slovenes], "Službene novine Kraljevine Srba, Hrvata i Slovenaca", godina III, br. 142 a, 28. jun 1921. godine. The Constitution was named after the feast of Saint Vid's day. It is interesting to note that St. Vid's day is particularly important in the Serbian history. The Battle of Kosovo popularly known as "the Battle on the Kosovo field" took place on St. Vid's day 1389. It led to the end of the medieval Kingdom of Serbia which in following centuries became a part of the Ottoman Empire.

[9] Article 1 of the Constitution from 1921.

the principle for all citizens to be equal under the law.[10] Consequently, it explicitly proclaimed the prohibition of the royalty as the title, and any kind of advantages due to one's origin or birth right.[11] Further on, it guaranteed the right to life, the right to freedom, the principle nullum crimen nulla pene sine lege; also the freedom of public speech, association and agreement; as well as freedom of the press. With respect to the protection of individual's vis-á-vis the public administration the Constitution of 1921 guaranteed any citizen the right to judicial review in the case of a criminal offences *ex officio* and liability of public institutions for damages.[12]

The Constitution from 1921 was, in fact, primarily orientated to the organization of the State's power by giving wide competences to the King in performing the legislative, executive and judiciary power, finally leading towards absolute monarchy and not parliamentary, as it had been the original idea of the creation of new state.[13] Albeit it contained some democratic principles, common in the post-war constitutions; it also comprised the causes of its abolition in 1929.[14]

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[10] Article 4 (1) of the Constitution from 1921. The *Vidovdanski* Constitution had 142 Articles which were divided in the following Sub-sections: General provisions; Fundamental citizen's rights and duties; Social and economic provisions; State power; King; Governing Regency *(Namesništvo);* National Assembly; Administrative authority; Judiciary; Government husbandry *(Državno gazdinstvo)*, and Military. For detailed reading of constitutional position of an individual under the *Vidovdanski* Constitution see, A. Fira, *Ustavni položaj čoveka i građanina u Ustavu Kraljevine Srba, Hrvata i Slovenaca od 28. juna 1921. godine,* [Constitutional position of an individual and a citizen in the Constitution of the Kingdom of Serbs, Croats and Slovenians from 28th June 1921], in A. Fira and R. Marković (eds.), *Dva veka srpske ustavnosti,* JP Službeni Glasnik, Beograd, 2010, pp. 230 – 237.

[11] Article 4 (2) of the Constitution. The radically breaking with the classical feudal hierarchy through constitutional regulation is not new in the constitutional development of Serbia (the Kingdom of Serbia was only independent state before the creation the Kingdom of Serbs, Croats and Slovenes in 1918. See *infra* n. 7). The Constitution of the Kingdom of Serbia from 1888 under Article 7 established the equality of all citizens under the law. Moreover, Article 8 provided that to the citizens of the Kingdom of Serbia could not give, nor recognize royalty and similar titles as expression of the feudal monarchy. Whereas the Constitution of 1903, as being the last Constitution of the Kingdom of Serbia, did not include the mentioned above provisions. Thus, the attitude of the Constituent of 1921 demonstrates that some areas of the new Kingdom were still under the feudalism.

[12] Art. 18 of the Constitution from 1921.

[13] In the political system of the *Vidovdanski* Constitution there could be found some elements of parliamentarism such as the control of the King by the prior signature of ministers, but also some elements of absolutism such as the prominent power of the King and the absence of the Parliament's constitutional right to vote for no confidence to the Government. Some authors have pointed to that according to the *Vidovdanski* Constitution "the King and Assembly are two supreme bodies; there is neither a single act of government, or legislative or administrative or judicial, which is the one way or the other, supposed not to be founded upon their authority." See: S. Jovanović, *Ustavno pravo Kraljevine Srba, Hrvata i Slovenaca,* [Constitutional law of the Kingdom of Serbs, Croats and Slovens], Beograd, 1955, p. 398; As one of reasons for such a prominent position of both the Head of the State and executive authorities is the environmental condition of unregulated and divided political background. See: S. Orlović, *Ustavni položaj organa u prvoj jugoslovenskoj državi*, [Constitutional position of ruling bodies in the first Yugoslav State], in A. Fira and R. Marković (eds.), *Dva veka srpske ustavnosti,* JP Službeni Glasnik, Beograd, 2010, p. 289.

[14] See: D. Janković and M. Mirković, *Državno-pravna istorija Jugoslavije,* [State-Legal history of Yugoslavia], 3th edition, Beograd, 1987, p. 379.

On January 6, 1929, the King of Serbs, Croats and Slovenes, Alexander I Karađorđević, established the royal dictatorship by proclamation the Act of King's authorization and Supreme State Government (*Zakon o kraljevskoj vlasti i vrhovnoj državnoj upravi*) which was followed also with change of the State's name as "the Kingdom of Yugoslavia".[15] Only two years after the seduction of its absolute power, the King decided to bring forth the constitution. Thus, on 3 September 1931 entered into force the Constitution of the Kingdom of Yugoslavia (the so-called Octroyed Constitution),[16] bringing back the constitutionality but not the level of parliamentary of the *Vidovdanski* Constitution. Significantly, as in the earlier Constitution, judicial review, a possibility to go to court in the case of criminal offence *ex officio*, and liability of public administration in damages for breach of the rule law are essential for the protection of individual and public interest.[17] Nonetheless, the main characteristics of the Octroyed Constitution were strong centralized authority and supremacy of the King in the legislative matters,[18] the full control of Ministers[19] and appointment of judges.[20] The Constitution of 1931 was in force until the beginning of the Second World War when the Kingdom of Yugoslavia was disintegrated.

The gradual inclusion of good administrative practice among the internal values in the legal order of the Kingdom of Yugoslavia, i.e. Kingdom of Serbs, Croats, and Slovenes from 1918 to 1929, passes through two important phases. One is related to the Act on State Council and Administrative Disputes [hereafter the ASCAD] from 17 May 1922[21] and other, to the General Administrative Procedure Act [hereafter the GAPA] adopted on November 25, 1930.[22]

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[15] According to Article 6 of the Act relating to the King's authorization and the Supreme State Government all functions of the public authority and politics in general were given to the King, such as: the right of war and peace, military command, foreign policy, legislation, whereas the ministers were his personal servants. The King is not responsible to anyone, whereas everyone is responsible to him. See: *Zakon o kraljevskoj vlasti i vrhovnoj državnoj upravi*, Službene novine, No. 6, 6 January 1929.

[16] *Ustav Kraljevine Jugoslavije* [The Constitution of the Kingdom of Yugoslavia], Službene novine br. 200 od 3. septembra 1931 i br. 207 – LXVI od 9. septembra 1931. godine. The Constitution from 1931 had 120 Articles and its structure has been the same as its predecessor [see *infra* n. 10].

[17] Article 18 of the Constitution from 1931.

[18] Article 26 (1) of the Constitution from 1931 stated that „the King and the National Representative (*Narodno predstavništvo*) exercise together legislative power". Further, „the National Representative is composed of the Senate and the National Assembly" (Art. 26 (2)).

[19] Article 77 of the Constitution contained that „the King appoints and releases the President of the Minister's Council and ministers", further „the President of the Minister's Council and ministers, which compose the Minister's Council, are directly under the power of the King."

[20] The organization of the power in the Octroyed Constitution did not overcome deficiencies manifested in the *Vidovdanski* Constitution. See more: S. Orlović, *op. cit.,* p. 291.

[21] *Zakon o državnom Savetu i upravnim sudovima od 17. maja 1922. godine sa izmenama i dopunama od 7. januara 1929. godine i 14. jula 1930. godine* [The Act on State Council and Administrative Disputes from 17 May 1922 as amended in 7 January 1929 and 14 July 1930], „Službene novine", br. 111 od 22. maja 1922. godine; br. 9-IV od 11. januara 1929. godine i br. 170-LXIV od 29. jula 1930. godine. See full text of

With regard to the first aspect, the ASCAD, emphatically confirmed the inclusion of the principle of the judicial review of administrative procedure among the guiding values of the new-born Kingdom. In Article 15 the administrative dispute has been defined as "dispute between an individual entity as the one party and the public administration as the other party, if the case may be, that individual rights or interest guaranteed by law are infringed by decisions or resolutions of the administrative authorities."[23] According to the ASCAD the right to appeal exists when the public administration did not respect or had improperly applied the law, as well as when the rules of the previous procedure were not respected.[24]

For the purpose of this inquiry, however, the more interesting feature of the ASCAD is the establishment of the State Council as the Supreme administrative court. In regard to judgments of the administrative courts, founded as the courts of first instance, and judgements of the State Council, the ASCAD adopted the principle of separate administrative-judicial hierarchy (*zasebne upravno-sudske jerarhije*).[25] This points to

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the Act from 1922 in M.A. Krstić, *Političko upravni zbornik zakona, uredaba i pravilnika, knjiga I* [Political administrative collection of laws, regulations and rules, book I], Privrednik, Beograd, 1935, pp. 58 – 64.

[22] *Zakon o opštem upravnom postupku od 9. novembra 1930. godine* [The Law on General Administrative Procedure from 9 November 1930], „Službene novine", br. 271-XCIII od 25 novembra 1930. godine. The Law on General Administrative Procedure of the Kingdom of Yugoslavia was published on 25 November 1930. However, it had been planned to start to apply it after the expiry of three months as from the date of its publication (*vacatio legis*). Thus, on 25 February 1931 its application started. Sometimes, for that reason in the literature it could be found that this Act is from 1930 and sometimes from 1931.

[23] Article 15 (1) of the Act on State Council and Administrative Disputes. This definition of the administrative dispute corresponds to its definition proclaimed in the Act on the State Council of the Kingdom of Serbia from 1870 in Article 35. See: S. Lilić, *Upravno pravo, Upravno procesno pravo*, [Administrative Law; Administrative Procedural Law], 5th edition, Pravni fakultet Univerziteta u Beogradu, Beograd, 2010, pp. 526 - 527.

[24] Article 23 of the ASCAD.

[25] Article 1 of the ASCAD: „The State Council is the Supreme administrative court. The State Council has thirty members". According to Article 17 of the ASCAD the State Council decides on appeals against judgments of the administrative courts.

The development of the administrative disputes in the Kingdom of Yugoslavia, i.e., Kingdom of Serbs, Croats, and Slovenes from 1918 to 1929, were related to the position and status of the State Council, which was took over by the Kingdom of Serbia. In the realm of administrative law, Serbia has a long tradition which stands in connection with the role and status of the State Council. State Council, as a forerunner of the administrative government, established by the *Sretenje* Constitution in 1835, was the highest organ of the state administration in which the entire state government was focused: legislature, administrative and judiciary branches were in its arms. By adopting the 1888 Constitution that transformed Serbia into constitutional monarchy, foundations have been set for the administrative regime, and so has been the base for the rule of law. Due to the 1888 Constitution, Serbia becomes a parliamentary monarchy and creates constitutional premises for the establishment of the parliamentary system of separation of powers. Administrative authority now comes under control from legislative and judiciary branches. Judiciary control over administrative authority is now held by the State Council, which for the first time appears in the role of an administrative court that resolves appeals in connection with decisions of the highest administrative organs. See: D. Danić, *Razvitak administrativnog sudstva u Srbiji,* [Development of administrative judiciary in Serbia], Belgrade, 1926, pp. 5, 28. State Council, which was subsequently modified with regard to jurisdiction and structure, since became a competent authority for resolving administrative disputes, which is the role it was found in at the time

the fact that administrative judiciary and public administration are two separate organized authorities with distinct competences.[26] Furthermore, Article 18 of the ASCAD stated that "individual which right or interest based on the law has been infringement by illegal act of the public administration has right to appeal *only to a higher administrative authority*", thus, "the appeal against the decision of such administrative authority could be raised *only to the administrative court*." Finally, "*if it is about the minister, than the State Council is competent for appeal*" [27] (emphasis added). Article 18 has a profoundly historical importance in this area and could be seen as the first attempt to limit the minister's power. In fact, until the ASCAD from 1922 the individual could appeal against the decision of the public administration for breach of the rule of law to higher authority, except in the case of minister's decision when an individual could not appeal to anyone.[28]

The State Council consisted of a great number of departments which opened up the possibility for different interpretations of same regulations. For this reason, it was decided that the questions resolved differently in various departments could be brought before the general session of the State Council which resolutions in such matters were obligatory for the departments and were published in the "Official Gazette". In practice, they were obligatory for administrative courts and administrative bodies since they were aware that their rulings or decisions would be annulled by the State Council if found to be in conflict with the decisions of the general session.[29]

It has to be noted that the State Council had an essential role in the gradual development of the administrative dispute in the Kingdom of Yugoslavia and thus positively affected the change of administrative justice and also strengthened and protected the rights of citizens.[30]

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of creation of the state of Serbs, Croats, and Slovenes in 1919. See: N. Stjepanović, *Upravno pravo II,* [Administrative law II], Belgrade, 1973, p. 245.

[26] See more: Lj. Radovanović and B. Protić, *Iz upravno-sudskog postupka,* [From administrative-judicial proceeding], Beograd, 1928, p. 7.

[27] Article 18 of the ASCAD is in accordance with Article 103 of the *Vidovdanski* Constitution which provided multi-level administrative judiciary where the State Council was recognized as the Supreme administrative court competent for appeals against judgments of the administrative courts of the first instance and for "disputes against the minister's decisions in first and last instance."

[28] For detailed discussion about Article 18 of the ASCAD see, Lj. Radovanović and B. Protić, *op. cit.,* pp. 1 – 4.

[29] For detailed reading about decisions of the State Council, see M. Ilić and Lj. Radovanović, *Odluke Državnog saveta 1924-1928. godine sa komentarom* [Decisions of the State Council 1924-1928. with comments], Beograd, 1930.

[30] For detailed reading about State Council, see among others: D. Denković, *Državni savet u Srbiji i Jugoslaviji 1805-1941,* [State Council in Serbia and Yugoslavia 1805 - 1941], in *Yugoslav Review of International Law*, 1-3/1973, pp. 431 – 441; S. Marković, Administracija Kraljevine Srbije [Administration of the Kingdom of Serbia], Beograd, 1893, pp. 365 – 412; M. Vukićević (ed.), *Zbirka*

The most important legal act governing the administrative procedure represented the General Administrative Procedure Act adopted as a federal act in 1930 and based on the Austrian Law from 1925 as a model, by which the Kingdom of Yugoslavia become the fourth State in the world that had passed a law on the basic administrative proceeding.[31] Nevertheless, the Yugoslav law was almost twice the size of its Austrian counterpart, which is accounted for by the fact that it contained numerous provisions of the litigation procedure.[32]

The guiding principles of the administrative proceeding, explicitly proclaimed in this first Yugoslav GAPA as main goals in order to ensure the protection of the individual rights and interests,[33] were procedural efficiency and cost-effectiveness.[34]

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odluka Držvnog saveta [The collection of decisions of the Steta Council], Beograd, 1908; K. Kumanudi, *Administrativno pravo* [Administrative law], Beograd, 1909; Lj. Radovanović, *O administrativnom sudstvu* [About administrative judiciary], in *Arhiv za pravne i društvene nauke,* knjiga IV, 1922, pp. 30 – 52; Lj. Radovanović, *Objektivan administrativni spor* [*Objektivan* administrative dispute], in *Arhiv za pravne i društvene nauke,* knjiga V, 1922, pp. 189 – 213, 273 – 297; S. Jovanović, *Ustavno pravo Kraljevine Srba, Hrvata i Slovenaca* [The Constitutional Law of the Kingdom of Serbs, Croats and Slovenes], Beograd, 1924; J. Stefanović, *O administrativnim sudovima i njihovim nadležnostima uopšte i kod nas* [About administrative courts and their jurisdiction in general and by us], Beograd, 1924; Lj. Radovanović (ed.), *Odluke Državnog saveta 1919 – 1923* [the decision of the State Council 1919 - 1923], Beograd, 1924; D.J. Danić, *Razvitak administrativnog sudstva* [The development of the administrative judiciary], Beograd, 1926; I. Krbek, *Upravno pravo* [Administrative law], knjiga I, Zagreb, 1929, pp. 35 – 36; B. Frantlović, *Komentar Zakona o Državnom Savetu i upravnim sudovima* [Review of the Act on State Council and Administrative Disputes], Beograd, 1935; I. Krbek, *Diskreciona ocjena* [Discretionary administrative action], Zagreb, 1937, pp. 77 – 186; N. Stjepanović, *Tužba Glavne kontrole kod Državnog saveta* [The main compaint of control by the State Council], in *Arhiv za pravne i društvene nauke,* knjiga XXXV, pp. 424 – 436; L. Kostić, *Administrativno pravo Kraljevine Jugoslavije* [Administrative Law of the Kingdom of Yugoslavia], knjiga III, Beograd, 1939, pp. 55 – 178; I. Krbek, *Upravno pravo FNRJ* [Administrative Law of the FPRY], knjiga I, Beograd, 1955, pp. 264 – 266; D. Janković, *Istorija države i prava Srbije u XIX veku* [The history of the State and Law of Serbia in the XIX century], Beograd, 1955.

[31] After Austria, Czechoslovakia and Poland codified general administrative procedure in 1928. Some scholars have been pointed to that the first General Law on Administrative Procedures in Europe was probably the Spanish Law of 19 October 1889 (known as the Azcárate Law). It was a "framework Law establishing a number of principles giving guidance to ministries to write their own ministerial procedures. This approach proved to be a failure because the Law was so general and imprecise that it left plenty of room for different and contradictory developments through ministerial secondary regulations and finally it did not prevent ministries from multiplying their special procedures." See more: W. Rusch, *Administrative procedures in EU Member States*, Sigma, Conference on Public Administration Reform and European Integration, Budva – Montenegro, 26 – 27 March, 2009, para. 31. However, the Austrian General Administrative Procedure Act could be considered as the first "successful" codification of administrative procedural rules in Europe.

[32] The GAPA from 1930 had 176 Articles. Prior to the Yugoslav GAPA numerous procedural regulations regulated the administrative procedures in various fields, such as, customs, building permits, taxes, etc. Additionally, these regulations also handled basic procedural issues, including, the right to appeal and the content of administrative decisions. In short, the administrative procedures were segmented in this region. See: I. Koprić, *Administrative Procedures on the territory of the former Yugoslavia,* Sigma. available at: www.oecd.org/dataoecd/52/20/36366473.pdf.

[33] Article 70 (1) of the GAPA.

[34] Article 71 of the GAPA.

However, fundamental duty of the official in charge of leading the process was to care for the public interest, whilst the parties were to care for their individual interests.[35]

One could add that administrative procedures had also the goal to ensure that decision-making will be transparent, along with orderly and efficient. Thus, in Article 42 of the GAPA the right of access to documents (*razgledanje spisa*) was recognized under the supervision of the public official except in the case when the public interest, interest of one party or third person, or the goal of the procedure could be jeopardize.

The inclusion of good administrative principles in the legal order of the Kingdom of Yugoslavia can be found also in Article 109 of the GAPA which imposed a duty of the administrative authorities to provide explanation for its decisions as one of the fundamentals of the administrative procedure.[36] Furthermore, Article 76 (4) stated that every party should be given the opportunity to be heard, before a decision is made in cases which affect his/her rights or interests.[37] Suggestion of the importance of the right to be heard was guaranteed in a series of provisions dedicated to the procedure of deriving proof of evidence by the authorized officer. The officer is responsible to offer the opportunity to the party to give statement on circumstances and facts quoted in the investigation proceeding, on proposal and given proof of evidence, to participate in the process of derivation of proof of evidence and to be informed about its results. Thus, it stipulated in detail the procedures to launch proceedings, to examine and derive proof of evidence, to specify in detail all issues relevant to bringing forth the decision, as well as actions to be undertaken as per regular and extraordinary legal remedies.[38]

In the twenty three years of the existence of the Kingdom of Yugoslavia, i.e. the Kingdom of Serbs, Croats, and Slovenes from 1918 to 1929, the Yugoslav legal order largely relies upon the German and Austrian tradition that emerged after the First World War. The Weimar Constitution of the Republic of Germany was a model for the first Yugoslav constitution of 1921 aimed to proclaim the democratic parliamentary monarchy. The internal political developments, however, did not include these values in the new-born State. The lack of parliamentary responsibility of the Government and of limited power of the Monarch together with all other unfavourable internal and

[35] See: J. Jovičić, *Administrative Law in Serbia,* in R. Scarciglia (ed.), *Administrative Law in the Balkans case studies of comparative Administrative Law in Albania, Bulgaria, Croatia, Serbia and Slovenia,* CEDAM, Quaderni giuridici del Dipartimento di Scienze Politiche e Sociali dell'Università di Trieste, 2012, p. 126.
[36] Article 109 of the GAPA.
[37] Article 76 (4) of the GAPA.
[38] See Art. 79 and 80.

external circumstances resulted in the fact that this constitutional system, as well as the further one from 1931, was not long lasting and successful.[39] On the other hand, Austrian tradition, based upon protecting the individuals in a situation of *a priori* supremacy of public administration, had influenced the inclusion of some good administrative values as an integral part of the Yugoslav legal order further transferred in the post-war Federal People's Republic of Yugoslavia.

1.2. Yugoslav State from the end of the Second World War to dissolution of the Socialist Federative Republic of Yugoslavia (1946 - 1991)

The numerous political and social changes, which occurred during the Second World War, found an extensive formalization in the Constitution of the Federal People's Republic of Yugoslavia from 31 January 1946,[40] based on the USSR Constitution (the so-called Stalin constitution) of 1936 as a model.[41] It was drafted and adopted by a Constituent Assembly (s)elected by the military Partisan leaders who established a new Communist regime in the post-war Yugoslavia.[42] These historical and political conditions deeply affected the writing of the document, whose authoritarian inspiration has been hard to blunt even after several constitutions adopted during the Fifties, Sixties and Seventies (in 1953, 1963 and 1974).

The Constitution of 1946 represented the first East European constitution of so-called people's democracy which was a powerful tool for propaganda in favour of

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[39] The post-war hopes based on introduction of new democratic constitutions and parliamentary government failed across all of South Eastern Europe. See: L.J. Cohen, *Administrative Development in 'Low-Intensity' Democracies: Governance, Rule-of-law and Corruption in the Western Balkans,* in *Simons Papers in Security and Development*, 5/2010, p. 7.

[40] *Ustav Federativne Narodne Republike Jugoslavije* [The Constitution of the Federal People's Republic of Yugoslavia], „Službeni list Federativne Narodne Republike Jugoslavije", godine II, br. 10, 1. februar 1946.godine. The Kingdom of Yugoslavia created by the First World War, was destroyed by the Second World War. However, the later gave birth to a new Yugoslavia. See: J. C. Fisher, Yugoslavia – *a Multinational State: Regional Difference and Administrative Response,* Chandler Publishing Company, San Francisco, 1966, p. 21.

[41] See: K. Čavoški, *Ustav kao sredstvo agitacije i propagande - Constitution FNRJ of 31 January 1946*, [Constitution as the means for agitation and propaganda – constitution of the Federal People's Republic of Yugoslavia as of 31st January 1946], in A. Fira and R. Marković (eds.), *Dva veka srpske ustavnosti,* JP Službeni Glasnik, Beograd, 2010, p. 347.

[42] During the Second World War the social-political order on the territory of the former Kingdom of Yugoslavia was changed. The new communist government abolished the Monarchy and proclaimed the Democratic Federal Yugoslavia on 10 August 1945. After the elections for the Constituent Parliament on November the same year, the State was renamed on 29 November as to the Federal People's Republic of Yugoslavia which was composed of six republics, at present independent states: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia.

historical advantage and undisputable correctness of the new Communist regime.[43] In Title II "People's authority", it stated that "all authority in the Federative People's Republic of Yugoslavia derives from the people and belongs to the people", thus, "people exercise their authority through freely elected representative organs of the state authority."[44] The Constitution, further, underscored that all decisions of the public administration and judiciary should be based on the rule of law.[45] However, the *law in book* was different from the *law in action*. The ruling Communist party was supra-constitutional factor for which expressed constitutional bans and limitations were not applicable and the term "people" has been used to cover its absolute power.[46]

Analysing the structure of the Constitution from 1946 it could be noted that it makes distinction between fundamental rights of the people and people's republics (Title III) and fundamental rights and duties of the citizens (Title V). The first guaranteed the sovereignty, equality and national liberty of the people's republics and protection of minority rights.[47] In respect to the citizens it recognized as fundamental values, among others, the principle of non-discrimination, duty to respect the legal order, right to vote, freedom of religion and freedom of press.[48] The procedural protection of individual vis-á-vis public administration was provided in Article 39 (2) whereupon it was stated that "against the decision of the relevant authority and irregular action of authorized officers, citizens are entitled to lodge a complaint", whereas "the law will stipulate procedure of lodging the claim." Further, Article 41

[43]See more: K. Čavoški, *Ustav kao sredstvo agitacije i propagande - Constitution FNRJ of 31 January 1946*, *op. cit.,* p. 343.

[44] Article 6 of the Constitution from 1946.

[45] Article 8 (2) of the Constitution from 1946. It is worth noting that it was during the transit post-war period where the Communist party established the new legal order and broke up with the *prior* Yugoslav legal tradition. The question of the rule of law and the relationship between laws of the Kingdom of Yugoslavia and the new legal order were regulated with the Law of irrelevance of legal regulations adopted before 6 April 1941 and during the enemy occupation from 23 October 1946. According to this Law all provisions of the *prior* war period could be applied only if they are in accordance with the new *post* war legal order. See *infra* n. 52. For a detailed reading of the principle of rule of law in this transit period see, I. Krbek, *Pravo javne uprave FNRJ, I knjiga, Osnovan pitanja i prava građana* [Right of public administration of the FPRY, book I, Fundamental questions and citizen's rights], Birotehnički izdavački zavod, Izdavačko-knjižarsko poduzeće Zagreb, 1960.

[46] See: K. Čavoški, *Ustav kao sredstvo agitacije i propagande – FNRY Constitution of 31 January 1946*, *op. cit.,* p. 342. Also, D. Jovanović, Yugoslav politician and university professor, pointed out the hidden communist dictatorship during the discussion on draft of the Law on public prosecutor on 17 July 1946: "Finally, there is one characteristic which is neither public but real: public prosecutor is actually the party, state party, sole, the Party written with capital letter. There could not be anything against the party [...] with us the Public prosecutor is without exclusion the member of the Communist party. It is not stipulated by the law, but it is the practice the law legalized omnipotence of the Prosecutor in practice. Such a Prosecutor is the incarnation of the one party doctrine ensuring one party ruling ." See: *Ibid.,* p. 343.

[47] Artt. 9 – 13 of the Constitution from 1946.

[48] See: Artt. 21, 22, 25 and 27.

guaranteed the compensation of damage caused by illegal acting of public administration.

However, the State Council and administrative courts were expressly abolished in the post-war Yugoslav State. During this period, no control of court over administration existed, and control of administration conduct essentially boiled down to certain forms of political and administrative control typical for socialist systems (e.g., control by the higher administrative organs).[49] Nonetheless, such legal situation was changed by adopting the Administrative Disputes Act of 1952[50] and thus the Federal People's Republic of Yugoslavia became the first of the socialist countries to introduce judicial control of administration and administrative dispute as a regular and systematic form of control of legality of administrative acts, which, among other things, was very well received worldwide.[51]

With creation of the Yugoslav State after the Second World War, the General Administrative Procedure Act from 1930 was repealed. However, this Law has not been repealed explicitly, but its legal effect terminated pursuant with the Law of irrelevance of legal regulations adopted before 6 April 1941 and during the enemy occupation (*Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije*) of 1946.[52] Still, some provisions of the GAPA from 1930, which were in accordance with the new Yugoslav post-war legal order, have been applied. On the other hand, the legal void that was created abolishing the Law of 1930 in some extent created room for the various special laws passed at that time, especially the Law of the People's Committees of 1952 (*Zakon o narodnim odborima*).[53]

The changes occurred from 1946 to 1953 in the field of economic, political and social organization of the Yugoslavia were primary regulated by legal acts, and then by the Constitutional Law of the Federal People's Republic of Yugoslavia, or more precisely, the Constitutional Law on the basis of social and political systems of the

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[49] See: N. Stjepanović, *Upravno pravo II,* [Administrative Law II], *op.cit.,* pp. 245-246.

[50] *Zakon o upravnim sporovima od 9. maja 1952. godine* [Administrative Disputes Act form 9 May 1952], „Službeni list FNRJ", br. 23/52, novele u „Službeni list SFRJ", br. 16/65.

[51] It has been noted by N. Stjepanović, see N. Stjepanović, *Judicial Review of Administrative Acts in Yugoslavia*, in *The American Journal of Comparative Law*, 1/1957, p.

[52] In the Decision number 132 on 3 February 1945 the Anti-Fascist Council of National Liberation of Yugoslavia stated that legal acts which were in force before the 6 April 1941 will be repeal if are in dis-accordance with the new legal order (Art. 2). See: the Decision No. 132, Službeni list FNRJ, n. 4 from 13. February 1945. Among these legal acts was also the *Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije*, Službeni list FNRJ, br. 86/46. See more: B. Majstorović, *Komentar Zakona o opštem upravnom postupku* [the Comentary of the Law on General Administrative Procedure], Nova Administracija, Beograd, 1957, p. 3.

[53] *Zakon o narodnim odborima*, Službeni list FNRJ, br. 22/52. *Ibidem.*

Federal People's Republic of Yugoslavia and the Federal Government of 14 January 1953.[54]

The central and guiding value of the Constitutional Law of 1953 was "socialist self-management" guaranteeing: a) social ownership over the production equipment; b) self-management in economy; c) peoples' self-management in municipality, city and region; and d) peoples' self-management in education, culture and social services.[55] The Federal People's Republic of Yugoslavia is positioned as "socialist, democratic federal state of independent and equal peoples."[56] The Constitutional Law abandoned division of state bodies to state authority bodies and bodies of public administration, proclaiming Federal Peoples' Assembly as the representative of peoples' sovereignty and the highest body of the Federation.[57] Thus, Government of the Yugoslav State was abolished whereas two executive bodies of the Federal Peoples' Assembly were founded: the President of the Republic and Federal Executive Council. The President of the Republic was at the same time the President of the Federal Executive Council. While the Republic President was acting in the role of the chief of the State, the Federal Executive Council was a kind of a political committee of the Assembly dealing with political-executive activities.[58]

Nonetheless, the social-political conditions in the Yugoslav State were not ready for the establishment of one completely new self-managed constitutional system, thus, the change of the ruling system at that moment was not done by the new constitution, but by the partial Constitution, the Constitutional Law of 1953, which together with outstanding provisions of the Constitution of 1946 made integral, complete constitution of Yugoslavia up to bringing the completely new Constitution in 1963.[59]

The existence of good administration values in the Federal People's Republic of Yugoslavia has been affirmed by the second Yugoslav General Administrative Procedure Act passed in 1956, as a federal law.[60] This law essentially takes over all

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[54] *Ustavni zakon o osnovama društvenog i političkog uređenja Federativne Narodne Republike Jugoslavije i saveznim organima vlasti* [The Constitutional Law on the basis of social and political systems of the Federal People's Republic of Yugoslavia and the Federal Government], „Službeni list Federativne Narodne Republike Jugoslavije", godina IX, br. 3, 14. januar 1953. godine.

[55] Article 4 of the Constitution, 1953.

[56] Article 1 of the Constitution, 1953.

[57] Article 11 of the Constitutional Act, 1953.

[58] Article 72 of the Constitutional Act, 1953.

[59] In literature it is considered that such fragmentary arrangement of constitutional issues by the force of constitutional provisions could be applied only when social conditions are not ready for bringing forth new and complete constitution. See: R. Marković, *Ustavno pravo,* [Constitutional law],13th edition, Pravni fakultet Univerziteta u Beogradu, Beograd, 2009, p. 134.

[60] *Zakon o opštem upravnom postupku* [The General Administrative Procedure Act], „Službeni list Federativne Narodne Republike Jugoslavije", br. 52 od 19 decembra 1956. godine. After the Second

important provisions and institutes from the GAPA of 1930 with the addition of many others, in order to resolve the greatest possible number of legal issues. Thus, the GAPA from 1956, with its 303 articles, became the most comprehensive law of this kind in the world.[61]

For the purpose of this inquiry the most important novelty is the Title I which introduced "the principles of administrative procedure". According to Article 1 the public administration and other public authorities are obliged to observe the law in their dealings with administrative matters by direct enforcement of the provisions when they take decision on rights, duties or legal interests of the individuals. Further, the GAPA explicitly guaranteed the protection of citizen's rights and public interests,[62] right to be heard,[63] right to appeal,[64] cost-effectiveness of the procedure[65] and right to use one's language.[66] Unlike its predecessor, the GAPA of 1956 significantly specify that in the course of an administrative process the public administration should ensure *ex officio* to party to realize and protect its rights and interests.[67]

World War many other European countries codified general administrative procedural rules: Hungary (1957), Spain (1958), Poland (1960), Czechoslovakia (1967), Switzerland (1968), Bulgaria (1970), Germany (1976), Denmark (1986), Sweden (1986), Italy (1990), Portugal (1991), Netherlands (1994), Greece (1999) etc. See: D. Memedović, *Legally Regulated Procedures – A Prerequisite of Modern Administration,* in I. Koprić (ed.), *Modernisation of the Croatian Public Administration,* Faculty of Law and Konrad Adenauer Stiftung, Zagreb, 2003, p. 415, and W. Rusch, *Administrative procedures in EU Member States*, *op. cit*., p. 8.

[61] Literature often refers to this law as a codex since it regulates the administrative procedure in its entirety. See: N. Stjepanović, *Upravno pravo II, op. cit*., p. 71. It represented "the most comprehensive and most detailed codification in the world". See: I. Krbek, *Upravni akt* [Administrative act], in D. Memedović (ed). *Hrestomatija upravnog prava,* Društveno veleučilište u Zagrebu I Pravni fakultet u Zagrebu, Zagreb, 2003, p. 36.

[62] Article 5 of the GAPA from 1956.

[63] Article 11 of the GAPA from 1956.

[64] Article 10 of the GAPA from 1956.

[65] Article 12 of the GAPA from 1956.

[66] Article 14 of the GAPA from 1956. The scope of application of the GAPA could be found in the „Information on the work of state bodies and organizations exercising public authority in resolving cases of administrative disputes, with special reference to the work of federal agencies and federal organizations" („Informacije o radu državnih organa i organizacija koje vrše javna ovlašćenja u rešavanju predmeta upravnog postupka, s posebnim osvrtom na rad saveznih organa uprave i saveznih organizacija") from October 1976, which has been prepared by the Federal Ministry of Justice and the Federal government organization. According to it in 1972, 1973 and 1974, the total number of completed first instance administrative cases was about 95% of all cases to solve, and 77% (for 1972 and 1973), i.e. 83,4% (for 1974), of the total number of second instance proceedings. Further, according to Article 247 of the GAPA from 1956 decision on the appeal has to be made and delivered to the party as soon as possible, but not later than two months, counting the time of submission of the appeal. However, the data from the above quoted document shows that the percentage of second instance administrative disputes settled after the specified time limit was very high and was increasing. See more: N. Stjepanović, Upravno pravo u SFRJ – opšti deo [Administrative law in the SFRY – general part], NIGP Privredni pregled, Beograd, 1978, pp. 570 – 571.

[67] See: S. Lilić, *Administrative law, Administrative procedural law, op. cit.*, p. 413.

On 10 April 1963 entered into force the new Yugoslav constitution which changed the State's name as to the "Socialist Federal Republic of Yugoslavia".[68] The Constitution from 1963 had a wider scope than its predecessor, aiming at establishing such socialist system which is "founded on relations among people as free and equal producers and creators whose work serves exclusively to satisfy their personal and common needs." The Preamble has also contained the proclamation that "inviolable basis relating to the position and role of a person is the social ownership over the means of production excluding return of any type of a man by a man and which provides exploitation system [….] conditions for self-management of working people in production and division of work products and also social direction of commercial development." The definition of the state is characterized not only by the provision that it is the federal state , but also the definition "socialist democratic union,"[69] which should specify the aspiration towards the Marxist ideal on the disappearance of the state.[70]

In Title III "Freedom, rights and duties of a person and citizen" of the Constitution everything is covered by socialist self-management and protection of an individual in relation to such a type of social order. In particular, the Constitution in detail regulated right to work, prohibited forced work, maximum number of working hours (Article 37), freedom of thought and choice (Article 39) etc.[71] With regard to the administrative disputes the Constitution guaranteed the judicial protection of the legality of individual acts of the public administration, if the particular law did not provide different legal protection (*lex specialis derogat legi generali*).[72] The most relevant innovation in the Constitution of 1963 with respect to the rule of law is inclusion of the Constitutional court of Yugoslavia and Constitutional courts of the Federal Republics by which Yugoslavia was the first communist country in the world which had introduced a procedure for the protection of constitutionality.[73]

In the field of administrative procedure the GAPA of 1956 was in effect, but it was amended in 1965 to be more in line with constitution modifications of 1963. On

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[68] *Ustav Socijalističke Federativne Republike Jugoslavije* [The Constitution of the Socialist Federative Republic of Yugoslavia], „Službeni list Socijalističke Federativne Republike Jugoslavije", godina XIX, br. 14, 10. april 1963. godine.

[69] Article 1 of the Constitution from 1963.

[70] See: R. Marković, *op. cit.,* p. 136.

[71] The Constitution of 1963, during the eleven years of its existing, has been changed and modified even 42 times: in 1967, 1968 and 1971.

[72] Article 159 of the Constitution from 1963.

[73] Artt. 241 – 251 of the Constitution of 1963. The fact that the Socialist Federal Republic of Yugoslavia first included Constitutional courts in its legal order was also noted by R. Marković, *op. cit.*, p. 136.

the other hand, the administrative disputes were regulated by the Administrative Disputes Act of 1952 [see *supra*].

Finally, the Constitution of the Socialist Federal Republic of Yugoslavia of 1974 completed the legal framework of the post-war Yugoslav State and implicitly indicated its end.[74]

In the opening lines the Constitution of 1974 recognized the Communist Union of Yugoslavia as "the leading idea and political power of the working class and all working people to build socialism and create solidarity among working people and brotherhood and unity of nations and nationalities in Yugoslavia."[75] Relating to idea, it represented extension of provisions on self-management stipulated by the Constitution of 1963. The self-management entered into classical state functions, such as juridical, which has been proclaimed as "social community". The expression of such understanding were the self-governing courts, that equally with the state courts were carrying out judicial function, as well as the social prosecutor attorney of self-management, with sole function to protect self-management rights of working peoples and socially owned property. The legal acts did not have classical hierarchy although they came from bodies of various "social-political communities", but they were founded upon the relation of so-called "prohibition of opposites" (*zabrane suprotnosti*).[76] Here, too, as in the earlier Constitution, the direct judicial review of legality was guaranteed in administrative disputes with an exception in the case of the *lex specialis derogat legi generali.*[77]

The values and mechanisms of good administration have been reconfirmed under the General Administrative Procedure Act of 1956 which was amended again, in 1977, to be in accordance with constitutional changes of 1974. It is possible to detect

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[74] *Ustav Socijalističke Federativne Republike Jugoslavije* [The Constitution of the Socialist Federal Republic of Yugoslavia], "Službeni list Socijalističke Federativne Republike Jugoslavije", godina XXX, br. 9, 21. februar 1974. godine. The Constitution of Federal Republic of Yugoslavia of 1974 is known in political audience under the title "the grave-digger of the second Yugoslav State" as it was proofed to be the constitution for the disintegration of Yugoslavia. At the same time it was the longest Constitution worldwide (with 406 Articles) and its wordings were burdened by political and ideological phraseology. All that lead to its length and extremely low legal quality of the regulative standards. Moreover, the Constitution of 1974 proclaimed institutions and used terms which do not have synonyms in comparative constitutional law. In Article 1 of the Constitution defining Yugoslavia as the above quoted: "Socialist Federal Republic of Yugoslavia" as being the federal state as state society of voluntary united peoples and their socialist republics, as well as Autonomous provinces of Vojvodina and Kosovo within the Socialist Republic of Serbia, based upon the government and self-government of working people and all working peoples, and as the socialist self-governing democratic community of working people and citizens and equal nations and nationalities."

[75] Part VIII "Fundamental principles", Para 1 of the Constitution of 1974.

[76] See Artt. 131, 189, 235 and 236 of the Constitution of 1974.

[77] Article 216 of the Constitution from 1974.

more committed efforts in terms of administrative procedural reforms taking place in the 1977. Thus, the formalization of the principle of efficiency as fundamental value of administrative proceeding lead to strengthening of good administrative practice.[78] Meanwhile, the new Administrative Disputes Act [hereafter ADA] was adopted and it obliged the Federal and Republics administrations from its entry into force in 1977.[79]

With respect to the procedural protection of the principle of rule of law and citizens vis-á-vis public administration, or more precisely in the terms of the ADA, „protection of citizens, organizations of associated labour and other self-management organizations and communities, and social-political communities", the courts were competent to decide on the legality of an administrative action[80] in cases of lack of competence, breach of an essential procedural requirement and infringement of the law or of any rule of law relating to its application.[81] The administrative dispute, as defined in the ADA, is "a dispute on the legality of the adoption of the administrative act by the competent court, regardless of which act was challenged and who initiated the dispute."[82]

By process of coming to the conclusion, it may be stated, that political actors played, again, crucial role in the life of the Yugoslav State between 1946 and 1989. Unlike the previous period, the Soviet Union tradition that emerged after the Second World War influencing the legal and social-political framework of Yugoslavia. The USSR Constitution (so-called the Stalin constitution) of 1936 was a model of the first post-war Yugoslav Constitution from 1946 that will be remembered in the history as the constitution without constitutionality or semantic constitution.[83] The subsequent Constitution Act of 1953 made intermediate step towards full inclusion of the model of socialist self-management as a guiding value of the Yugoslav legal order by the

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[78] Article 149 (4) of the Yugoslav Constitution from 1974 openly recognized constitutional principle of efficiency of public administration; For a detailed reading on principle of efficiency see, S. Lilić, *Načelo efikasnosti u ostvarivanju prava i obaveza građana,* [The principle of efficiency in performing of citizen's rights and duties], in *Zbornik Više upravne škole u Zagrebu,* br. 11/1982.

[79] *Zakon o upravnim sporovima* [The Administrative Disputes Act], „Službeni list Socijalističke Federativne Republike Jugoslavije", br. 4/77 i 36/77.

[80] Article 1 of the Administrative Disputes Act from 1977.

[81] See: N. Stjepanović, *Upravno pravo u SFRJ – opšti deo, op. cit.,* p. 806. According to the reports of the Federal Ministry of Justice and the Federal government organization for 1975 and 1976 the grounds for the annulment of administrative acts in an administrative dispute were mostly: improper application of law (15,5%), infringement of an essential procedural requirement (14,1%), incorrect or incompletely established facts (68,9%) and others (1,5%). In 1975 the scope of application ratione personae were Communities (18,3%), Republics – Provinces (21,1%), Bureau of Insurance (25,7%) and others (19%). *Ibid.,* pp. 789 - 790.

[82] *Ibid.,* p. 788.

[83] Some scholars pointed that it is linguistically good way to guarantee particular rights and freedom in the Constitution of 1946. Whereas in practice they were ignored as if that Constitution has not been in existence. See more: K. Čavoški, *op. cit.,* p. 342.

Constitution of 1963. Finally, in the Constitution of 1974 the model of socialist self-management culminated and entered in legislative, executive and judicial powers of the State.

Good administrative practice based on the original adhesion to the Austrian model of general administrative procedure accepted before Second World War has been more comprehensive and codified in more detail in the General Administrative Procedure Act of 1956. On the other side, the mechanism of procedural protection of individual vis-à-vis public administration was introduced and guaranteed in the Administrative Disputes Acts of 1952 and 1977. These processes were carried out despite the predominant ideas of "socialist legality"[84] based on administrative actions which had to reflect and enforce the requests of the ruling Communist Party.[85] In fact, the public administration was based upon the "State administration" model understood as the tool of power and oppression of the government.[86] To illustrate the said, it is worth paraphrasing how the government is defined in leading Soviet study book at that time which was also used in post-war Yugoslavia: "The government is [...] manifestation of power comprising tax collection, political repression (banishment and exile, arrest), management and organization of the military, espionage and counterintelligence, protection of the social order and national security [...]."[87] Clearly,

[84] I borrowed the term "socialist legality" from I. Koprić, see: I. Koprić, *Administrative Procedures on the Territory of Former Yugoslavia,* Sigma Paper, 2005, p. 2. Available at: http://www.oecd.org.

[85] *Ibidem*

[86] For detailed reading about state administration placed within the framework of the „class essence of state and law" doctrine in the Soviet Union and other European socialist countries see, H. Collins, *Marxism and Law,* Clarendon Press, Oxford, 1982.

[87] See: A.I. Denisov, *Osnovi marksističko-lenjinističke teorije države i prava,* [The basis of the Marxist-Leninist theory of State and Law] Arhiv, Beograd, 1949, p. 165. Since the end of World War Second in Serbian legal theory were two streams. The first one represents the continuation of tradition and adheres of European and worldwide thought on government and administrative law that is administration as a complex system for the social regulation (government as public service). The second one, primarily under the influence of the Soviet school of state government and rule of law, is characterised by the notion that the government is exclusively in the function of the state government, whereas the state is authoritative organization with monopoly over the application of physical force. The most prominent representative of this stream of opinion is Prof. Nikola Stjepanović advocating the concept of legal-social state (see: N. Stjepanović, *Osnovi administrativnog prava,Basis of administrative law* [staviti naziv na engleskom], Subotica, 1940, p. 41). On the other hand, Prof. Radomir Lukić considers the state as relation between the ruling class and the exploited class (see: R. Lukić, *Država savremenog građanskog društva,* [*State of contemporary civil society*], Radnički Univerzitet „Đuro Salaj" u Beogradu, Centar za društveno-političko obrazovanje, Večernja politička škola, Beograd, 1066, p. 213). The idea of Prof. Lukića and later Prof. Pavla Dimitrijevića, created the concept of so-called "pure" theory notion of government, due to the application of exclusively legal-dogmatic method of legal issues study. For detailed reading about establishment and development of administrative law in Serbia, see S. Jakovljević, *Neke karakteristike nastanka i razvoja upravnog prava u Srbiji,* [Some characteristics of emergence and development of administrative law in Serbia], in *Arhiv za pravne i društvene nauke, Archive for legal and socail sciences* 2/2000, Beograd, pp. 545 – 554.

such a notion of governing within the context of social reality could not be sustainable as it comes to conflict which is to be best seen in the period to come in Yugoslavia.[88]

1.3. The last Yugoslav State (1992 – 2003)

The end of the Cold War and subsequent political and social changes in the international environment had a direct institutional impact on the Socialist Federal Republic of Yugoslavia. In particular, the conflict in the Balkans in the Nineties revealed the deflagrating potential of the rapid disintegration of the Communist world and dissolution of the Yugoslav State.[89] At this historical moment has been created the new Federal Republic of Yugoslavia between two remaining republics, Serbia and Montenegro.

The 1992 adoption of the Constitution of the Federal Republic of Yugoslavia represented a cornerstone of the new Yugoslav institutional architecture.[90] It broke up with the soviet constitutional tradition and replaced it with the contemporary liberal democratic constitutionalism.[91] Consequently, the Constitution was ideologically a neutral act which established political and economic pluralism. The central and guiding values were democracy and freedom.[92]

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[88] See: S. Lilić, *Upravna reforma i post-komunistička transformacija uprave (sa posebnim osvrtom na Jugoslaviju),* [Administrative reform and Post-comunist transformation of administration (with special regard to Yugoslavia)], in *Aktuelna pitanja jugoslovenskog zakonodavstva*, Zbornik radova sa Savetovanja pravnika, Budvanski pravnički dani, Beograd, 1999, pp. 67 – 68.

[89] The second Yugoslav State, just as in the case of the Kingdom of Yugoslavia, was created by one war and it was destroyed by another war. The Yugoslavia's disintegration started on 25 June 1991, with the declaration of independence by Croatia and Slovenia. This caused five interconnected armed conflicts which still "cast long shadows on developments in the successor states." See: M. Baskin and P. Pickering, Former Yugoslavia and Its Successors, *op. cit.,* p. 284.The Macedonia was the only Yugoslav Republic which secession was peaceful. In contrast of the violent disintegration of ex-Yugoslavia the Czech Republic and the Slovakia were created after the peaceful dissolution of Czechoslovakia in 1992, the so-called „velvet divorse". See: Z. Csergo, *Ethnicity, Nationalism, and the Expansion of Democracy,* in S. L. Wolchik and J. L. Curry (eds), *Central & East European politics from Communism to Democracy,* Rowman & Littlefield Publishers Inc., United Kingdom, 2011, p. 96.

[90] Ustav Savezne Republike Jugoslavije [The Constitution of the Federal Republic of Yugoslavia], „Službeni list Savezne Republike Jugoslavije", godina I, br. 1/92, od 3. januara 1992. godine. The Yugoslav Constitution of 1992 entered into force on 27 April 1992.

[91] The Constitution of 1990 represented the revolutionary step back from socialist self-management to the classical democratic constitutional values such as State's organization and protection of fundamental rights. See more *infra* § 1.1. Creation of the Kingdom of Yugoslavia (1918-1941).

[92] After decades of experimentation in constitutional matters and "from one impossible constitutional type that lasted too long and gave disastrous results, it has crossed into the realm of "normal constitutionality" - the constitution again received itself immanent features. It became the supreme legal act of the State, it lost the character of social Charter of self-management, thus it limited two classical constitutional issues - the organization of government and the sphere of civil rights, it

As in the previous section I will ask whether good administration has been considered as a fundamental Yugoslav value. Additionally, I will examine whether the new legal order could have introduced new dimensions of analysis in the relation between individual and public administration.

With respect to the first aspect, the Constitution of 1992, emphatically affirmed the inclusion of many good administration principles among the guiding values of the new Yugoslav State.

The principle of legality of administration found its expression in Article 9 of the Constitution, which stated that the Federal Republic of Yugoslavia "is founded on the rule of law", thus "laws should be in accordance with the Constitution, and executive and judicial power are obliged to observe the law."

Further, the Constitution recognized the principle of language neutrality. This right was based on Article 49 by providing the right to use one's language in the judicial or administrative proceedings in which it has been deciding on his/her rights and duties, as well as the right to be informed about the facts of the case in one's language.[93] As regards the scope of the language right, the Constitution refers to "every person".

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introduced a series of classic constitutional institutions and so on.", see M. Jovičić, *Uvodna reč Miodraga Jovičića,* [Foreword of Miodrag Jovičić], in *Arhiv za pravne i društvene nauke,* 2-3/1991, Beograd, p. 173.

There are two indispensable elements of the Constitution from 1992, it was the supreme legal act which proclaimed corresponding catalogue of fundamental rights which was to a great extent in accordance with international standards of that time and it was a balanced system of power based on principles of rationalized parliament system. See: D. Simović, *Pisani i živi ustav za vreme važenja Ustava Republike Srbije iz 1990* [Written and actual constitution during effectiveness of the Constitution of the Republic of Serbia in 1990], in A. Fira and R. Marković (eds.), *Dva veka srpske ustavnosti,* JP Službeni Glasnik, Beograd, 2010, p. 409. From the quantitative point of view, we can observe, that the importance of the fundamental rights has been affirmed under the Title II of the Constitution from 1992 which included even one–third of the constitutional provisions (Artt. 19 - 68). Furthermore, the institutionalized assumptions were established so that the Constitutional Court along with broadened scope of competencies could become a true guardian of the Constitution. The scope of competencies of the Federal Constitutional Court were declared in Article 124 regarding the following subject matters:

"1) compliance of the Constitutions of the Republics with the Constitution of the Federal Republic of Yugoslavia,

2) compliance of laws and other regulations and general acts with the Constitution of the Federal Republic of Yugoslavia, and ratified and published international treaties,

3) compliance of laws and other regulations and general acts of the Republics with federal law,

4) compliance of regulations and general acts of federal agencies with federal law,

5) compliance of general acts of political parties and associations with the Constitution and federal law,

6) constitutional complaints in the case when the constitutional individual rights and freedoms are infrigement by individual act,

7) conflict of jurisdiction between federal and republic authorities, as well as between republic authorities,

8) prohibition of the work of political parties and civic association,

9) violation of rights in the election of federal bodies.

The Federal Constitutional Court may decide on the constitutionality and legality of the acts which are no longer valid, if did not exceed one year from their expiry to the beggining of the legal process."

[93] Article 49 of the Constitution from 1992.

The individual right to compensation for damage caused by the illegal or improper action of a public officials, bodies or organizations entrusted with public authority in accordance with the law marked another significant good administrative value.[94]

Finally, the Constitution of 1992 guaranteed the procedural protection of individual vis-á-vis public administration. The main constitutional provisions governing the principles of the judicial review of administrative procedure in the Federal Republic of Yugoslavia were Articles 26, 119, 120 and 124. Article 26 (2) established the right to appeal or to other legal remedy against decisions which consider individual rights or interests.[95] The right to appeal has been affirmed under Article 119 by providing such right against decisions of courts, public administration and other public authorities brought in the first instance which could be, further, excluded in the cases provided by law. Review of legality of administrative action has been more precisely guaranteed by Articles 120 (1) and 124 (6) by proclamation the jurisdiction of the courts in administrative disputes and the constitutional complaints in the case when the constitutional individual rights and freedoms are infringement by individual act.[96] The grounds of action to annul an administrative action were not provided by the Constitution. This task was left to the Administrative Disputes Act [see *infra*].[97]

For the purpose of this inquiry, however, the most interesting feature of the Constitution from 1992 is the inclusion of principle of transparency. Here, Article 122 was the step forward in protection of individual's vis-à-vis public administration by providing transparency in the work of federal authorities which could be limited or excluded only in the cases provided by law. Evidence of the growing importance of this value can be found in constitutional attempt to accept all the heritage of contemporary democratic constitutionalism.

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[94] Article 123 (1) of the Constitution from 1992.

[95] Article 26 (2) of the Constitution from 1992.

[96] For scope of competencies of the Federal Constitutional Court see *supra* n. 93.

[97] With respect to the protection of fundamental rights, the Constitution of 1992, explicitly proclaimed that „individual citizen's freedoms and rights exercise, and their duties implement on the base of the Constitution." See: Article 67 (1). However, the way of exercising of fundamental rights could be provided by law „when the Constitution recognize it or *when it is necessary for their implementation*" (emphasis added). See: Article 67 (2). The latter could be seen as blanket provision which lead to expansion of the legislative power. It was also noting by S. Popović, in relation to the same provision regulated under Article 12 of the Constitution of Serbia from 1990, see S. Popović, *Teorijski pojam subjektivnih javnih prava i slobode građana po Ustavu Srbije* [The theoretical concept of subjective public rights and liberties under the Constitution of Serbia], in *Arhiv za pravne i društvene nauke,* br. 2-3/1991, p. 246.

The last Yugoslav constitution had a wider scope than its predecessor, aiming at broad establishing of many good administrative values. Nonetheless, there was the burden of authoritarian heritage and the process of democratic consolidation were significantly slowed down due to challenges imposed by state issues which resulted in discrepancy between written and live constitution. As Linz and Stepan, scholars who have carefully examined the democratic transition and consolidation, distinguished that the consolidation of a democratic system is possible exclusively if the state issue has been resolved, because some types of resolutions regarding the issue of statehood are themselves incompatible with democracy.[98] The divergence between reality and written constitution was especially expressed in the field of exercising power, since the position of the executive was dominant position in political life of those times. Other discrepancies between written and actual constitution can also not be neglected, such as for example the Constitutional Court, which instead of guarding the constitution became a guardian of the ruling politics.[99]

The fundamental legal engines of good administrative values in the last Yugoslav State were the Administrative Disputes Act of 1996[100] and the General Administrative Procedure Act of 1997,[101] adopted as federal laws,[102] which have taken into account constitutional requirements and constraints, aiming to ensure that all types of public administrative actions and decisions that could impinge upon individual rights or legitimate interests of citizens are awarded full legal protection.

The Administrative Disputes Act entered into force on 12 October 1996 as the third and last Yugoslav Law of that kind which substituted its forerunner of 1977.

Here, the principle of the judicial review is emphatically reconfirmed as fundamental requirement of the Yugoslav legal order for procedural protection of individual's vis-à-vis public administration. In Article 1 the administrative dispute has been defined as judicial review of legality of an administrative act[103] in order to protect

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[98] See: J.J. Linz and A. Stepan, *Demokratska tranzicija i konsolidacija,* Beograd, 1998, pp. 20 and 48.

[99] See: D. Simović, *op. cit.,* p. 409.

[100] *Zakon o upravnim sporovima* [The Administrative Disputes Act], „Službeni list Savezne Republike Jugoslavije", br. 46 od 4. oktobra 1996. godine.

[101] Zakon o opštem upravnom postupku [The General Administrative Procedure Act], „Službeni list SRJ", No. 33/97 from 11 July 1997

[102] According to Article 77 (1) of the Constitution from 1992 „the Federal Republic of Yugoslavia, through its agencies, establish policies, *enact and enforce federal laws*, other regulations and general acts, provides constitutionally-judicial and judicial protection in following matters: 1) freedoms, rights and duties of individuals and citizens establish under this Constitution; proceedings before the courts and other state bodies [...]" (emphasis added).

[103] The ADA of 1996 explicitly provided that an administrative dispute could be conducted only against an administrative act (Article 6 (1)). „Administrative act, under this law, represent the act by which public administration and companies or other organizations in the exercise of public authority decide

the rights and legal interests of natural and legal entities and other parties in an administrative proceeding. The grounds of action to annul an administrative action were: the lack of competence, infringement of an essential procedural requirement, and infringement of the law or other regulation.[104] Furthermore, the Court[105] was obliged on use of procedural powers in order to guarantee their strict observance for the benefit of individuals or relevant institutions, but it does not encroach into the discretion of the administrative authorities to interfere with the substantive decision.[106]

The General Administrative Procedure Act, adopted on 26 June 1997 and entered into force on 11 July 1997, concludes this institutional Yugoslav path towards good administration and lays out the relevant legal framework to be considered in the subsequent Chapter five, in the section dedicated to the case study of Republic of Serbia where it is still on force.[107]

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on a particular right or obligation of a natural or legal person or other party in an administrative matter", see Article 6 (2).

[104] Article 10 (1) of the ADA from 1996.

[105] Article 3 of the ADA: „Administrative disputes are handled by Republic's courts, the Supreme Military Court and the Federal Court."

[106] Article 10 (2) of the ADA from 1996; Interestingly, the ADA did not make a specific distinction between ordinary and extraordinary legal remedies. However, upon analysis of the statutory text the following legal remedies can be identified: appeal; request for extraordinary review of a final court decision; request for the protection of legality; complaint for procedure repetition; amending and annulment with regard to administrative disputes; legal remedies with regard to non-compliance to judicial decisions („new complaint", „particular submission notice", „request for adopting an administrative act by the court"); request for revindication and damage in administrative disputes. About legal remedies see more Chapter 4. § 4.2.2.

[107] The GAPA of 1997 replaced its predecessor („Službeni list Federativne Narodne Republike Jugoslavije", br. 52/56; „Službeni list Savezne Federativne Republike Jugoslavije", br. 10/65, 18/65, 4/77, 11/78, 32/78, 9/86, 47/86 and „Službeni list Savezne Republike Jugoslavije", br. 24/94).

The new states established after the dissolution of the Yugoslav State have been largely assumed the Yugoslav GAPA of 1986. Bosnia and Hercegovina, the State with very complex state, administrative and legal order, has been adopted four new GAPA after 1998. The first GAPA has been brought in Federation of Bosnia and Hercegovina in 1998 (*Zakon o upravnom postupku*, "Službene novine Federacije BiH", br. 2/1998 and 48/1999). Then, in 2002 has been adopted GAPA of the Republika Srpska, Brčko District and Bosnia and Hercegovina. For an enlightening reading of the evolution of public administration in BiH see, Z. Seizović, G. Trpin, S. Arnaut, O. Tabak and S. Petrović, *Upravni postupak* [Administrative procedure], in *Sistemski pregled javne uprave u BiH – završni izveštaj,* 2005; Croatia took the GAPA of 1986 ("Službeni list Savezne Federativne Republike Jugoslavije", br. 47/86) by the Law on Retention of the GAPA ("Narodne novine", br. 53/1991); The General Administrative Procedure Act of the Republic of Macedonia was passed on May 26, 2005 ("Službene novine Republike Makedonije", br. 38/2005). For an detailed reading of the administrative law in Macedonia see, N. Grizo, B. Davitkovski, S: Gelevski and A. Pavlovska-Daneva (eds.), *Administrativno pravo* [Administrative Law], Praven fakultet Justinijan Prvi, Skopje, 2008; Montenegro brought the new GAPA in 2003 ("Službeni list Crne Gore", br. 60/2003). About administrative regulation in Montenegro see, S. Dujić, *Uvodne napomene – novi upravni propisi Republike Crne Gore* [Opening remarks – a new administrative regulations of the Republic of Montenegro], in *Zbirka upravnih propisa Republike Crne Gore,* Ministarstvo pravde, Podgorica; Serbia did not bring yet the new GAPA. Finally, Slovenia adopted the new GAPA 1999 which has been further amended several times ("Uradni list Republike Slovenije", br. 80/1999, 70/2000, 52/2002, 73/2004, 119/2005, 24/2006, 105/2006, 127/2007, 65/2008, 8/2010). See more: T. Jerovšek, G. Trpin, B. Bugarič, M. Horvat, E. Keršervan, P. Kovač, A. Mužina, S. Pličanić, T. Vesel and G. Virant (eds.), *Zakon o splošnem upravnem postopku s komentarjem*, [The General Administartive Procedure Act with commentary], Nebra I Inštitut za javno pravo, Ljubljanja, 2004.

The overview of the constitutional and administrative development in the eighty five years long Yugoslav experience, i.e. the Kingdom of Serbs, Croats, and Slovenes from 1918 to 1929, gives an idea of the pervasiveness of public administration which have been since the beginning inextricably linked with legal *acquis* of traditional model of regulated, literate, documented and legally bound public administration. On the internal side, however, the Yugoslav state was not able to restrict the influence of political factor on its legal order which represented the dominant peculiarity of administrative law in this region.

2. Process of European Integration and the Region

The method of inclusion through conditionality represent the main feature of the European approach to the enlargement process since the adoption of the Copenhagen criteria in 1993. On that occasion, the European Council adopted a set of political, economic and institutional criteria that candidate states must fulfil in order to join the European Union. Specifically:

"Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."

Additionally,

"The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries."

The most relevant aspects of the Copenhagen criteria for our inquiry are surely the political and institutional: ability of candidate countries to take on the obligations of membership. Before to approach these aspects it will be briefly underlined the process of the EU enlargement.

2.1. EU accession process

The legal basis of the EU accession process is provided in the Treaty of Lisbon according to which any "European State" that respects and promotes the values of (Article 49) human dignity, freedom, democracy, equality, the rule of law, respect for human rights, the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men (Article 2) may apply to become a member of the Union[108].

According to this the accession process is based on two main conditions. First, the interested country must conform to and respect the commonly held values of the European Union. Further, the promotion of these values by the interested country is the condition sine qua non of the accession process.

The accession process officially starts when the interested country submits the formal application for membership to the European Council. The European Council further must consult the Commission which is in charge of providing a formal opinion on the applicant country, and receive the consent of the European Parliament. On these bases the European Council decides on the application for the membership. Once the Council officially accepts the application, the status of "candidate country" is granted to the state.

The next step is so-called "pre-accession strategy" which embraces, for each candidate country, procedures and instruments to support and orient the path of the enlargement process, including bilateral agreements between the European Union and the candidate countries, Accession (AP), National Programmes for the Adoption of the Acquis (NPAA) and instruments for pre-accession financial assistance (IPA).

The Accession Partnership (AP) sets out the key priorities which the candidate country must fulfil in order to become an EU Member State. The AP could be updated according to the progress achieved by candidate country. The National Programme for the Adoption of the Acquis (NPAA) is a fundamental instrument addressing each candidate country to create its own national programme for implementation of the "acquis" that gives details, timetables and costs for the fulfilment of each priority area defined by the EU in the Accession Partnership. The pre-accession assistance provides the financial support to the candidate country for the accession process in particular for

[108] This part of work is based on the EU accession process described in V. Volpe, "Global dimensions of democracy".

implementation of the Accession Partnership. This instrument is also established for each candidate country.

The unanimous decision of the Council to accept the application for membership opens the negotiation process between the candidate country and each Member State. The substantive part of the negotiations will be conducted in an Intergovernmental Conference with the participation of Member States on one side and the Candidate State on the other. The negotiations include discussions about the timing, conditions for adoption the "acquis" and alignment with the Copenhagen criteria. During this process the candidate country cannot discuss the conditions of its entrance into the EU. The EU conditions intend to "provide the benchmarks for assessing each candidate's progress. These conditions remain valid today and there is no question of modifying them."

The pace of negotiations, which are conducted individually, depends on the pace of each country's reforms and their alignment with the EU laws. In the case of Croatia, for example, the accession negotiations started on 17 March 2005 and finished on 30 June 2011.

In order to ensure progress in the negotiations, the candidate countries must make tangible progress in meeting the requirements for membership, most importantly the Copenhagen criteria. Since 1998, the European Commission has reported regularly to the Council and the Parliament on the progress of each of the candidate countries. "Progress" as defined in the 2010 Croatia's report "is measured on the basis of decisions taken, legislation adopted and measures implemented. As a rule, legislation or measures which are being prepared or awaiting parliamentary approval have not been taken into account. This approach ensures equal treatment across all reports and permits an objective assessment." The annual reports are fundamental instruments for monitoring the progress of the candidate states in their achievement of the European standards. The European Commission provides a large number of subsections which allow it to analyse almost all sectors of political and institutional life of applicant countries. The duration of monitoring ends when the applicant country joins the EU.

Definitive closure of negotiations occurs when all Member States are satisfied with the candidate's achievements. The Draft Accession Treaty which contains the detailed terms and conditions must have the support of the European Council, the Commission and the European Parliament. It is signed by the candidate country and the representatives of the all Member States, and then it is submitted to the Member

States and the candidate country for ratification. The candidate country becomes an "Acceding State" in the moment when the Accession Treaty is signed. The treaty enters into force when the ratification process is complete. Consequently, the accession state officially becomes a member state.

2.2. European Union's initiatives vis-à-vis South Eastern Europe

The European Union did not exhaust its power of attraction with the last enlargement waves in 2004 and 2007. Numerous other European states applied for membership over recent years, primarily from South Eastern Europe.[109]

On December 1996 has been established the Royaumont Process which represents the first European Union's initiative regarding the stabilization process in the region of South Eastern Europe. The opening lines of the document state that its aim is to "consolidate peace and stability in the region of South Eastern Europe, sound structures and constructive policies", which "are required […] more than ever."[110] This approach was quite innovative and significantly contributed to the improvement of the situation by encouraging democratisation through dialogue within the population.[111]

The document was, in fact, more a result of the Balkan conflict's fears then of European Union's membership hope.[112] The great expectations and political ambitions expressed in the Dayton-Paris peace agreement[113] just a one year earlier, in December 1995, were main inspiration for bringing the Royaumont Process which supported the implementation of the agreement.[114] However, this document, among others, predicted

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[109] For a detailed reading about the European conditionality with regard to the Balkan Countries see, L. Appicciafuoco, *Integrazione dei Balcani occidentali nell'Unione europea e principio di condizionalità,* in *Diritto pubblico comparato ed europeo*, 2/2007, pp. 547 – 582.

[110]See R. Panaghiotis, *The Royaumont Process – An Initiative for Stability and Good Neighbourliness in South-Eastern Europe,* 1998. Available at: http://www.hri.org/MFA/thesis/autumn98/royaumont.html.

[111] "The potential for conflict both within and across national boundaries is aggravated by the lack of effective communication channels among citizens and politicians. In the absence of institutions enabling conflicts to be resolved and differences to be transmuted into political debate, confrontation is always a possibility. Ethnic and national prejudices are thus perpetuated in the region. It is therefore of paramount importance to promote the concept of a broader European identity in a shared democratic culture for conflict situations to be alleviated and relations between the countries of the region and the EU to be strengthened. Conflicts based on cultural, ethnic, and religious differences cannot, however, be prevented or resolved only at the political level. These are matters of conscience and, as such, must be addressed by the individuals themselves who must be assisted in order to overcome their prejudices, and learn about their fellow citizens and how to tolerate their differences." *Ibidem*

[112] „The belief that someday they will join us in the EU originates from their fervent desire to become part of the western world of democracy and economic growth." *Ibidem*

[113] The General Framework Agreement for Peace in Bosnia and Herzegovina, the full text is available at: http://www.ohr.int/dpa/default.asp?content_id=380.

[114] It is worth noting that the Royaumont Process played important role in establishing of inter-parliamentarian relations within the Stability Pact for South East Europe, adopted on 10 June 1999 in Cologne, which represents "a significant contribution to the normalisation of intra-regional relations." See S. Knezović, *EU's Conditionality Mechanism in South East Europe – Lessons Learned and Challenges for the Future,* in *European Perspectives – Journal on European Perspectives of the Western Balkans,* Vol. 1, No. 1, October, 2009, p. 97; The Cologne's Stability Pact is an EU initiative created to bring peace, stability

as one of the future tasks in the South Eastern European region "adjusting to the *western principles of public administration, enhancing public awareness of the citizen's role, and balancing private and public interests*"[115] (emphasis added).

One year later, in 1997, the Luxembourg European Council adopted a regional approach for South Eastern European countries, establishing a coherent and transparent policy towards the development of relations with Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia (Serbia and Montenegro), Former Yugoslav Republic of Macedonia, and Albania. It is worth noting that this document put an emphasis on respecting a series of conditions, such as the principles of democracy, the rule of law, human rights, minorities protection and economic reforms, which could be identified within the framework of the Copenhagen criteria.[116]

On May 26, 1999, the European Commission proposed the Stabilization and Association Process [hereafter SAP] for the five countries of the region, as "an ambitious strategy that helps the region to secure political and economic stabilisation and to develop *a closer association with the EU, opening a road towards EU membership* once the relevant conditions have been met"[117] (emphasis added).

The first official announcement to accept the Western Balkan countries into the "European family" was done in the Presidency's Conclusions of the European Council of Fiera in 2000: "All the countries concerned are *potential candidates* for EU membership" (emphasis added), and for this reason the Council supported the Stabilisation and Association through technical and economic assistance.[118]

On that occasion the Council adopted another significant decision. The Fiera Council encouraged Member States "to review the quality and performance of public

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and economic development to the region. It includes co-operation between EU, United States, Russia, Turkey, Japan, countries fro the region and many others regional and international institutions. *Ibidem*

[115] R. Panaghiotis, *op. cit.*

[116] I. Sanader, *Croatia's Course of Action to Achieve EU Membership,* Zentrum für Europäische Integrationsforschung Center for European Integration Studies, Rheinische Friedrich-Wilhelms-Universität Bonn, Bonn, C 59, 1999, p. 12. Available at: http://aei.pitt.edu. pp. 3 -28; See also S. Knezević, *op. cit.,* p. 98; As previously mentioned *supra* § 2.1, stability concerns played a fundamental role in making the enlargement in the eyes of the Luxembourg European Council.

[117] Commission of the European Communities (2001b), The Stabilisation and Association Process and CARDS Assistance 2000 to 2006, European Commission Paper for the Second Regional Conference for South Eastern Europe, see F. Trauner *The Europeanisation of the Western Balkans: deconstructing the EU's routes of influence in justice and home affairs,* Paper presented to the ECPR Fourth Pan-European Conference on EU Politics, Riga, September, 25 -27, 2008, p. 5. Available at: http://www.jhubs.it.

[118] Council of the European Union, *Presidency Conclusions,* Santa Maria Da Fiera, 19 – 20 June 2000, D. Western Balkans, para. 67. Available at: http http://www.europarl.europa.eu/summits/fei1_en.htm.

administration in view of *the definition of a European system of benchmarking and best practices*"[119] (emphasis added).

The prospect for membership of Western Balkans countries was reiterated several times, most notably at the European Council of Thessaloniki in 2003.[120] The "Thessaloniki agenda for the Western Balkans: moving towards European integration" was endorsed by the Council which lead to the enrichment and strengthening of the SAP process thanks to the experiences of the Central and Eastern Enlargement.[121]

The framework of the EU enlargement policy to Western Balkans region consists in the Stabilization and Association Process, adopted at the Zagreb Summit on November 2000,[122] aimed to ensure assistance and to promote contractual relations with each of country in the region by establishing the Stabilization and Association Agreements [hereafter SAAs].[123] The SAP set the Copenhagen criteria from 1993 as the key feature of the enhanced accession of Western Balkan countries.[124] It also

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[119] In para. 31 states: "The European Council stresses the role of public administrations, administrative action and better regulation in enhancing the competitiveness of the Union and of the Member States, thus contributing to economic growth and employment opportunities. The European Council encourages Member States to review the quality and performance of public administration in view of the definition of a European system of benchmarking and best practices." *Ibidem*

[120] Council of the European Union, *Presidency Conclusions,* Thessaloniki, 19 – 20 June 2003, 11638/03, Brussels, 1 October 2003. Available at: http://www.consilium.europa.eu.

[121] "The EU's commitment and assistance must be matched by a genuine commitment of the governments of the Western Balkan countries and concrete steps to make the necessary reforms, to establish adequate administrative capacity and to co-operate amongst themselves. Building fully functioning states capable of providing for the needs of their citizens remains a major challenge for the whole region. The fight against organized crime and corruption is essential for ensuring the rule of law. The EU expects the Western Balkan countries to pursue these objectives at an accelerated pace, thus allowing the prompt passage of each of them to the next stage of relations with the EU within the Stabilization and Association Process." See: "The Thessaloniki agenda for the Western Balkans", available at: http://www.westernbalkans.info/htmls/page.php?category=391&id=419. This Agenda remains "the cornerstone of EU policy towards the region", see Commission Opinion on Serbia's application for membership of the European Union, COM (2011) 668 final, Brussels, 12.10.2011, p. 2.

[122] See the full text of the Declaration of the Zagreb Summit at http://www.esiweb.org; In 2000, the Fiera European Council stated that all the countries of the region were „potential candidates for EU membership", see F. Trauner, *op. cit.,* p. 5.

[123] The Stabilisation and Association Process includes: Signing the Stabilization and Association Agreement; asymmetrical trade subventions and other economic and trade relations; economic and financial aid; humanitarian aid for refugees; cooperation in the field of justice and internal affairs; and political dialog. See: *Proces stabilizacije i pridruživanja,* [Stabilization and Association Process], Government of the Republic of Serbia, the EU Integration Office, 2006; The deadline for the beginning of negotiations on the Stabilization and Association Process and concluding the Stabilization and Association Agreements and their implementation was different for each concrete case. For detailed reading about Stabilization and Accession Process, see Commission Staff Working Paper, *EU and Association process for countries of South-Eastern Europe, Compliance with the Council Conclusions of 29 April 1997 & 21/22 June 1999, Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia and Albania*, Brussels, 9 February 2000, SEC (2000) 168/2.

[124] These criteria are also recognized under Articles 6 and 49 of the Treaty of Lisbon. As it was discussed in the previous sections Article 49 states that any European State which respects the principles set out in Article 6(1) TEU may apply to become a member of the European Union. Article 6 (1) describes these principles as those of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Some commentators have

introduced some additional requirements, such as full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), the return of refugees and internally displaced persons, and enhanced cooperation of all countries in the region according to the EU model which is often pointed out as undertaking that maintains peace among its member state.[125] This points to the fact that the EU approach towards the Western Balkans region has been conditioned by problematic issues in post-conflict period which were lead to inclusion of broader range of conditions.[126]

The Stabilisation and Association Agreement represents the new generation of agreements which are made for countries in the process of stabilisation and accession, as the most significant cornerstone in achieving the status of "candidate country".[127] It is signed by the interested country and the representatives of all the Member States, and then it is submitted to the Member States and the interested country for ratification, according to their national constitutional rules.[128]

For the purpose of this inquiry the most interesting feature of the Stabilisation and Association Agreement is the requirement of consolidation of the rule of law, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular.[129]

This correspondence is restated, in four SAAa, in very similar terms in the area of cooperation which should ensure the development of an efficient and accountable

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been pointed that the rationale for creation of the Stabilisation and Association Process was need of "a solid and realistic perspective" of the Western Balkan region „in order to be motivated to carry out the vast number of reforms that the EU expected of them." See: H. Schenker, *The Stabilization and Association Process: An Engine of European Integration in Need of Tuning*, in JEMIE, Vol. 7, 1/2008, by European Centre for Minority Issues, p. 1, available at: http://www.ecmi.de.

[125] See: J. Jørgensen, *The Enlargement Process: The Path to a Peaceful and Prosperous Europe*, available at: http://jpn.cec.eu.int/.

[126] Interestingly, unlike in the case of countries of fifth EU enlargement where the regional cooperation was recommended, it was conditional for the Western Balkan countries.

[127] The SAAs have all elements of the previous treaties, signed with the Central and Eastern Europe countries. Nonetheless, the SAAs represented a stronger version of EU association than the Europe Agreements. Using the word „stabilisation" clearly indicates the difference among them. See: G. Pridham, *Change and Continuity in the European Union's Political Conditionality: Aims, Approach, and Priorities,* in *Democratization,* Vol. 14, 3/2007, p. 458;

The legal basis of the Stabilisation and Association Agreement present Article 217 the Treaty of Lisbon which provides that "the Union may conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."

[128] The Stabilization and Association Agreement is part of the EU Stabilisation and Association Process (SAP) and European Neighbourhood Policy (ENP). Until June 2008 all Western Balkans countries have been signed the Stabilisation and Association agreement with EU Member States: Albania (signed 2006, entered into force 2009); Bosnia and Herzegovina (signed 2008, entry into force pending); Croatia (signed 2001, entered into force 2005); Macedonia (signed 2001, entered into force 2004); Montenegro (signed 2007, entered into force 2010) and Serbia (signed 2008, entry into force pending).

[129] See Article 75 of Croatia SAA; Similar, Article 80 of Serbia SAA.

public administration, notably to support rule of law implementation, the proper functioning of the state institutions for the benefit of the individuals.[130]

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The proper implementation of the Stabilisation and Association Agreement could further lead to application for membership. The European Commission is in charge of providing a formal opinion on the interested country (also known as the *avis*), in which great attention is paid to core Copenhagen criteria and full cooperation with the International Criminal Tribunal for the Former Yugoslavia.[133]

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In order to ensure progress in the achieving the candidate status, the applicant countries must make tangible progress in meeting the requirements for membership. The annual progress reports play a key role in this process. It carefully lists achievements, and things which remain to do. On this basis, the European Council

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[130] See Article 111 Albania SAA; Article 111 of BiH SAA; Article 114 of Montenegro SAA; and Article 114 of Serbia SAA. Interestingly, similar provision could not be found in Croatia SAA and Macedonia SAA.

[131] See Article 75 of Croatia SAA; Similar, Article 80 of Serbia SAA.

[132] See Article 111 Albania SAA; Article 111 of BiH SAA; Article 114 of Montenegro SAA; and Article 114 of Serbia SAA. Interestingly, similar provision could not be found in Croatia SAA and Macedonia SAA.

[133] For the purpose of the accession negotiations, the Stabilisation and Association Agreement is divided in several sections: 1. General principles; 2. Political dialog; 3. Regional cooperation; 4. Free movement of goods; 5. Movement of workers, establishment, supply of services, movement of capital; 6. Approximation of laws, law enforcement and competition rules; 7. Justice, freedom and security; 8. Cooperation policies; 9. Final cooperation; 10. Institutional, general and final provisions.

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2.4. European Administrative Space

The last consideration brings us to one of the most important issues relating to the means of good administration promotion: i.e. European Administrative Space, which the EU utilizes as a benchmark for evaluating candidate's achievements in the reform of public administration.

The concept of European Administrative Space is associated with the matter of convergence of divergent administrative systems. The harmonization of public administration and the development of common core administrative principles, rules and practices are at the heart of the convergence principle.[135] Therefore, the future members shall be directed towards a common ground.

For the purpose of our analysis, this means asking which parameters the EU offers to the candidate countries as a model for their administrative reforms? Who defined the concept of European Administrative Space during the accession phase? And why the promotion of European Administrative Space is so relevant for the EU institutions during the enlargement process?

[135] Administrative convergence „implies a reduction of variance and disparities in administrative arrangements", thus „produces more homogeneity and coherence among formerly distinct administrations" See: J. P. Olsen, *Towards European Administrative Space?,* Arena Working Papers WP02/26, available at: http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2002/wp02_26.htm. Some scholars make distinction between approximation and harmonization and underline that there is no „need" nor „project" for unique EU administrative model. See: J. Ziller, *EU integration and Civil Service reform*, in Sigma Papers: No. 23, *Preparing public administration for European Administrative Space,* OECD (CCNM/SIGMA/PUMA(98)39), Paris, 1998*,* p. 137. Similar, Harlow put that "in detaching administrative law too fast from its cultural environment, harm may be caused to the structure of national constitutions, legal order and administrative systems" thus "there are further risk that the search for a single model of administrative justice will produce stagnation, impoverishing our different legal traditions and draining the pool of ideas for experimentation." See: C. Harlow, *European Administrative Law and the Global Challenge,* in P. Craig and G de Burca (eds.), *The Evolution of EU Law,* Oxford University Press, Oxford, 1999, p. 272.

2.4.1. Concept of the European Administrative Space: who learns what from whom?

In 1992, in joint initiative of the European Union and the Organisation for Economic Cooperation and Development (OECD) has been established the program of Support for Improvement in Governance and Management [hereafter Sigma] in order to guide the alignment of candidate's public administrations with general EU standards.

Sigma has been primarily launched to support and orient the path of administrative reform efforts in Czech Republic, Hungary, Poland, Slovakia and Slovenia. Further, it has been extended to all candidate countries of the Eastern Enlargement and the recent EU's candidates. In June 2008, Sigma started also support to countries covered by European Union Neighbourhood Policy.[136]

The complex mechanism of Sigma support embraces procedures and instruments for evaluation of the each candidate's reform progress, including Sigma Papers and Sigma Assessments Reports.

The Sigma Paper (SP) is a fundamental instrument addressing key administrative priorities for candidate countries to fulfil in order to join the European Union.[137] The majority of SPs were published prior to launching the most important enlargement in the EU history from 2004.[138] From quantitative point of view, we can observe, that decades of state socialism and communism, a trait that was suggested as main peculiarity of public administration in the target countries, affected on inclusion of additional conditions and preparations unlike the previous candidates countries.[139]

Sigma is required to create Assessment Reports (ARs) which represent the contribution to the European Commission's Annual Progress Reports on each of the candidate countries. The ARs are highly specific instruments that consider the extent to

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[136] Since 2008 Sigma activities have been started in Algeria, Armenia, Azerbaijan, Egypt, Georgia, Jordan, Moldova, Morocco, Tunisia and Ukraine. For detailed reading about Sigma support towards EU neighbouring countries, see Sigma's official website http://www.enpi-info.eu/index.php?lang_id=450.

[137] Since 1995, it has been published 47 Sigma Papers which could be grouped in the following sections: 1. Institution building and institutional reforms of public administration as well as its adaptation to the European standards, in particular within the European Administrative Space; 2. Financial control and audit; 3. Law drafting, regulatory management and assessing the impact of proposed regulations; 4. Development of public administration legal framework and the content of regulations; 5. Public services, civil services, integrity and professionalism; 6. Different issues of public procurement; 7. Policy making and public policies coordination; 8. Specific issues of transitional countries.

[138] Even 36 Sigma Papers of total 47 were published in the period 1995 – 2004. On the contrary, in the period after eastern enlargement (2005 - 2010) 11 Sigma Papers were published mainly in domain of civil service professionalism, budgeting and financial management.

[139] During the preparations for accession in 1973, 1980, 1986 and 1995 the EU did not evaluate national administrative systems. See: J. Ziller, *EU integration and Civil Service reform*, *op. cit.,* p. 138 para. 564.

which the public administrative systems in candidates correspond to the EU standards defined as European Administrative Space [hereafter EAS].

In 1999, the Sigma Paper no. 27 officially launched the concept of the European Administrative Space. Specifically:

> "Shared principles of public administration among EU Member States constitute the conditions of a 'European Administrative Space' (EAS). The EAS includes a set of common standards for action within public administration which are defined by law and enforced in practice through procedures and accountability mechanisms. [...] Although the EAS does not constitute an agreed part of the acquis communautaire, it should nevertheless serve to guide the public administrative reforms in candidate countries."

Additionally,

> "If we attempt to systemise the main administrative law principles common to western European countries, we could distinguish the following groups: 1) reliability and predictability (legal certainty); 2) openness and transparency; 3) accountability and 4) efficiency and effectiveness."[140]

The European Administrative Space is "non-formalised *acquis"* which includes administrative standards derived from the shared legal traditions of the Member States that have been defined and refined by the jurisprudence of the European Courts. In fact, the only formal part of this concept are the administrative principles recognized under the right to good administration enshrined in Article 41 of the EU Charter of Fundamental Rights which could have served as a minimum standard throughout all the Member States, leading to convergence.

The European Administrative Space is "non-formalised *acquis"* which includes administrative standards derived from the shared legal traditions of the Member States that have been defined and refined by the jurisprudence of the European Courts. In fact, the only formal part of this concept are the administrative principles recognized under the right to good administration enshrined in Article 41 of the EU Charter of Fundamental Rights which could have served as a minimum standard throughout all the Member States, leading to convergence.

[140] F. Cardona, *European Principles for Public Administration, op. cit.*, pp. 5 and 8.

The European Administrative Space could be described as response to the European Council's requests regarding the process of accession to the Union, formulated at Copenhagen, Madrid, Luxembourg and Helsinki between 1993 and 1999 as the main EU instrument for preparing public administration of Central, Eastern and South Eastern European countries according to the Union's standards in this area.[141] This is linked with the EU ambition, "to define itself in terms of values to the world as well as to its citizens" and "[c]ertain values have become incorporated into the Union's identity to the extent that they are regarded as a condition of membership."[142]

On the other hand, the EU lacks direct internal competence over national administrations. One of the core principles of the Union is contained in Article 5.1 of the TEU: "The limits of Union competences are governed by the principle of conferral", which implies that: "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties" and that "[c]ompetences not conferred upon the Union in the Treaties remain with the Member States." (Art. 5.2). As we have seen, except the inclusion of the right to good administration, there is no explicit recognition of administrative principles in the EU. National public administrations have so far "remained strictly an area of national sovereignty, there cannot be any European *policy* since there is no community *competence* in this area."[143]

The convergence process of the administrative systems should be based on standards of good practice and "voluntary imitation of a superior model".[144] For this process to be realised, the administrative model of the EC must be perceived as attractive enough to be copied by the national systems.

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[141] "Constant contact amongst public servants of Member States and the Commission, the requirement to develop and implement the *acquis communautaire* at equivalent standards of reliability across the Union, the emergence of a Europe-wide system of administrative justice, and shared public administration values and principles, have led to some convergence amongst national administrations. This has been described as the 'European Administrative Space'." See: F. Cardona, *European Principles for Public Administration, op. cit.*, p. 14.

[142] See: M. Cremona, *Values in the EU Constitution: the External dimension,* CDDRL Working Papers, Stanford IIS, No. 26, 2 November 2004, p. 2. Citation found in the work of V. Volpe, op. cit.

[143] M. Mangenot (ed.), Public Administrations and Services of General Interest: What kind of Europeanization?, Maastricht, 2005, p. 4; "Debates over the distribution of administrative competence have been linked to struggles over the general distribution and separation of powers in the Union. Member States have guarded their autonomy and have been reluctant to grant general organizational, supervisory and enforcement competence to European institutions. Most of them have been satisfied with laws that give the Commission direct administrative responsibilities only in specified domains and otherwise assume that the EU will not interfere with the internal administrative organization of the member states – as long as Union obligations are followed and common rules are implemented. Administrative instruments that leave discretion to member states have been more popular than those imposing specific administrative solutions." See: J. P. Olsen, *op. cit.*

[144] *Ibidem*

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[146] *Ibidem*

2.4.2. The resignation of the Santer Commission.

Administrative reforms are considered as essential mean and a crucial element for successful transplantation of the EU legal standards and their effectively implementation in candidate countries during the accession process. On the other side, the EU also pursues a relevant self-interest.[147]

The resignation of the Santer Commission and the publication of the Committee of Independent Experts' First Report on allegations regarding fraud, mismanagement and nepotism in the European Commission[148] in 1999 represent turning points in the EU approach to administrative issues. The Committee emphasized that these categories could overlap, and emphasized that they were bad examples of a more fundamental idea that public servants should be held to proper standards of behaviour.

In 2000 the Commission launched a White Paper on Administrative Reform where underlined that:

> "The citizens of the Union deserve no less, the staff of the Commission want to provide no less. To fulfil that objective, we must keep the best of the past and combine it with new systems designed to face the challenges of the future."

Additionally,

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[147] The need for administrative reform became apparent after the resignation of the Santer Commission in 1999 because of accusations of mismanagement, fraud and nepotism. In 2000, the Commission launched a White Paper on Administrative Reform which points, among others: openness, transparency in the process of decision making, political responsibility of the ruling governments and effectiveness of the administrative capacity.

Deirdre Curtin wrote that "given the (amazing) fact that in all its 50-odd years of existence as the most important part of the public administration of the EU it had never undergone a proper reform of the way it is organised and functions, this exercise was scandalously overdue and could, given time constraints, only touch upon the tip of the iceberg in terms of the most pressing organisational and management defects highlighted by the Committee of Independent Experts in its reports […]" Additionally, "[w]hat the White Paper on Administrative Reform reveals is an administration desperately trying to pull itself up by its boot straps. This reflects the fact that it did not voluntarily undergo this process of organisational reform but was rather forced to because of events. The Commission in so doing nevertheless took on board the fact that during the course of its lifetime the domain and understanding of public administration as such has undergone considerable changes. The move from a traditional bureaucratic paradigm in the sense of a downward and inward looking Weberian organisation towards a more modern administration viewed in more business, private sector terms enabled the goals of efficiency and performance to move to centre-stage." **See:** D.Curtin, *The Commission as Sorcerer's Apprentice ? Reflections on EU Public Administration and the Role of Information Technology in Holding Bureaucracy Accountable*, Jean Monnet Working Paper no. 6/2001, p. 2. Available at: http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/011801.html.

[148] The Committee of Independent Experts First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999, available at: wwweuroparl.europa.eu.

> "The Commission itself, therefore, needs to be independent, accountable, efficient and transparent, and guided by the highest standards of responsibility."

In this context, the right to good administration has been explicitly enshrined in Article 41 of the EU Charter of Fundamental rights in order to encompass relevant administrative principles and practices that could have served as a minimum standard throughout all the Member States, leading to convergence. The convergence enables to the EU citizens to enjoy the rights provided by the Treaties, irrespective of the country in which they live. The interest of the Union in the administrative systems of Member States in order to ensure equivalent standards of reliability across the Union has been confirmed in the Treaty of Lisbon. Specifically:

> "Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law."[149]

Thus, the element of proper functioning of the Union that could be identified at the core of the EU integration policy is an undeniable element also of the administrative promotion strategy.

Nonetheless, the EU driven administrative reforms operate also in the interest of candidate states. It can be argued that administrative improvements stimulated by EU could be valuable for democratic consolidation by promoting a professional, predictable, transparent and efficient public administration rather than political one.[150] The introduction and development of good administrative praxis and standards is in fact part of the consolidation phase of any democratic transition, which aims at improvement of fundamental rights standards and protection of individual vis-à-vis public administration in order to guarantee the fulfilment of regime continuity expectations.

[149] Article 197 (1, 2).

[150] See: G. Pridham, *Change and Continuity in the European Union's Political Conditionality: Aims, Approach, and Priorities, op. cit.*, p. 452.

3. Uneven between heritage and tradition

3.1. From transition to consolidation

As pointed by D. McSweeney and C. Tempest the generalization in studies of democratization concerns three aspects: a) *process*, "identifying the phases through which countries pass in the moving from an authoritarian regime to democracy"; b) *preconditions*, "depicting the social, political and economic circumstances which allow democratization to take place"; and c) *causes*, "defining the particular political alliances and historical events which propelled countries towards democracy".[151]

In order to create one general theory of democratic transformation, Wolfgang Merkel identified the so-called "triad problem". 1) the social, economic and political proceedings of system transformation; 2) problem of their research at micro and macro level; and 3) three different phases of transformation: the end of an old system, the democratization phase, and the consolidation of a new system.[152]

In 1996, Juan Linz and Alfred Stepan, underlined that "[a] democratic transition is complete when sufficient agreement has been reached about political procedures to produce an elected government, when a government comes to power that is the direct result of a free and popular vote, when this government *de facto* has the authority to generate new policies, and when the executive, legislative and judicial power generated by the new democracy does not share power with other bodies *de jure*."[153]

Democratic consolidation is achieved when democracy becomes "the only game in town".[154] This final stadium of democracy includes noticeable changes in

[151] See: D. McSweeney and C. Tempest, *The Political Science of Democratic Transition in Eastern Europe,* in *Political Studies*, XLI, 1993, p. 409.

[152] See more: W. Merkel, *Die Konsolidierung postautorität und posttotalitär Demokratien: Ein Beitrag zur theorientierten Transformationsforschung*, in H. Süssmuth (Hsg.), *Transformationsprozesse in den Staaten Ostmitteleuropa 1989 – 1995,* Nomos Verlagsgesselschaft, Baden-Baden, 1998, pp. 39 – 61.

[153] See: J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation (Southern Europe, South America, and Post-Communist Europe),* The John Hopkins University Press, Baltimore, 1996, p. 3.

[154] *Ibidem*

behaviour (*behaviour aspects*), attitude (*attitudinal aspects*) and constitutional practice (*constitutional aspects*).[155]

Behaviour aspects. Democratic consolidation implies that "no significant national, social, economic, political, or institutional actors spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence of foreign intervention to secede from the state."

Attitudinal aspects. Democratic consolidation is attained "when a strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society such as theirs and when the support for anti-system alternatives is quite small or more or less isolated from the pro-democratic forces."

Constitutional aspects. Democratic consolidation is constitutionally managed "when governmental and non-governmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process." Additionally, in consolidate democracy exist five interacting arenas which "reinforce one another in order for such consolidation to exist": free and lively civil society, relatively autonomous and valued political society, *rule of law, a usable state burecracy*, and an institutionalized economic society (emphasis added).[156]

The post-Yugoslav countries, according to some theoretical categorizations, together with other East European countries, belong to the fourth wave of democratization.[157] Unlike the Mediterranean or Latin American transitions, as countries of third wave, the transition of post-communist countries included not only the imperative of political and institutional transformation but also the economic one which the process of democratic consolidation in these societies makes more demanding task.

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[155] *Ibid.,* all three following definitions are at p. 6; Schmitter also argues that every regime of consolidation, as well as democratic one, establish the structures and relationships „that are realibly known, regularly practicised and habitually accepted" by relevant participants. See: P. Schmitter, *The Consolidation of Political Democracies: Processes, Rhythms, Sequences and Types,* in G. Pridham (ed.), *Transitions to Democracy (Comparative Perspectives from Southern Europe, Latin America and Eastern Europe),* Dartmouth, Aldershot, 1995, p. 539.

[156] See more in M. Jovanović, *Transition and Federalism East Europen Record,* in M: Jovanović ans S. Samardžić, *Federalism and Decentralisation in Eastern Europe: Between Transition and seccession,* Institute of Federalism Fribourg Switzerland, Zurich, 2007, pp. 19 -21.

[157] The term „wave" belongs to Huntington, who after the Second World War (Germany, Japan, Italy and Austria) and the third one concernes the Mediterranean countries (Greece, Portugal, Spain) and twelve Latin American countries. See: C. Offe, *Political Liberalism, Group Rights, and the Politics of Fear and Trust,* in L.R. Basta-Fleiner and E.M. Swiderski (eds.), *Democratic Transition and Consolidation in Central and Eastern Europe,* Institut du Fédéralisme Fribourg, Helbing & Lichtenhahn, Bâle, 2001, pp. 1 – 2.

3.2. Good administration vs. State administration

Traditional political theories define administration as a specific and legally regulated function of state, i.e. as a modality of state law.[158] The striking feature of the concept of state law, which originally derives from continental European state theories, inter alia, *Staatsrecht* of the German *Obrigkeitsstaat* and the German *Machtstaat*, is coercive enforcement of laws by administrative actions and measures.[159]

After the Second World War the traditional concept of state law model has been widely circulated in all Central and Eastern European countries under communism, particularly under the influence of the Soviet legal theory.[160] It was modified and placed within the framework of the "class essence of state and law" doctrine in the Soviet Union where it received specific repressive features.[161] The task of public administration, as has been argued already, consisted of tax collection, political repression, management and organization of the military, protection of social order and national security etc.[162] The use of this concept reflected the predominant idea of state as a monolith and of public administration as an instrument of power.[163]

The Yugoslav case, however, could be consider as an exception among ex-communist countries as the State that has been preserved key features of its prior Second World War system of public administration based on the Austrian legal

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[158] See: S. Lilić, *Challenges of Government Reconstruction: Turbulence in Administrative Transition (From Administration as an Instrument of Government to Administration as Public Service),* in *Law and Politics,* Vol. 1, 2/1998, p. 187.

[159] S. Eriksen, *Institution Building in Central and Eastern Europe: Foreign Influences and Domestic Responces,* in *Review of Central and East European Law,* 32/2007, p. 341.

[160] S. Lilić, *Challenges of Government Reconstruction: Turbulence in Administrative Transition (From Administration as an Instrument of Government to Administration as Public Service), op. cit.,* p. 187.

[161] See: S. Lilić, *Strategy of Administrative Reform in Serbia in the Context of European Integration,* in *Hrvtaska i komparativna javna uprava,* 4/2011, pp. 1110 – 1111; P. Harris pointed to the socialist view of bureaucracy as a „reasonably straightforward matter", thus „[i]t was Lenin who argued that under the socialism the *housewife will learn to run the state.*" See: P. Harris, *Foundations of Public Administration: A Comparative Approach, op. cit.,* p. 143.

[162] A.I. Denisov, *Osnovi marksističko-lenjinističke teorije države i prava, op. cit.,* p. 165.

[163] S. Eriksen, *Institution Building in Central and Eastern Europe: Foreign Influences and Domestic Responces,* in *Review of Central and East European Law, op. cit.,* 340 – 341

tradition. The uneven between communist heritage and European tradition could be defined as an internal Yugoslav paradox.

In fact, the Yugoslav state has been since the beginning inextricably linked with legal *acquis* of traditional model; *however* such model emphasizes that the exercise of state power is governed by law thus the public administration is a legally bound quasi-judicial activity.[164] A key difference emerging during the period of communism was "the extent of formalism" in the application of Yugoslav legislation as compared to the more pragmatic approach that developed in Western Europe, partly under the influence of European Union legislation.[165] Thus, the Soviet culture of using the public administration for political ends found its place in Yugoslav legal environment.[166]

This internal situation could be described by example. An executive of the bank X in the country Y during takeovers negotiations with other bank Z made a series of securities transactions on behalf of X and credited the proceeds to an account to which only he had access. If the judges could not find any rules in Y that executive had breached, they will reject the claims for reimbursement, respectively damages by the bank. The case illustrates a methodological problem with ambiguities and lacunae which has been widespread in the ex-communist countries.

The state administration model is today considered as one-sided and obsolete. The modern administrative systems show a general tendency towards substituting traditional authoritative instruments of administrative power by promoting good administrative practice through the rule of law, reliability, predictability, accountability, transparency, efficiency and effectiveness. *Grosso modo*, it may be concluded that administrative repression today is a feature of underdeveloped social and economic systems, and leads to the phenomena of "vicious bureaucratic circles" - once applied, repression leads to more repression, which agitates the problem even more.[167]

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[164] See: F.F. Ridley, *The New Public Management in Europe: Comparative Perspectives,* in *Public Policy and Administration,* 1996, pp. 16 – 29.

[165] S. Eriksen, *Institution Building in Central and Eastern Europe: Foreign Influences and Domestic Responces, op. cit.,* p. 339.

[166] See: F. Emmert, *Administrative and Court Reform in Central and Eastern Europe,* in *European Law Journal,* Vol. 9, 3/2003, p. 304.

[167] M. Crozier, *The Bureaucratic Phenomenon*, University Press, Chicago, 1963, p. 133. See also: J. Ahrens, *Governance, Conditionality and Transformation in Post-socialist Countries,* in H.W. Hoen (ed.) *Good Governance in Central and Eastern Europe. The Puzzle of Capitalism by Design,* Cheltenham – Northampton, 2001, pp. 54 – 90.

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The Yugoslav state, being the most liberal of the European socialist countries, at the end of the Eighties initiated administrative reforms. In 1987, the Federal Expert Board for Public Administration in Yugoslavia, inter alia, emphasized, that "[t]he general re-orientation should be co-ordinated together with the constitutional changes, the changes of the Law on the System of Government Administration, as well as the changes of the other laws and by-laws that regulate the activities of the administration."[169] However, the end of the Cold War and ethnic conflicts on the Balkans slowed the process of administrative transformation.

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[169] See *Opinions, Proposals and Initiatives* of the Federal Expert Board for Public Administration in S. Lilić, *Challenges of Government Reconstruction: Turbulence in Administrative Transition (From Administration as an Instrument of Government to Administration as Public Service), op. cit.,* pp. 190 – 191.

[170] M. Crozier, *The Bureaucratic Phenomenon*, University Press, Chicago, 1963, p. 133. See also: J. Ahrens, *Governance, Conditionality and Transformation in Post-socialist Countries,* in H.W. Hoen (ed.) *Good Governance in Central and Eastern Europe. The Puzzle of Capitalism by Design,* Cheltenham – Northampton, 2001, pp. 54 – 90.

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4. Conclusion

The public administration in the Yugoslav state was, since the beginning, inextricably linked with *acquis* of legally bound administration. The first Yugoslav and the fourth world General Administrative Procedure Act from 1930 explicitly recognized many administrative principles, such as right to be heard, right to a motivated decision, procedural efficiency and cost-effectiveness, which were integral part of the Yugoslav public administration model throughout the whole period.

With regards to the Yugoslav case, one cannot but observe that although it dealt with the protection of individuals vis-à-vis administrative powers, its vision of administrative justice was traditional from today's point of view. This is a consequence of adoption of the classical, Weberian model of public administration where the administrative process is perceived as regulated, literate, documented and legally bound. Such a model of administrative procedure seems misplaced in the Community context, where most modern administrative standards are present such as accountability, transparency and effectiveness.

On the other hand, it is obvious that soviet legal theory and communist political culture played a pivotal role in the Yugoslav state. Without a doubt, the long lasting communist experience, more than fifty years,[176] led to deeply rooted patterns of administrative behaviour such as widespread corruption, fraud, mismanagement, nepotism and low public trust in state authorities, which represent the main obstacles to reform public administration in the ex-Yugoslav countries and to achieve modern European standards after the fall of communism.[177] Richard Rose stipulated an interesting empirical research in the last decade of the XIX century in order to illustrate how people born in communist regimes now evaluate their post-communist regimes. As shown by the research **the** citizens do not see their new regimes as democratic and open societies. On the question do they have more influence on authority today or earlier, 46 per cent do not see any difference, 31 per cent believe that they have more

[176] The first Yugoslav state existed 23 years (from 1918 to 1941), the communist Yugoslavia 55 years (from 1946 to 1991) and the last Yugoslavia only 11 years (1992 - 2003).

[177] See: K. H. Goetz, *Making sence of post-communist central administration: modernization, Europeanization of Latinization?,* in *Journal of European Public Policy,* 2001, pp. 1042 – 1043.

influence, and 23 per cent said less influence.[178] It seems that the political culture which is respectful of good administrative principles is still far from being achieved and that will be, as Max Weber has put it, "a strong and slow boring of hard boards", which "takes both passion and perspective."[179]

The wars in former Yugoslavia slowed the European Union enlargement process with the Eastern European countries. In particular, since the Madrid European Council of 1995, the European Union revised the membership criteria and placed administrative issues high on the enlargement agenda by requirement that candidate countries must adapt their administrative structures in order to transpose EU law and effectively implement it. Furthermore, in 1999, the Helsinki Council specified obligation of candidate countries to share the values and objectives of the European Union as set out in the Treaties. This marked, among others, the assumption that the public administrations of candidate countries have to reach good administrative practice through reliability, predictability, accountability, transparency, efficiency and effectiveness in order to meet the EU accession requirements. Consequently, the EU conditionality introduced new dimensions of analysis in the relation between ex-communist countries and good administration through the concept of European administrative space.

Finally, drawing from the Yugoslav experience it could be noted that the process of EU integration has been highly diverse in these countries which share long historical ties and a common political tradition. Slovenia managed to achieve tangible results and joined the Union in 2004. Croatia has status of "Acceding State" which will become member state in 2013. Other countries are still grappling with the heritage of the past without clear timeframe for accession. The reason for this phenomenon must be researched from a greater distance and in particular, in connection with the largely unsettled "stateness"[180] issue and lack of the political stability. Administrative reform plays a pivotal role in national development.

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[178] R. Rose also pointed out that citizens of post-communist countries not only „want to be free to say what they think and to vote their conscience; they also want a government that obeys the rules it lays down and is not steeped in corruption." See: R. Rose, *How People View Democracy – A Diverging Europe,* in *Jornal of Democracy,* Vol. 12, 1/2001, p. 97; The more than fifty years of a profound effect of communist regime on generation of lawyers, civil servants and citizens require both legal and socio-political reforms.

[179] M. Weber, *Politics as a Vocation,* see: H.H. Gehrt and C.W. Mills (eds.), *From Max Weber: Essay in Sociology,* Oxford, 1946, p. 128.

[180] I borrowed this term from M. Jovanović. According to M. Jovanović the unsettled „stateness" issue in its consequence „produced the elevation of problems such as state and borderlines legitimacy or ethnocultural majority-minority relations into high ranking priorities in the democratization process", see M. Jovanović, *Transition and Federalism: East European Record,* in M. Jovanović and S. Samardžić

(eds.), *Federalism and Decentralisation in Eastern Europe: Between Transition and Secession,* Institute of FEderalism Fribourg Switzerland, 2007, p. 24.

Chapter 3 – Case Study – Croatia

1. Legal framework

1.1. Constitution of 1990

The contemporary Constitution of the Republic of Croatia was adopted on 22 December 1990.[1] In its Preamble, a constituent assembly affirmed that "[a]t the historical turning point characterized by the rejection of the communist system and changes in the international legal order in Europe", and "[r]especting the will of the Croatian nation and all citizens so unwaveringly expressed in free elections, the Republic of Croatia is hereby established and shall further develop as a sovereign and *democratic state* in which equality, freedom and *human and civil rights are guaranteed and secured,* and economic and cultural advancement and social welfare are promoted"[2] (emphasis added). Thus, the Constitution of 1990 represents the first post-communist Constitution of the Republic of Croatia, which marked a definitive rapprochement with European democratic principles after decades of communist domination.[3]

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[1] *Ustav Republike Hrvatske* [the Constitution of the Republic of Croatia], "Narodne novine" br. 56/90, 22. prosinac 1990, amended 135/97, 8/98, 113/2000, 124/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010; The Croatian Constitution of 1990 is also known as "Christmas" Constitution (*Božićni Ustav*).

[2] See: Historical Foundations (*Izvorišne odredbe*) of the Constitution of 1990. It is worth nothing that the Historical Foundations of the Constitution are more than the usual constitutional prologue. Although they have a declaratory significance, many scholars have been pointed out that are to long and that should be more concisely. Among others, see E. Pusić, *Država i državna uprava,* [State and state administration], Pravni fakultet, Zagreb, 1998, p. 134.

[3] The fall of communism in the ex-Yugoslavia has been followed by its dissolution. Thus, four of the six Republics proclamed independence during the Nineties. Formally, the breakup of Yugoslavia was started on 25.06.1991 when the residents of Slovenia voted in favour of independence of Slovenia from Yugoslavia. For a detailed analysis about dissolution of the Yugoslavia see, for example, R. Nakarada, *Raspad Jugoslavije: problemi tumačenja, suočavanja i tranzicije* [Dissolution of Yugoslavia: problems of interpretation, coping and transition], Službeni Glasnik, Belgrade, 2008; J. Dragović-Soso, *Why did Yugoslavia Disintegrate? An Overview on Contending Explanations,* in L.J. Cohen and J.Dragović-Soso (eds.) *State COllpase in South-Eastern Europe. New Perspectives on Yugoslavia's Disintegration,* Purdue University Press, pp. pp. 1- 39; J. Linz and A. Stepan, *Political Identities and Electoral Sequences: Spain, Soviet Union and Yugoslavia*, in *Daedalus*, Vol. 121 2/1992, pp. 123-139; Sabrina P. Ramet, Angelo Georgakis. Thinking about Yugoslavia: Scholarly Debates about the Yugoslav Breakup and the Wars in Bosnia and Kosovo, Cambridge University Press, 2005.

The guiding values of the constitutional legal order in Croatia, explicitly proclaimed under Article 3, are "freedom, equal rights, national and gender equality, peace-making, social justice, *respect for human rights*, inviolability of ownership, conservation of nature and the environment, *the rule of law* and a democratic multiparty system" (emphasis added).

Article 4 (1) stipulates the principle of the separation of powers into legislative, executive and judicial branches. A system of checks and balances, along with the principle of the separation of powers, represents the common core of democratic constitutionalism explicitly recognized in Article 4 (2).

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The fact that more than two-thirds of the constitutional provisions are dedicated on protection on human rights and fundamental freedoms affirmed also its aspiration to accept the heritage of contemporary democratic constitutionalism.[4] Similar trend could be found in other Eastern European constitutions.[5]

The constitutional provisions related to the rule of law, right to judicial review, principle of equality and Ombudsman institution are of significant importance for the good administrative guarantees.

The concept of good administration, as it has been already argued, is founded on the rule of law. According to the principle of formal legality provided in Article 5 (2) of the Croatian Constitution everybody is obliged to observe the Constitution and laws. Procedural rights, proclaimed under Articles 18 and 19, guarantee the enforcement of

[4] The Constitution of the Republic of Croatia is divided into ten sections: 1. Historical foundations; 2. Basic provisions (Artt. 1-13); 3. Protection of human rights and fundamental freedoms (Artt. 14-70); 4. Organization of Government (Artt. 71-125); 5. The Constitutional Court of the Republic of Croatia (Artt. 126-132); 6. Community-level, local and regional self-government (Artt. 133-138); 7. International relations (Artt. 139-142); 8. European Union (Artt. 143-146); 9. Amending the Constitution (Artt. 147-150); 10. Final provisions (Art.. 151, 152). According to the number of constitutional provisions, in total 152, the Croatian Constitution belongs to group of "short" European constitutions. About protection of human rights and fundamental freedoms under the Constitution in Croatia doctrine see, for example: B. Smerdel and S. Sokol: *Ustavno pravo* [Constitutinal Law], Zagreb, 2009; B.Smerdel and Đ.Gardašević (eds.), *Izgradnja demokratskih ustavnopravnih institucija Republike Hrvatske u razvojnoj perspektivi*, [Building a democratic constitutional institutions of the Republic of Croatia in development perspective] Zagreb, 2011; A. Bačić, *Komentar Ustava Republike Hrvatske* [The Comment of Croatian Constitution], Pravni fakultet Sveučilišta u Splitu, Split 2002.

[5] Compare, for example, with: the Constitution of the Republic of Serbia from 1990 (see *infra* Chapter 4); the Constitution of the former Yugoslav Republic of MAcedonia from 1991; the Constitution of the Czech Republic from 1992.

the rule of law in administrative proceedings and procedural protection in case of infringement of this principle.

Article 14 stipulates the principle of equality by stating that "[a]ll persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics."

The creation of the Ombudsman institution could be considered of noteworthy importance for enforcing respect for good administrative values in Croatia. Unlike the other post-Yugoslav countries, Croatia was the first to recognize the significance of such human rights protection machinery.[6]

The People's Ombudsman (known as the *Pučki pravobranitelj*)[7] is a commissioner of the Parliament responsible for the promotion and protection of human rights and freedoms enshrined in the Constitution, laws and international legal instruments on human rights and freedoms ratified by the Republic of Croatia.[8] Further, the constitutional recognition of the parliamentary immunity, an achievement of the liberal state, plays a vital role in guaranteeing the real independence and political autonomy of the Ombudsman office.[9]

It is worth noting that the Constitution guarantees also the right to access to information of public importance held by public authorities. Restrictions on such right "must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, as stipulated by law."[10] Bearing in mind that this provision found its place in the part dedicated to the freedom of thought

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[6] Croatia introduced the Ombudsman institution in December 1990; Slovenia introduced the Ombudsman institution (known as the *Varuh človekovih pravic*) in December 1991 under Article 159 of the Constitution; In Bosnia and Herzegovina the Ombudsman institutions (known as the *Ombudsman za ljudska prava*) has been introduced on the basis of the Dayton Peace Agreement in 1995. Until recently, there were three of Ombudsman institutions, one for each entity and one at the state level. Since 2010 was conducted the reform aimed at centralization and all powers are transferred to a state institution of Ombudsman; The Former Yugoslav Republic of Macedonia introduced the Ombudsman (known as the *Народен Правобранител*) by Constitution in 1997 (Art. 77); The Ombudsman in Montenegro (known as the *Zaštitnik ljudskih prava i sloboda*) has been established by the Law on the Protector of Human Rights and Freedoms in 2003. Following the adoption of the Constitution of Montenegro in 2007, the Ombudsman institution became a constitutional category under Article 81; Similar, as in the case of Montenegro, the Republic of Serbia established first the Ombudsman (known as the *Заштитник грађана*) by Law on the Protector of Citizens in 2005 and then became the constitutional category in 2006 [see *infra* Chapter 4]. It is worth noting that the Ombudsman is not necessary a part of the Constitution. For example, France, Switzerland, USA, United Kingdom, Canada ecc.

[7] The term „Peoples's Ombudsman" is used by the Ombudsman office in the Republic of Croatia in official documents in english as a word which correspond to the croatian word Pučki pravobranitelj.

[8] Article 93 (1) of the Croatian Constitution of 1990.

[9] Article 93 (5) of the Croatian Constitution of 1990.

[10] Article 38 (3) of the Constitution of 1990.

and expression of media it could be interpreted that the subject of such right could be only institutions of public communication. Nevertheless, extensive interpretation of the provision and systematic interpretation of the Constitution highlights right to access to information of public importance to all citizens.[11]

The Croatian Constitution of 1990 has been further, reinforced through several constitutional amendments. In particular in 1997, 1998, 2000, 2001 and 2010. The National Parliament, in regard to the amendments adopted in 2010, underlined importance of transformation of the highest national act in order to "*enable a valid constitutional basis* for Croatian accession to the European Union and for the *effective functioning* of Croatia in the European Union" (emphasis added).[12]

While transformation of legal system remains an important issue, the conversion of the liberal democratic principles embodied in the reformed national constitution, legislation and administrative structures into social and political liberal-democratic culture and praxis presents "the other side of the coin". Proportions of this effort are maybe best illustrated by Janus Justynski with regard to the Polish experience, that communist ideology "transformed the act [the Constitution] into a kind of

[11] The magnitude of this Article is explained by Rajko, who – in 2002 – wrote: „The reasons *pro* restrictive interpretation are: (a) the wording of Article 38 of the Constitution Croatian (linguistic interpretation), (b) a special position of the media in society, (c) the view of the European Court of Human Rights on the case of *Leander*.

The most important arguments supporting the extensive interpretation are following: (a) the elements of the right to freedom of expression under Article 19 of the Universal Declaration and Article 19 of the International Covenant on Civil and Political Rights and their [...] relation to the rights to know, (b) rules on the relationship of citizens and public administration, including the view that in doubt, regulations governing this area is interpreted in favor of the citizens, (c) element of the Annex to Council of Europe Recommendation No.R/81/19 of the Committee of Ministers of Member States on the Access to Information Held by Public Authorities, currently unassigned in the Croatian legislation: the existence of special interest for seeking information in a concrete situation is not a prerequisite for access to document (d) practical-political questions (to reporters to reach the data is usually not necessary formal procedures, and sources of their information is protected, preventing government tyranny)." See A. Rajko, *Zaštita prava na pristup informaci putem ustavne tužbe* [Protecting the right of access to information through the constitutional complaint], in *Hrvatska javna uprava,* god. 1, 3/1999, pp. 479-486 and pp. 490-491.

However, an overview on the contemporary Croatian academic literature shows that a major number of authors accept the restrictive interpretation of Article 38 (3). Among others, M. Klarić (see *Pristup informacijama od javnog značaja – hrvatsko i poredbeno iskustvo* [The access to informations of public importance – Croatian and comparative experience], in *Hrvatska pravna revija,* god. V, 2/2005, p. 34.); M. Boban (see *Problem sukoba prava na pristup informacijama i prava na objavu informacija* [The Conflict of the Right of Access to Information and the RIght to their Disclosure], in *Hrvatska pravna revija,* god. XII, 6/2012, p. 56); V. Ivančević (see *Pravo na slobodu izražavanja i pravo na informiranje* [The Right of Freedom of Speech and the Right to Information], in *Hrvatska pravna revija,* god. VI, 12/2006, p. 13).

[12] See: *Izvješće Odbora za Ustav, Poslovnik i politički sustav s rasprave o utvrđivanju Prijedloga promjene Ustava Republike Hrvatske* [Report of the Committee on the Constitution, and political system with a discussion of the Proposal to amend the Constitution of the Republic of Croatia], 15 June 2010, available at: http://www.sabor.hr/Default.aspx?art=34064.

declaration having no practical application."[13] The question of effectiveness and its importance will be analysed in the final part of this work.

1.2. Law on Right to Access to Information of Public Importance from 2003

The right to access to information of public importance has only recently become a concept readily identifiable in the Croatian legal framework. Primarily, it has been recognized as a constitutional value in 1990 and then, in 2003, the first Croatian Law in the area was enacted.[14] Croatian authorities, adopting the Law on Right to Access to Information of Public Importance [hereafter the RAIPI],[15] expressed a clear preference for democracy and citizens "right to know".

The purpose of the RAIPI is "to enable and secure the exercise of the right to access to information", by way of "transparent and open public administration" (Art. 2). The subject of this right could be any domestic or foreign natural and legal person.[16]

Nonetheless, this right is not absolute and does not imply that all information must be made public. The RAIPI stipulates a set of exceptions which may justify restraining access to information. The exceptions to access should be made in the case of state, military, official or professional secret; data protection or in the case of reasonable doubt that the publishing of the information could put out of the criminal prosecution, impartial court or administrative proceeding, the work of organ dealing with administrative or legality control; further, if the publishing could cause serious damage to a life, health, safety or environment, monetary policy or intellectual

[13] See: S Rodin, *Requirements of EU Membership and Legal Reform in Croatia*, in *Politička misao,* Vol. XXXVIII, 5/2001, p. 90.

[14] Providing the right to access to information of public importance both in the Constitution and in special Law could be found in many countries. For example, in Switzerland, Slovenia, Netherlands, Serbia etc. For a detailed reading about the right to access to information of public importance see M. Klarić, Pristup informacijama od javnof znacaja – hrvatsko i poredbeno iskustvo [The Access to Informations of Public Importance – Croatian and Comparative Experiences], in *Hrvatska pravna revija,* god. 5 no. 2/2005, pp. 32-41.

[15] *Zakon o pravu na pristup informacijama*, [the Law on the Right to Access to Information of Public Importance], "Narodne novine", br. 172/03, 144/10.

[16] Article 3 (3) of the Law on Right to Access to Documents of 2003. According to the Governments Reports on implementation of this Law it is underlined that the most request on access to information has been received in 2004 (approximately 19.600) the first year of implementation of the Law, in 2005 - 4.499 requests, in 2006 - 4.357 requests, in 2007 – 3.670 requests, in 2008 – 2.731 requests, in 2009 – 4.032. Interestingly, according to the Report of 2010 it was 12.340 requests. As underscored by the Agency for Personal Data Protection a large number of public authorities do not consider oral requests as access to information requests. From that reason probably the Reports from previous years were a mistake. See: *Izvešće AZOP-a dokazuje da su prethodna izvešća o provedbi zakona o provedbi Zakona o pravu na pristup informacijama puna krivih podataka i nepotpuna*, available at: http://gong.hr.

property.[17] The status of information as "non-accessible" could be provided for maximum 20 years from the date of its establishing if the law did not proclaim the longer term. In comparative terms, providing the time-limit in the area is welcomed.[18]

To this analysis the relevant 2010 amendment of the RAIPI must be added, which includes among its key provisions a possibility of giving access to information, which could be refused by some of the previously specified grounds, if it is "in the *public interest*, necessary to achieve the provided purpose of the law and proportionate to the aim which has to be achieved"[19] (emphasis added). The European Commission has considered this reform and concluded that "[i]n 2011, no public interest test was applied to classified data. The current practice of the Administrative Court is to confirm the existence of such data and deny access to it. The practice of applying the public interest test to classified information needs to be developed, including through legislative changes".[20]

The Law of Right to Access to Information of Public Importance uses the term "information" to define any data, photography, drawing, film, table or other possessor of information, regardless the date of obtained information, manner of coming to the information.

The right to access to information receives broad recognition in the Law of 2003. In order to enhance democratic functioning of public administration the legislator provided that all information that the public administration hold, dispose or monitor has to be available to the interesting persons which have the right to know. If

[17] Article 8 (1) and (2) of the Law on Right to Access to Information of Public Importance from 2003. The table shows the implementation of the right to access to information of public importance in the first four years of practice.

Year	**2004**	**2005**	**2006**	**2007**	**2008**
Resolved (accepted) requests	19,401	4,292	4,140	3,385	2,520
Un-resolved requests	62	15	93	54	55
Refused requests	34	182	49	124	103
Forwarded to autorised bodies	36	7	173	107	84
Resolved requests (%)	99,32	95,40	95,02	92,23	92,27

Ž. T. Godec, *Informiranost građana i slobodan pristup informacijama javnog sektora,* [Informed citizens and free access to public sector information], in *Hrvatska javna uprava,*2/2009, p. 330.

[18] In the case of Serbia, as will be demonstrated in the Chapter 4, there is no time limit.

[19] See Article 8 (4) of the RAIPI.

[20] See: European Commission, *Communication from the Commission to the European Parliament and Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership,* COM (2012) 601 final, Brussels, 10 October 2012, p. 10. Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/hr_rapport_2012_en.pdf.

the access is not allowed the public authority is obliged to explain the reasons in written decision.[21] The information has also to be complete and correct.[22] Further, the Law provides the principle of equality in performing the right to access to information. Thus, the public authorities should not "put at a disadvantage any one beneficiary on the way to give information earlier".[23] According to Article 12 the public organ without any delay, the latest within 15 days as from the date of receipt of the application, should enable access to information. The time-limit could be prolonged by maximum 30 days if the information is not in the seat of public organ or are requested large sum of information. Finally, the person who obtained the information has right of information to the public.[24]

Against the decision on refusing the access to information the applicant has a right to appeal to head of the competent public authority within the time limit of 8 days. On appeal against the decision of second instance organ rules of Administrative Disputes Act will be applied.[25]

Since 2011, the Agency for Personal Data Protection (known as the *Agencija za zaštitu osobnih podataka*) expanded its competences in the access to information of public importance domain. This points to the fact that Croatia's Agency, as well as Serbia's Commissioner for Information of Public Importance and Personal Data Protection,[26] plays a dual role in domestic legal order.

The last consideration raises the following question: is such dual role incompatible with the contemporary administrative standards?

Among the EU Member States there is no consensus on whether such a dual role of oversight bodies guarantees the most appropriate way to protect the interests of the laws on the protection of personal data, on the one hand, and access to information of public interest on the other. In this sense, there is no indication that the dual role of the Agency, i.e. Commissioner, is incompatible with any relevant European or

[21] Article 4 of the Law on Right to Access to Information of Public Importance from 2003. The terms "public administration" or "public authorities" in the present section refer to "state bodies, bodies of units of local and regional self-government, legal persons vested with public powers and other persons to whom public powers have been delegated." (Article 3 (1 (2)) of the RAIPI). According to Article 3 (2) the Croatian Government is obliged to publish a list of bodies of public authorities each year by 31 January.

[22] Article 5 of the Law on Right to Access to Information of Public Importance from 2003. If the information is not complet and correct then could be applied sanctions provided under Article 26 of these Law.

[23] Article 6 of the Law on Right to Access to Information of Public Importance from 2003.

[24] Article 7 of the Law on Right to Access to Information of Public Importance from 2003.

[25] Article 17 of the Law on Right to Access to Information of Public Importance from 2003.

[26] See *infra* Chapter 4 § 4.

international standards.[27] It could be said that the dual role even brings certain benefits because these bodies reinforce the notion of a sensitive balance between the opposing interests of privacy and respect for freedom of expression and the media.

It is worth noting that Croatia undertook steps forward, in the last five years, in order to strengthen the right to access to information of public importance. Thus, in 2007 it acceded to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[28] On the internal level, according to the *Strategy of Public Administration Reform in the Period of 2008-2011* "openness and access to public administration" is declared as one of eight goals of the administrative reform.[29] However, Croatia is still grappling with the heritage of the past in the domain of transparency and access to information area. The long authoritarian tradition with dominant concept of *Nachtwächterstaat*, common to all Western Balkan Countries, substantially limits the openness and access to public administration.

In light of the above, the European Commission underlined that Croatia, in order to achieve the full translation of the *acquis* in time before the accession, has to adopt the new law on access to information" and consequently "to strengthen the legal and administrative framework in the area of access to information."[30]

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[27] A comparative overview demonstrates that such a dual role exists in Germany, Hungary, Slovenia and Great Britain.

[28] The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus. It grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice. See the full text of the Aarhus Convention at: http://www.unece.org/env/pp/treatytext.html. The European Union accepted tthe Conveention in 2005.

[29] The eight goals delineates in the Strategy document are: 1. Increasing efficiency and economy in public administration system; 2. Raising the quality of administrative services; 3. Openess and access to public administration; 4. The rule of law; 5. Increasing social sensitivity inside public administration and in relations with citizens; 6. Rising ethical level and reducing corruption; 7. Modern ICT implementation; 8. Joining the European Administrative Space. See: *Strategija reforme državn euprave za razdoblje 2008.-2011,* available at: http://www.vlada.hr.

[30] European Commission, *Communication from the Commission to the European Parliament and Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership, op. cit.,* p. 19. It is worth noting that adoption of the new law on access to information is one of ten goals which in Commission's opinion have to be achieved before the 1st July 2013.

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1.3. General Administrative Procedure Act of 2010

The Republic of Croatia has very rich legal tradition in regulation of administrative procedure which dates from 1931 when the first Yugoslav and the fourth world's General Administrative Procedure Act [hereafter GAPA] were adopted. Since 1991, the year in which Croatia officially declared its independence, it has continued to apply the Yugoslav GAPA of 1956 (the last amendment was in 1986).[34] Finally, in 2010 such legal situation has been changed by adoption of the new law in the area.[35]

Focusing on the current administrative procedure in Croatia, the present section aims to examine the features of the Croatian administrative procedure in good administration domain.

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at: http://www.unece.org/env/pp/treatytext.html. The European Union accepted tthe Conveention in 2005.

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[33] European Commission, *Communication from the Commission to the European Parliament and Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership, op. cit.,* p. 19. It is worth noting that adoption of the new law on access to information is one of ten goals which in Commission's opinion have to be achieved before the 1st July 2013.

[34] *Zakon o preuzimanju Zakona o općem upravnom postupku*, "Narodne novine", br. 53/1991; The only change made in the GAPA of 1991 (in the period 1991 - 2010) was adopted on basis of the decision of the Croatian Constitutional Court U-I-248/1994 from 13. November 1996. See more in Chapter 2.

[35] *Zakon o općem upravnom postupku*, [the General Administrative Procedure Act], "Narodne novine", 16. travanj 2009. godine, br. 47/09.

1.3.1. State Administration Reform Strategy in Croatia

With regard to Croatia's application for membership the European Commission openly recognized in its Opinion from 2004 that:

> "Croatia has made significant efforts to align its legislation with the acquis […]. These efforts need to be continued vigorously. Administrative capacity is uneven and enforcement of legislation needs to be improved. Croatia needs to continue legislative alignment while at the same time strengthening administrative and judicial structures that are necessary for the effective implementation and enforcement of the acquis."[36]

Additionally, the Commission in its first Progress Report on Croatia of 2005 traced that the General Administrative Procedure Act is not in full compliance with European standards and the rule of law.[37] It recognized *la valeur de la différence* which requires adequate citizen's protection vis-à-vis public administration and the implementation of European administrative principles.[38]

On March 2008 the Croatian Government adopted the first *State Administration Reform Strategy*[39] which has underlined that "reliable, open, transparent and friendly public administration" is an accelerator of legal harmonization and legal transplants of European Union standards into Croatian legal order.[40]

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[36] *Opinion on Croatia's Application for Membership of the European Union,* p. 120.

[37] *Croatia 2005 Progress Report,* European Commission, COM (2005) 561 final, Brussels, 9 November 2005; In December 2005 SIGMA published assessment of the Croatian public administration: 1. Public Service and Administrative Framework Assessment; 2. Policy-Making and Co-ordination Assessment; 3. Elements of Public Integrity System Assessment; 4. Public Expenditure Management System Assessment; 5. Public Internal Financial Control Assessment. With respect to the first assessment has been concluded that among the critical problems of administrative framework are legal uncertainty, uneven regulation of administrative procedures, excessive politicization and insufficient judicial protection. See more, I. Milošević, *SIGMA – ocjene javne uprave iz lipnja 2005.,* [SIGMA – assessments of public administration of June 2005], in *Hrvatska javna uprava,* god. 6, br. 1/2006, pp. 39 – 52.

[38] The new socio-political framework in Croatia requires urgent legal reform of administrative procedure. Croatia regulates more than 65 special administrative procedures which are not in accordance with GAPA of 1991. Furthermore, the long administrative procedure, formalizm and corruption are one of the main critical aspects of Croatian public administration. See: D. Đerđa, *Nova rješenja Zakona o općem upravnom postupku iz 2009. godine,* [New solutions of the Law on General Administrative Procedure], in *Hrvatska pravna revija,* god. IX, 11/2009, p. 64.

[39] *Strategija reforme državne uprave za razdoblje 2008. – 2011., op. cit.*.

[40] *Ibid.*, p. 1. It is important to emphasize that the reform of public administration in Croatia represent a long and continuous process that is systematically implemented before the adoption of the Strategy. See more: J. Jurinjak, *Glavni rezultati provedbe Strategije reforme državn euprave za razdoblje 2008.-2011.* [The Main

The Strategy includes the measures for improvement of legal order by implementation of new legal acts.[41] In this process particular importance is made on the adoption of the new General Administrative Procedure Act aimed to strengthen the legal protection of citizen's against public administration and to simplify the administrative procedure. Driven by the European conditionality, on 27 March 2010, after more than Fifty years, the National Parliament (known as the *Hrvatski Sabor*) adopted the new GAPA which entered into force on 1st January 2010.[42]

1.3.2. Principles of administrative procedures

The General Administrative Procedure Act of 2010 provides a set of overarching principles of administrative procedures which play a pivotal role in the interpretation of the law, as well as in filling legal gaps. Albeit a large number have been already provided in the previous GAPA, the subsequent analysis intends to illustrate that many of these principles are not merely restatements.

1.3.2.1. Principle of legality

The principle of legality is a core value of administrative procedure in Croatia and finds its expression in Article 5 (1) of the GAPA, which states that public administration is obliged to act on the basis and within the limits established by law.

Albeit, the lawfulness has special meaning in the process of applying legal norms by public administration, the carrying out of the administrative procedure in Croatia upon this principle is insisted also in administrative matters where public authorities decide by its discretional power (known as *slobodna ocjena*).[43] Thus, the public administration has to bring forth the decision not only by the rules of administrative

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Results of Implementation of the State Administration Reform Strategy for the period of 2008-2011], in *Hrvatska javna uprava,* god. 9 no. 1/2009, p. 31.

[41] According to the Strategy of 2008, the five reform areas are: 1. Structural adaptation of the public administration system (crossing from structure to good administrative practice); 2. Increasing the quality of programs and regulations (better regulation); 3. New system of public servants (modern civil service); 4. Education and in-service training of state administration (knowledge, skills and competencies); 5. Simplification and modernization of administrative procedure (e-administration). *Ibid*., p. 2.

[42] For a detailed reading of the process of drafting the new Croatian General Administrative Procedure Act see, V. Đulabić, *Novi hrvatski Zakon I općem upravnom postupku kao poluga modernizacije javne uprave,* [The new Croatian Law on General Administrative Procedure as a leaver of public sector modernization], in *Hrvatska javna uprava,* god. 9, 2/2009, p. 308.

[43] The Croatian term *slobodna ocjena* emerged as a combination of the German term - *freies Ermessen* and the French term - *pouvoir discrétionnaire* for this legal institute. See moreV. Ivančević, *Institucije upravnog prava* [Institutions of the Administrative Law], 1983, Zagreb, p. 197.

procedure, but within the limits of the granted authorization in compliance to the objective of the entrusted authorization.[44]

In order to protect the rule of law the GAPA provides a number of legal instruments, such as regular and extraordinary legal remedies, as well as 'challenging' of such a decision in the administrative dispute, which is stipulated as an additional instrument to protect legality in the administrative procedure.[45]

1.3.2.2. Impartial and Fair Administration

The particular attention in the GAPA is paid to the impartiality and fairness of public administration. Although not explicitly quoted, it is an umbrella principle which could be recognized in numerous provisions of this law.

The GAPA stipulates that the public officials are independent in establishing all the facts and circumstances important for adjudication on the administrative matter. In the GAPA's understanding this notions as opposite to arbitrariness and preferential treatment. One of the most important guarantee is the rule stated in Article 24 of the GAPA that an official who has a conflict of interest in decision should not take part in its bringing. This rule extends to all possible cases of biased attitude.[46]

The importance of the exclusion of the official for the impartiality in carrying out of the procedure in Croatia may be illustrated by the obligations of any person

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[44] Article 5 (2) of the GAPA from 2010. Groppi e Simoncini pointed out that *la pubblica amministrazione non è libera di scegliere gli obbietivi da persequire, ma, dovendo rispettare i limiti positivi e negativi previsti dal legislatore, mantiene una libertà di giudiyio e di scelta solo nella misura in cui il legislatore gliela concede.* See: T. Groppi and A. Simoncini, *Introduyione allo studio del diritto pubblico e delle sue fonti,* Giappichelli Editore, Torino, 2012, p. 259.

For a detailed reading of discretionaly power in the Croatian legal order see, for example, I. Krbek, *Diskreciona ocjena,* [Discretional power], Jugoslavenska akademija znanosti i umjetnosti, Zagreb, 1937, And J. Osrečak, *Slobodna (diskrecijska) ocjena u hrvatskom i europskom pravu: kontrola i naknada štete* [Free (discretionaly) Decision in the Croatian aand European Law: control and compesation of damage], in *Hrvatska javna uprava,* god. 10 no. 1/2010, pp. 181 – 202.

[45] See more Art. 105 and Artt. 123 – 131 of the GAPA from 2010 and Article 3 of the Administartive Disputes Act („Narodne novine" no. 20/10).

[46] *Exemption of official persons* - Article 24: (1): "The head of the body shall exempt by a conclusion an official person from conducting proceedings, i.e. from deciding in administrative matters, when in the administrative matter concerned the official person is: 1. a party, a co-beneficiary or co-obligor, a witness, an expert witness or authorised representative, 2. a direct blood relative to the party or the authorized representative, or an indirect relative to the fourth degree exclusively, a spouse or relative by marriage to the second degree, even after the termination of marriage, 3. related to the party or the authorized representative in the capacity of guardian, adoptive parent or adopted child.

(2) The head of the body shall exempt by a conclusion an official person from conducting second-instance proceedings when the official person concerned participated in first-instance proceedings.

(3) The head of the body shall exempt by a conclusion an official person from conducting proceedings i.e. from deciding: 1. if the official person and the party or its authorized representative are in a close personal relationship, 2. if the official person and the party are in an economic or other business relationship, 3. if the official person acts towards the party in a discriminatory manner,

4. if other reasons which would cast a doubt on the official person's impartiality are determined.

participating in the administrative procedure that is the party, witness, expert, and the official to inform the head of the public authority organ on reasons of such exclusion without delay. The fact that the participant in the process had to be excluded represents one of the most important violations of the procedure rule that it is at the same time the reason for retrial.[47]

The impartial and fair bringing forth of the decision is, further, strengthening by *the principle of material truth* as stipulated by Article 8 of GAPA and accordingly the presumption that the bringing forth of the decision is the complete and correctly confirmed the factual state. Therefore, the official carrying out the procedure should establish the state of facts by establishing all facts and circumstances essential for the legal and justified decision.[48]

To the principle of material truth in legal procedure is directly connected to *the principle of free judgement* of proof of evidence, that is also stipulated by the GAPA, authorizing the official to decide what facts and circumstances would take as being proved with his free will, based upon duly and careful estimation of any proof of evidence in particular and all proof of evidence in total, so on the basis of the results of the complete procedure.[49] In this a way the Croatian administrative procedure has strengthened the idea according to which the official as per its free opinion decides which facts would be attested, with what proofs of evidence and would he accept them as being proofed or not. The free judgement of proofs of evidence is subjected to the limitation only in case of legal presumptions, that is the existence of facts stipulated by the law, but even if the official is related to this presumption only if not being proofed contrary. These requests relation to carrying out of the administrative procedure the attention is paid to the court practise, thus especially strengthening them, whereas their violation represents serious mode of illegitimacy.[50]

In light of the above it could be concluded that Croatian legal order in ensuring impartial and fair administration is in the line with the European Union standards in area.

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[47] Article 123 (1) of the GAPA from 2010.

[48] Article 8 of the GAPA from 2010. The material truth consider complete and correct establish of facts as the basis for the bringing forth of the decision.

[49] Article 9 (2) of the GAPA from 2010.

[50] See: Administrative Court Republic Croatia, the judgements Us-4873/95 of February 28, 1996, and Administrative Court Republic Croatia, the judgement Us-7203/96 of November26, 1997.

1.3.2.3. Principle of Access to Data and Data Protection

The principle of access to data and data protection is recognized in the Croatian legal order as one of the most important aspects of open and accountable administration.

According to Article 11 (1) the public administration is obliged to enable to parties "the approach to required information, stipulated forms, internet pages and *give other information, advice and professional support*" (emphasis added). Further, the GAPA stipulates also the duty of public administration to respect the legitimate interests of privacy and confidentiality with regard to the relevant regulations in the area of personal data protection and confidentiality.[51]

The full recognition of this principle has been confirmed by providing the party's right to review documents.[52] Thus, the parties have the right of personal insight to the proofs of evidence, documents, notes and other relevant acts of the concrete case as well as to transcribe of photocopy the necessary documents at their own expense.[53] Nonetheless, some parts of the case documents are excluded from the access and copying in Croatia, if the insight might disturb the procedure, as for example, are the minutes on counselling and voting of the members of council bodies and drafts of the resolution, and other acts stipulated by the rules as with some degree of confidentiality. With respect to the third parties the GAPA openly recognized this right if they made credible legal interest.

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[51] Article 11 (2) of the GAPA from 2010. The two essential laws in the area of personal data protection and confidentiality are: *Zakon o zaštiti osobnih podataka* [the Law *on Protection of Personal Data*], „Narodne novine", no. 103/03, 118/06, 41/08 i 130/11, and *Zakon o tajnosti podataka* [the Law on confidentiality of documents], „Narodne novine", no. 79/07 i 86/12. Relating to business and professional secret is relevant *Zakon o zaštiti tajnosti podataka* [the Law on Protection of Secrecy of Documents] („Narodne novine", no. 108/96 i 79/07). Thus, for the purpose of carrying out adminsitrative procedure the public authorities should distinguish two pillar groups of information: accessible information with free access in principle with extraordinary stipulation of the limited access, and inaccessible information in principle inaccessible with extraordinary defined possibility of access in specific case. For a detailed reading about personal data protection and confidentiality in A. Rajko, *Kriteriji dostupnosti informacija i zaštita prava na pristup informacijama,* [Criteria on access of information and protection of rights to the access to information], *Ius info*, 2010, and A. Rajko, *Novi zakon o tajnosti podataka*, [New Law on Secrecy of Information], *Informator*, nos. 5570-5571, 2007.

[52] The scope *ratione personae* of the GAPA is 'every person' to whose application the procedure was initiated, against whom the procedure is conducted or who is entitled to participate in the procedure in order to protect its rights or legal interests. See Article 4 of the GAPA.

[53] The importance of reviewing the documents as the legal institute is also underlined by Borković, stating that the possibility of having the insight the case documents is the result of the principle of transparency in the work of the administration, enabling citizens to protect their legal rights and legal interests. I. Borković, *Upravno pravo*, [Administrative law], Narodne novine, Zagreb, 2002, p. 425.

It could be concluded that the principle of access to data and data protection in Croatia is harmonized with the Article 41 (2) of the EU Charter of Fundamental Rights. However, it has to be ensured that the exceptions under the GAPA requirement of 'respecting the legitimate interests of privacy and confidentiality' are interpreted in a coherent manner.

1.3.2.4. Right to be heard

The principle *audiatur altera pars* has embedded itself in the administrative procedure of Croatia from 1956.[54] In the GAPA's words "it must be enabled the pronouncement on all facts, circumstances and legal issues which are important for resolving the administrative matter."[55] Without the prior hearing of the party the administrative procedure may be carried out only if the party's claim is accepted or if the decision on the procedure does not affect the legal interest of the party adversely or if it is proscribed by the law.[56] For example, the Supreme Court found that in the case "when all the relevant facts have been established by written means of evidence, the authority conducting the administrative procedure [..] could decide that expression of party's opinion *is not necessary* only if it will not affect it adversely" (emphasis added).[57]

It is worth noting that, unlike the scope of the EU Charter right to be heard and its formulation - "before any individual measure which would affect him or her adversely is taken" (very individualist in character), the scope of the GAPA right to be heard consider involvement of third parties and public-interest group in rule-making.[58]

The *audi alteram partem* rule is, further, developed by numerous provisions relating to the rights and obligations of the party during the investigation procedure. Thus, the GAPA grants the right to participate in this procedure, to give statements and explanations, bring forward facts and circumstances important for resolving the administrative matter and to challenge the statements that do not comply with its

[54] D. Đerđa, *Učinak europskih pravnih pravila na pravno normiranje upravnog postupka u Hrvatskoj,* [The Effect of European Legal Rules on Legal Norms of Administrative Proceedings in Croatia], 2012, p. 25. Prof. Đerđa gave this paper to the author of this work who went for research reasons at the University of Rijeka in October 2012.

[55] Article 30 (1) of the GAPA of 2010.

[56] Article 30 (2) of the GAPA of 2010.

[57] See the judgement of the Supreme Court of Croatia U. 3691/07, 10.Aprile 2008.

[58] See, for example, Article 76 (1) of the GAPA of 2010: „A record shall be made in the form of minutes of oral hearings, on site inspections or other activities of importance in the proceedings, as well of important oral statements by the parties or third parties in proceedings."
One of the progressive regulation could be found in the Italian Law no. 241/1990. It grants the right to be heard not only to target parties but also to intervenors. See Article 9 of the Law no. 241/1990.

statements. For that purpose the public authorized organ carrying out the procedure it is explicitly responsible for the obligation to enable the party to give both the announcement on all facts and circumstances brought forth in the investigation procedure and the proposals to present evidences. Furthermore, the party could participate in presentation of evidence and asking questions to other parties, witnesses and experts, as well as informing about the result of the evidences presentation and pronouncement about such results. The latter has been confirm in the case-law of the Supreme Court of Croatia according to which when in administrative proceedings conducted expertise, public administration has to visualize to the party expert opinion and allow to comment it.[59] Additionally, the same court underlined that "the party's statement expressed in some other administrative procedure should not be taken as relevant to the conduct of certain administrative proceedings."[60]

In relation to the previously quoted it may be concluded that the right to be heard in the Croatian legal order takes and should have its place in compliance with the European rules.

1.3.2.5. Right to a Motivated Decision

The right to a motivated decision has the extraordinary importance in judicial review of administrative measures to ensure the legality of administrative action and consequently it becomes a fundamental principle to ensure the citizen's rights.[61] In this sense, the GAPA imposes a duty to provide reasons as an integral part of every administrative decision.[62]

The general duty of administration to provide reasons for decisions (will be discussed further) applies on the discretional decisions, too. It has been confirmed by the Supreme Court of Croatia in its decision *U-I-248/1994* from 13 November 1996 where the Court found that duty to state reasons is an essential part of individual's right of defence during the administrative proceedings.[63] In that sense the court abolished Article 294 (4) of the previous GAPA which stipulated exceptions of such rule.[64]

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[59] The Supreme Court of Croatia U-1266/56/69, of 21 May 1966.
[60] Supreme Court of Croatia U-7993/69, of April 22, 1970.
[61] See for example, the decision of the Constitutional Court Republic Croatia, Us-218/79 of September, 12 1979; the decision of the Constitutional Court Republic Croatia , Us-7666/96 of April, 30 1997; the decision of the Constitutional Court Republic Croatia , U-III-1862/00 of October 10, 2001.
[62] Article 98 (1) of the GAPA from 2010.
[63] See the analysis of this decision *infra* § 2.3.1.
[64] Article 290 (4): „If a law or decree specifically provides that the decision upon the discretion does not need to state the reasons for which the authority is issuing a decision-directed [...]authority is

Such a legal regulation of the motivation of decision in the GAPA is founded on the Croatian legal doctrine where for a long time it has been pointed out that the explanation has great practical meaning: strengths the rule of law; forces the public authority to think upon the decision before bringing it forth and enables easier monitoring over the bringing forth of the decision. The explanation at the same time offers important authentic tool for the correct understanding of the legal remedy to the decision.[65]

The importance of 'motivated decision' has been confirmed in numerous decisions of the administrative courts and the Constitutional Court. The case-law insists on the explanation to the decision quoting that by the means of the explanation it is confirmed has the public authorized organ stick to the principle of legality and acting in the process of legal procedure and decision enabling the party to protect easier its rights and legal interests. On contrary, when the reasons for decisions missing in the case of refusing giving of positive decision violates the constitutional right of equality in front of the law, as the party in the procedure that does not know the reasons for the unequal position towards the ones who were informed about the reasons so due to that reason he cannot duly protect either his rights or in effective way obtain as by the Constitution guaranteed right to legal protection.[66]

The explanation is more valuable when the party has some obligations, when the party's request is rejected or when there are more participants in the procedure with opportune interests. To be more complete, the party receives in explanation all necessary information for timely use of legal remedies. The GAPA also stipulates the content of explanation.[67] Thus, it proscribes that the explanation must consist of short exposition of the party's claim, decisive reasons for establishing the state of facts, and crucial reasons for the estimation of particular proofs of evidence, reasons for non-acceptance of particular request of the parties, reasons for bringing forth conclusions during the procedure and rules upon which the legal case is resolved. When the complaint does not postpone the execution of the resolution, the explanation contains

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empowered to not state reasons for the decision-directed solutions." More about the right to a motivated decision in administrative procedure see further in this section.

[65] See Borković, *op. cit.,* p. 455 and I. Krbek, Upravni akt, Hrestomanija upravnog prava, Društveno veleučilište u Zagrebu, Pravni fakultet sveučilišta u Zagrebu, Zagreb, 2003, pp. 39-40.

[66] See, the Constitutional Court Republic Croatia, U-I-248/94 of November 13,1996, The Constitutional Court Republic Croatia, U-I-206/1992, U-I-207/1992, U-I-209/1992, U-I-222/1992, of December 8, 1993., People's Herald, no. 113/93, and the Constitutional Court of Croatia, U-III-419/98 of July 12, 2001.

[67] Article 98 (1) of the GAPA of 2010.

relation to the law which stipulates that.[68] In that way the party has sufficient legal basis by the receipt of the act to estimate if the resolution on its rights, obligations and legal interests is based upon the law or it baselessly deprives any right of the party, thus this request of the Union is incorporated in Croatian constitutional procedural right.

1.3.2.6. Principle of Proportionality

The GAPA of 2010 stipulated the principle of proportionality as one of the essential principles of the administrative procedure in the Republic of Croatia.[69] In relation to this principle the public administration is obliged to protect in adequate way protect both the individual's rights and the public interest during an administrative procedure.[70] This points to the fact that Croatia recognized that administrative justice is not one-sided and that the public administration has duty to serve to the public interest too. Such progressive solution, as it has been already argued, is stipulated under Article 13 of the Treaty of Lisbon. Nonetheless the EU Charter is still silent about the furtherance of the public interest in administrative procedure.

In order to realize the principle of proportionality the GAPA provides that the public authority in its acting could "limit any right of the party only if it is stipulated by the law and if such acting is necessary to acquire legally stipulated objectives and proportionally to the objective that should be acquired" (Article 6 (1)). Thus, there are two *conditio sine qua non* requests: the limit must be stipulated by the law and must be proportionate to desired aim.

Nevertheless, because of the proportionality of the limited right it must always be correlated to its objective to be acquired by the application of the material law; it

[68] See: P. Krijan, *Komentar Zakona o općem upravnom postupku*, [The Comment On the General Administrative Procedure Act], Novi informator, Zagreb, 2004, pp. 293-294.

[69] The proportionality is incorporated in 2009 in the principle of the protection of the right of parties and public interest which were provided in Article 5 of the former GAPA. Thus the position of the citizens is considerably strengthen in relation to the public administration.

[70] Article 6 of the GAPA of 2010.

means that for the party it must be the easiest possible, as only in that way its rights and legal interests would be protected up to the highest degree.

The principle of proportionality does not relate only to the limitations but the acquired rights of the parties, but to impose some new responsibilities to the party. Thus, according to Article 6 (2) of the GAPA, when on the basis of the rules the obligation is imposed to the party, the means stipulated for fulfilment of such obligation which are for the party as the most favourable must be applied, if such a mean acquires the objective of the rule. But, also the responsibility imposed to the party may not go up to the moment of fulfilment of the objective of the rule proscribing the imposition of such a responsibility, but not beyond it. The most favourable mean to acquire proscribed objective in Croatia is considered to be the mean that is in all more favourable for the party than the other possible means which are at the disposal to the public authorized organ to acquire the same objective, that would enable fulfil of the responsibility as stipulated by the law or other rule.[71] Therefore the impose some stricter that the said responsibility to the party should be understood as violation of the principle of proportionality relating of the rights protection of the party. In that way the Croatian administrative legislature, as well as the legal order of the European Union, has given the proportionality in the carrying out of legal procedure and decision making in legal cases the due attention.

1.3.2.7. Reasonable time-limit for taking decision

Stipulating the time limit during which the public administration should bring forth the decision, in Croatian legal order has been for long time the standard for carrying out the administrative procedure.

Urgency in resolving legal case is derived from the obligation of efficient and economic carrying out of the administrative procedure. Under Article 10 of the GAPA the legislator provides that the public administration should act in the simplest way, without delay and at least expense, but in such a way as to establish all relevant facts and circumstances essential for its decision. Consequently, the public administration during the legal procedure should resolve in the more rapidly possible way, without doubt as for the establish either of material truth or procedure rights of the parties. This is imposed by the very nature of the administrative activity, as the dullness in the

[71] See Ž. Dupelj, and Z. Turčić, *Komentar Zakona o općem upravnom postupku* [The Comment on the Law on general legal procedure], Organizator, Zagreb, 2000, p. 40.

direct application of the law and other rules in legal procedure are essential for the efficient acting of the public organs in general.

Albeit the time-limit for taking decision is stipulated primarily by the law defining specific administrative fields and they are completely accommodated to the specific circumstances of these fields,[72] general time-limit for bringing forth the decision is stipulated by the GAPA. But, the provision defining general period in Croatia is not complete, as this period is stipulated only for procedures launched by the parties, but not for those lodged *ex officio*. The Article 101 of the GAPA stipulates that the public authorized organ is obliged in cases of direct resolving upon the request of the party to bring forth the decision and submit it to the party without delay, at the latest within 30 days as from the date of lodging the duly request. The public authorized organ is responsible in cases of carrying out investigation upon the request of the party to bring forth the decision and submit it to the party at the latest within 60 days as from the date of lodging the duly request. However, as it has already been pointed out, this GAPA is lack of the time-limit for resolution of legal cases in procedures lodged *ex officio*, which presents its disadvantages. Nonetheless, it should be presumed that the objective of the public authorized organ should complete these procedures as soon as possible, so the juristically doctrine it is pointed out that period for resolution of public authorized organs to resolve legal cases upon the request of the party should be responsible for the case lodged *ex officio*. This opinion is based upon the fact that periods for completion of legal procedure are stipulated for the legal security of the parties, so it is considered to be unacceptable that they do not oblige the public authorized organ when the case is lodged *ex officio*.[73] Unfortunately, the basis for this understanding of the legal issues cannot be found in the GAPA.

If the public authorized organ does not bring forth the decision and submit it to the party within the proscribed period, it should be considered as "the silence of administration". In that case, based upon the Article 105 (2) of the GAPA the party may lodge a complaint to protect its right to the duly deciding upon its right or legal

[72] For example, Article 86 of General tax law (*Opći porezni zakon,* „Narodne novine", br. 147/08, 18/11 i 78/12) recognized that the tax decision brought forth on the basis of annual tax application must be submitted to the tax payer as soon as possible, within one year at the latest upon the expiration date for the submit of the application, whereas Article 192 Law on social welfare (*Zakon o socijalnoj skrbi,* „Narodne novine", no. 33/12), the procedure for the acquiring of social care is prompt, the social care centre is responsible to bring forth resolution upon the request and submit it to the party within 15 days as from the date of lodging the procedure. If it is necessary to carry out separate and examination procedures, the centre is obliged to bring forth the resolution within 30 days as from the date of submitting the duly request or launching procedure as per the official duty.

[73] See: D. Turčić, *op. cit.,* p. 437.

interest. Moreover, if the second instance organ upon the complaint of the party on the silence of administration has not bring forth the decision, also when against the resolution on legal case about which the public authorized organ has not resolved within the legally proscribed time-limit it is not possible to lodge a complaint, the party may terminate the legal case contesting the legality of such a legal acting in front of the administrative court.[74] In this way this request by the European rule is adopted in legal regulation of administrative procedure in Croatia.

The harmonization of the Croatian legal order with the European administrative standards has particular importance for Croatia which should become the EU Member State on 1st July 2013.

Driven by the EU conditionality the Croatia in the last seven years undertook the administrative reforms both institutional and legislative aspects.

In could be noted that many good administrative standards has been recognized in the Croatian legal order. The Croatia, as well as all ex-Yugoslav countries, has a long tradition of qualitative regulation of administrative procedure (starting from the first GAPA of 1930). The process of its changes and modernization which was only several times during its eighty years long tradition, (except the bringing the new GAPA of 1956), finally has been done in 2009 within the process of the EU integration.

Nonetheless, the harmonization of the Croatian legal order with the EU standards will not be enough if there is no effectiveness in its implementation in the practice.

1.4. Law on Public Administration of 2011

In order to implement a comprehensive legal framework for establishing the public administration as a service of citizens, the Republic of Croatia adopted in 2011

[74] Article 3 (1) of the GAPA.

the new Law on Public Administration.[75] Unlike its predecessor,[76] the new Law includes a much wider range of activities, both in quantitative and qualitative terms.

For the purpose of our analysis, the present section will be focus on the innovative solutions that the new Law offers with regard to the administrative tasks (Artt. 17 - 35) and relation between citizens and public administration (Artt. 77 - 89).

1.4.1. Tasks of public administration

The Title "Tasks of public administration" of the Law from 2011 provides five groups of affairs in the area:

The first priority, stated in Article 17, is that "[g]overnment bodies, bodies of local (regional) government and legal persons with public authorities [henceforth: public authorities], by directly applying of laws and other regulations, decide on administrative matters, keep records, issue certificates and perform other professional tasks." Thus, the legislator first underlined the rule of law, the constitutional principle as well, in performing public administrative tasks.

Second, the Law in Article 18 provides a classical task of public authorities consisting in execution of laws, regulations and by-laws. It is worth noting that the Serbian Law on Public Administration of 2005 offers progressive and contemporary solutions in area by providing "professional and political function of participating in shaping government policy" as the first priority in performing administrative tasks and then execution of laws, regulations and by-laws.[77]

Enforcing of the administrative monitoring is underscored as third category of public administrative tasks in Croatia. The public administrative bodies monitor and assess the implementation of laws, regulations, and by-laws and the legality of the

[75] *Zakon o sustavu državne uprave*, [the Law on Public Administration], „Narodne novine", br. 150/11.
[76] The Law on Public Administration, „Narodne novine", br. 75/93, 48/99, 15/00, 127/00, 59/01 i 199/03.
[77] See: S. Lilić, *Strategy of Administrative Reform in Serbia in the context of European integration*, in *Hrvatska i komparativna javna uprava*, 11/2011, p. 1114.

conduct of public authorities.[78] In particular, they monitor: a) legality, b) deciding in administrative matters, c) effectiveness, efficiency and expediency of the performance of public administration tasks, d) purposefulness of internal organization and training of officials and employees in the performance of public administration tasks, and e) relation between officials and citizens.[79] According to the Law on the public administration, the public administrative bodies should undertake the certain action in order to eliminate illegalities or irregularities.[80]

The Law of 2011, further provides, special provisions of inspection in performing of public administrative tasks. [81] The inspection includes a direct insight into general and specific acts, conditions and methods of work of legal entities and individuals. Inspection control is performed by inspectors and other civil servants, as stipulated by a special law [hereinafter inspectors].

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In performing these tasks the public administration is guided by principles of transparency,[83] compensation for damage caused by public administration,[84] independence of work[85] and accountability.[86]

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[78] Article 20 of the Law on Public administration of 2011.
[79] Article 21 of the Law on Public administration of 2011.
[80] Article 22 of the Law on Public administration of 2011.
[81] See Artt. 24 – 33 of the Law on Public administration of 2011.
[82] See: S. Lilić, *Strategy of Administrative Reform in Serbia in the context of European integration*, in *Hrvatska i komparativna javna uprava*, 11/2011, p. 1114.
[83] Article 13 of the Law on Public Administration of 2011.
[84] Article 14 of the Law on Public Administration of 2011.
[85] Article 15 of the Law on Public Administration of 2011.
[86] Article 16 of the Law on Public Administration of 2011.

One of the novelties of the Law on Public Administration from 2011 is introduction of rules directed to the mutual cooperation between first instance organs of public administration.[87]

The overview on the concept of affairs of the public administration in the Croatian Law on Public Administration of 2011 shows that it is normatively defined by contemporary standards in area. It is not merely an authoritarian activity and it expands in the area of modern administration such as monitoring in the respective fields, monitoring public services etc.

1.4.2. Citizens vis-á-vis public administration

The rules under the Title "Relations between public administration and citizens" consider the duty of efficient, transparent and accountable behaviour of the public administration in relation to the citizens.[88]

The duty of transparency of the relations between public administration and citizens is based on mutual cooperation, trust and respect of the fundamental individual rights. In this sense, the public administration is obliged, on request of citizens and legal entities, to provide data, information, guidance and professional assistance. Moreover, the public administration should inform the public about the performance of their tasks and report on their work through the media or in any other appropriate manner. The exception will be made only in the cases provided by the law.

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All these elements seem to confirm that the relation between citizens and public administration is based on good administrative European standards.

1.5. Administrative Disputes Act of 2010

[87] See more: *Strategija reforme državne uprave za razdoblje 2008 – 2011*, [The Strategy of State administration Reform in the priod of 2008 -2011], in *Hrvatska javna uprava,* br. 2/2008, p. 323.
[88] See Articles 77 – 89 of the Law on Public Administration of 2011.

One of the most relevant aspects of administrative reforms has been the adoption of the new Administrative Disputes Act in 2010 [henceforth the ADA],[89] the main legal instrument of judicial oversight of the legality in the work of public administration.

The Constitution of the Republic of Croatia in article 19 (2) provides that "judicial review of decisions made by public authorities and other bodies vested with public authority should be guaranteed." With respect to this the ADA of 2010 proclaims the judicial protection of subjective rights of citizens and legal entities as the main goals (Art. 2 (1)). Unlike the Serbia, in Croatia the Administrative Courts and the High Administrative Court are competent for administrative dispute.[90]

The ADA lists, in Article 3, as the subject matter of an administrative dispute following:

- "assessment of the legality of a decision by which the public authorities adjudicated on a right and obligation in an administrative matter against which it is not allowed to declare a regular remedy;

- assessment of the legality of an act of the administrative authority by which a right, obligation and legal interest of the party was breached against which it is not permissible to declare a regular remedy;

- assessment of the legality of a failure of the public authority to adjudicate on an application or a regular legal remedy of the party or to act in accordance with subordinate legislation;

- assessment of the legality of the conclusion, termination and enforcement of administrative contracts.

- assessment the legality of general acts of local and regional self-government, legal entities vested with public powers and legal entities performing public services."

One of the most relevant aspects of administrative reforms has been the adoption of the new Administrative Disputes Act in 2010 [henceforth the ADA],[91] the

[89] *Zakon o upravnim sporovima*, [Administrative Disputes Act], „Narodne novine" br. 20/10.

[90] Article 12 (1) of the ADA from 2010. Further, Article 12 (2) provide: Administrative courts decide: 1) on complainants against individual decisions issued by public bodies; 2) treatment of complaints against public law body; 3) on claims for failure to make individual decisions and actions of public legal body within the stipulated period, 4) the charges against the management contracts and execution of administrative contracts 5) in other cases prescribed by law. Article 12 (3) provide: The High Administrative Court decides: 1) appeals against judgments of the administrative courts and administrative courts decision against which an appeal is permitted, 2) on the legality of general acts 3) conflict of j urisdiction between administrative courts,4) in other cases prescribed by law.

[91] *Zakon o upravnim sporovima*, [Administrative Disputes Act], „Narodne novine" br. 20/10.

main legal instrument of judicial oversight of the legality in the work of public administration.

The Constitution of the Republic of Croatia in article 19 (2) provides that "judicial review of decisions made by public authorities and other bodies vested with public authority should be guaranteed." With respect to this the ADA of 2010 proclaims the judicial protection of subjective rights of citizens and legal entities as the main goals (Art. 2 (1)). Unlike the Serbia, in Croatia the Administrative Courts and the High Administrative Court are competent for administrative dispute.

Administrative dispute is based on a set of principles and subjective rights such as legality,[92] right to be heard,[93] principle of efficiency,[94] principle of assistance to an ignorant party[95] and principle of the binding nature of the court's decision.[96]

One of the progressive solutions of the ADA of 2010 is possibility of conducting a "model dispute" regulated in Article 48. Thus, when in "ten or more first instance disputes at the same court the merit of the complaint is of the same legal and factual nature, the court may decide in a decision which case will be resolved in a model dispute. In other matters, the court should issue a decision suspending the dispute." This novelty is introduced in the ADA of 2010 from the German law with aim to accelerate administrative disputes.[97]

In the Commission's words "[t]here has been some progress regarding access to justice. In the area of administrative justice, preparatory steps to ensure full implementation of the Administrative Dispute Act have been taken, including for the introduction from January 2012 of four first instance courts and of a Higher Administrative Court *as courts of full jurisdiction within the meaning of […] Article 47 of the Charter of fundamental rights*" (emphasis added).[98]

Nevertheless, the motive of "urgency" in its adoption brought serious deficiencies in relation to certain legal institutions and legal-technical quality of the new Law which be underlined in the following section with regard to the unqueness of case-law issue.

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[92] Art. 5 of the ADA.
[93] Art. 6 of the ADA.
[94] Art. 8 of the ADA.
[95] Art. 9 of the ADA.
[96] Art. 10 of the ADA.
[97] See: D: Đerđa, *Administrative Law in Croatia,* in R. Scarciglia*, Administrative Law in the Balkans,* CEDAM, 2012, p. 110.
[98] The European Commission, *Commission Staff Working Paper. Croatia 2011 Country Progress Report, Enlargement Strategy and Main Challenges 2011-2012, SEC (2011) 1200 final*, Brussel, 12.10.2011, p. 50. Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/hr_rapport_2011_en.pdf.

2. Judicial review of administrative actions

I will here first present a brief overview on the organization of the courts in order to give the contemporary picture of court structure in Croatia. Further, I will

analyse what effect on the uniform interpretation of law, Finally, I will analyze selected cases.

2.1. Organization of the Courts

On 14 March 2013 entered into force the new Law on the Courts in the Republic of Croatia[99] according to which the judicial power in Croatia belongs to ordinary courts, specialized courts and the Supreme Court.[100] The ordinary courts are municipal courts and county courts. Courts of specialized jurisdiction are commercial courts, High Commercial Court, administrative courts, High Administrative Court, magistrate's courts and High Magistrates Court. The highest judicial authority in the Republic of Croatia belongs to the Supreme Court (Art. 14).

High Commercial Court, High Administrative Court and High Magistrates Court are founded for the territory of the Republic of Croatia with setting in Zagreb. Municipal and magistrates courts are established for the territory of one or more municipalities, one or more towns or parts of town. County, commercial and administrative courts are set up for the territory of one or more counties. The Supreme Court has its seat in Zagreb (Art. 15).

The Law on the Courts, further, stipulates that the High Administrative Court decides on remedies institute against decisions of administrative courts. The High Commercial Court is second instance body for commercial courts and the High Magistrates Court is directly higher judicial body for the magistrate's courts.[101]

The High Administrative Court (known as *Visoki upravni sud*) commenced with work on 1st January 2012 by replacing the former Administrative Court (known as *Upravni sud*).[102] From that date, the new four specialized administrative courts also

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[99] *Zakon o sudovima*, [the Law on the Courts], „Narodne novine" no. 28/2013. Interestingly, the new Law on the Courts, as noted with regard to the previously observed legal acts in this Chapter, takes into account the gender equality. Thus, in Article 1 (2) the Law on the Courts stipulates that „terms used in this Law for persons in the masculine gender were used neutral and apply to male and female persons (*sudac/sutkinja, savjetnik/savjetnica, vježbenik/vježbenica i dr.*)."

[100] Unlike the contemporary law, the previous Law on the Courts stipulated that jurisdiction is vested to ordinary and specialized courts. The Supreme Court has been considered as ordinary court with highest judicial authority. Compare with Section II of the Law on the Courts („Narodne novine" no. 150/05., 16/07., 113/08., 153/09., 116/10., 27/11. i 130/11).

[101] See Artt. 24-26 of the Law on the Courts from 2013.

[102] The history of administrative disputes in Croatia could be divided in three fases: The first belongs to the period when the Supreme court of Socialist Republic of Croatia was competent for administrative disputes. The second initiated on 1st July 1977 when was established the Administrative Court as specialized judicial body for administrative disputes in Croatia. (See *Zakon o redovnim sudovima* [the Law on Ordinary Courts], "Narodne novine" no. 5/1977). The latter took all pending cases of the Supreme Court as well as all administrative-computational disputes that have been previously under the

began with work - the Administrative Court in Zagreb, the Administrative Court Split, the Administrative Court Rijeka and the Administrative Court Osijek.[103] These courts judge in administrative disputes and carries out other actions as stipulated by the law,[104] with the except of cases which according to the Administrative Disputes Act and other special laws solves the High Administrative Court of the Republic of Croatia.[105]

However, the introduction of the four administrative courts has an important, albeit apparent, limit: additional difficulties of the uniform interpretation and application of law and the uniqueness of the court practice. How to ensure, thus, unification of case law? And how to solve potential problems in already divergent administrative practice?

Indeed, these questions, which represent one of the core *fil rouge* of this work, are relevant for all countries in the Western Balkan region.

In the following section, in order to complete the examination of the good administrative values in Croatia, I will focus on the models of uniform interpretation and application of law and ensuring the uniqueness of court practice according to the Administration Disputes Act.

2.2. Uniqueness of case law?

jurisdiction of the High Commercial Court of the Socialist Republic of Croatia. It is worth noting that from 1st July 1977 the Croatia abandoned the so-called Anglo-Saxon tradition of supervision the public administration by the ordinary courts (present in the United Kingdom, Denmark, Norway, Estonia, United States ecc), and accepted the so-called French tradition, i.e. the supervision of public administration by specialized court (present in French, Austria, Italy, Germany, Greece ecc.). For a detailed reading about development of institutional structure of the administrative judiciary in Croatia see D. Đerđa, *Pravci reforme institucionalnog ustroja upravnog sudstva u Republici Hrvatskoj,* [Reform Directions of the institutional structure of the administrative judiciary in Croatia], in: Zbornik radova Pravnog fakulteta u Splitu, god. 45,1/2008, pp. 78,79. Albeit the administrative judiciary of Yugoslavia was formed in two stages, the Croatian legislator choised to adopt one stage administrative dispute. With regard to the Member State of the European Union such solution is adopted, for example, in Austria. See *Verwaltungsgerichtshofsgesetz*, Bundesgesetzblatt no. 10/85, 136/01, 124/02, 89/04 and 4/08.About administartive dispute in Austria see more in K.L. Adamovich, B.C. Funk, *Allgemeines Verwaltungsrechts,* Wien, 1987, pp. 444-462.

[103] Article 6 of the Law on Territorial Jurisdiction and Seats of the Courts See: *Zakon o područjima i sjedištima sudova*, „Narodne novine" no. 144/2010, 84/2011.

[104] Article 22 of the Law on the Courts from 2013 provides that administrative courts: 1) decide on complaints against individual decisions issued by public bodies; 2) decide on appeals against actions performed by public bodies; 3) decide on claims for failure to make individual decisions or actions by public bodies within the stipulated term, 4) decide on appeals against administrative contracts and execution of administrative contracts, 5) decide in other cases prescribed by law.

[105] The High Administrative Court, according to Article 25 of the Law on the Courts from 2013 decide on the following: 1. appeals against the judgments of administrative courts and decisions against which an appeal is permissible; 2. lawfulness of general acts; 3. conflict of jurisdiction between administrative courts, and 4. in other cases laid down by law.

The work of the administrative courts and, in particular, of the Supreme Court has the significant role in realisation of the rule of law, transparency of public administration and consequently, protection of individual's rights and interests. Nonetheless, in the Croatian scientific and professional literature to theoretical and practical analysis of court decisions is devoted very little space.[106] One of the reasons for such situation could be found in the fact that the major number of authors considers the 'creation of rights' as legislative activity. Indeed, such view on the case law has been for a long time dominant in the South Eastern countries.[107]

In Croatia the most significant role in uniform application of law have Administrative courts (previously was one Administrative court). The fact that the new four administrative courts started with work on January 2012 the following analysis will be based on the work of their predecessor - the Administrative court.

The work of the Administrative court, in particular judgments and opinions, expresses court's views in relation to legality of actions taken by public administration and contribute to uniform interpretation and application of law for all other institutions which apply the same provisions in performing their tasks, too.

The Administrative court usually and mostly decided on the issue such as jurisdiction,[108] application of relevant legislation[109] and other procedural issues in an administrative procedure.[110] Moreover, the Administrative court decides in doubtful cases with regard to application of material law. For example, the Administrative court found that the changing of address does not mean automatically the changing of residence,[111] that the funds for legal child support which the parents contribute are not child's income during recognition of the right to personal disability[112] etc.

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[106] The court decisions are usualy analysed in the monograph in the administrative law area and commentaries of the Administrative Disputies Act. See, for example, I. Borković, *Upravno pravo* [Administrative Law], Narodne novine, Zagreb, 2002; B. Babac, *Upravno pravo: odabrana poglavlja iz teorije i praxisa* [Administrative law: selected chapters from the theory and praxis], Pravni fakultet u Osijeku, Osijek, 2004; P. Krijan, *Komentar Zakona o upravnim sporovima sa sudskom praksom* [Commentary on the Law on Administrative Disputes with the jurisprudence], Informator, Zagreb, 2001.

[107] This part of work is based and inspired on the research developed in D. Aviani and D. Đerđa, *Uniformno tumačenje i primjena prava te judinstvenost sudske prakse u upravnom sudovanju* [Uniform interpretation and application of law and the uniqueness of court practice in administrative adjudication process], in *Zbornik radova pravnog fakuleteta u splitu,* god. 49 no. 2/2012

[108] See, for example, the judgement of the Administrative Court Us-7185/2002 from 19 may 2005; the judgement of the Administrative Court 4331/2002 from 15 February 2006.

[109] See, for example, the judgement of the Administrative Court Us-3892/02 from 20 October 2004; the judgement of the Administrative Court Us-11837/2001 from 14 December 2005.

[110] Such as the judgement of the Administrative Court Us-8610/2004 from 26 January 2006; the judgement of the Administrative Court Us-4161/2002 from 13 September 2006.

[111] Administrative court Republic Croatia Us-5426/2002 from October 2006.

[112] Administrative court Republic Croatia Us-8521/2002 from 14 Decembre 2006.

At the meetings of the judicial departments of the Administrative Court considers issues relevant to the implementation of regulations in particular administrative areas. From 2006 to 2012 the Administrative court brought more than 50 conclusions which should help in interpretation and application of some legal provision in practice. Consequently, the conclusions determinate who could have be party in an administrative procedure, on which rights could be bring decision in an administrative procedure, nature of legal terms etc.

In the process of uniform application of law the important role is affirm also to extraordinary legal remedies in administrative dispute, in particular, a request for extraordinary examination of legality of final judgment. However, the Supreme Court could examine the decision only in the limit of the claim thus the unification is limited in this case.

In 2010, as it has been already argued, the new Administrative Disputes Act entered into force. The main feature of this act which could directly affect the harmonization of the case-law is foundation of the new four courts for resolving the administrative disputes. This points to the fact that the disputes of similar factual and legal basis will be object of decision in front of various courts. Further, the ADA obliged the administrative courts that in the case when they determine that an individual decision of public administration is unlawful or that was not respected the term for bringing such decision, to adopt by judgment the claim, abolish the decision and resolve by oneself the case. Indeed, it could be expected that the court will decide in a different way in the similar cases.

The fact the Administrative Disputes Act was brought in an urgent procedure and has many contradictions will not help in achieving the uniqueness of court practice. Considering the raising challenges in this area Damir Aviani and Dario Đerđa wrote:

"From 1st January 2012 as an important mechanism to unify the interpretation and application of the law will definitely show appeals in administrative proceedings. However, due to the very strict "filter" that restricts filing complaints all cases this means will have only limited effect. Therefore, in order to unify the law and need to resort to extraordinary legal remedies, especially the request for extraordinary review of the legality of a final judgment, and in rare cases and renewal dispute. In order to unify the interpretation and application of administrative law will have a special meaning and legal interpretations of the administrative courts and the High Administrative Court,

which will be adopted at the sessions court departments and the majority of judges. Finally, special attention is sure to be given to the selection decisions of administrative courts and the High Administrative Court and the legal interpretation of the courts should be more accessible to administrative officers and judges and the whole public."[113]

2.3. Guarantees of an Efficient Judicial Review of the Legality of Administrative Acts in the case-law

In Croatia the judicial review of the legality of administrative acts is a constitutional category. Article 19 (2) of the Constituion states that "[j]udicial review of individual decisions made by governmental agencies and other bodies vested with public authority shall be guaranteed."[114]

The Administrative Disputes Act, further, provides that "in order to ensure judicial protection of individuals and rule of law the court, in administrative dispute, decides on legality of public administration acts".

I will here focus on the practice of the Constitutional Court, whose decisions reinforce the guarantees of judicial review of legality of individual administrative acts.

2.3.1 Review of the legislation

In this section I will analyze two decisions of the Constitutional court, having both a strong relevance for democratic and good administrative values in the domestic legal framework.

No. 1 – U-I-248/1994 – "Assessment of constitutionality of the General Administrative Procedure Act"

[113] See d. Aviani and D. Đerđa,*Uniformno tumačenje i primjena prava te judinstvenost sudske prakse u upravnom sudovanju* [Uniform interpretation and application of law and the uniqueness of court practice in administrative adjudication process], in *Zbornik radova pravnog fakuleteta u splitu,* god. 49 no. 2/2012, pp. 293-294.

[114] See more supra § 1.1.

The decision *U-I-248/1994* from 13 November 1996 encompasses the duty of public administration to provide reasons for its decisions. The issue which lies at the core of the case deals with limits of that duty provided by Articles 209 (3) and 209 (4) of the previous GAPA.

Article 209 (3) in its second frase stipulated that "[t]hese reasons will not be given when it is in *public interest* explicitly *provided by law or statute*" (emphasis added).

Article 209 (4) "[i]f a law or decree specifically provides that *the decision upon the discretion* does not need to state the reasons for which the authority is issuing a decision directed [...] authority is empowered to not state reasons for the decision-directed solutions" (emphasis addded).

From quioted provisions emerge two exceptions of the obligation to provide explanations for administrative acts: public interest and discretionaly decision.

The relationship between public and private interest is traditionally challenging one, in particular in the Eastern European countries. Soviet style of thinking (corruption, authoritarianism and nepotism) as it has been already argued, has been dominant in all areas of social life and consequently in administrative law area of whole region.[115]

In the European Union, the duty of administration to provide reasons has been recognized since the Maastricht Treaty of 1992. The outcomes of the European Courts practice, analyzed in the first part of the thesis, confirm that the duty to state reasons has two objectives: first, it is *conditio sine qua non* to ensure individual right to challenge a given measure and to ensure that the Court can exercice its power and review lawfullness of administrative acts.[116]

The Constitutional Court of Croatia underlined:

"Provisions of Article 18 of the Constitution guarantees the right to appeal against decisions made in the first instance before a court or other authority. The right to appeal may exceptionally be excluded in cases specified by law if other legal protection is provided. According to the provisions of Article 19 of the Constitution of individual acts of public administration and bodies vested with public authority must be based on law, and guaranteed to judicial review of decisions of public administration and other bodies of public authority."

[115] See more *supra* in Chapter 2 § 3.2. Good administration v. State administration.

[116] "The remedies themselves are at the heart of judicial review" See: P. Leyland and T. Woods, Textbook on Administrative Law, 4th edition, Oxford University Press, Oxford, 2002, p. 504.

Additionally,

"From these constitutional provisions follows that the right to appeal or other legal protection can effectively exercise only if the public authority provided reasons for decision. The lack of these reasons disabled or hampered the efficient use of the constitutional right of appeal or other legal protection. Only the citizen who knows the reasons could successfully contested decision also come to the conviction of the hopelessness of appeal against that decision, which contributes to the principles of efficiency and economy of procedure."

The explanation of an administrative decision reinforce the principle of legality and protects individuals from public administration arbitrariness. It enables to determinate whether the public administration respected the principle of legality and conducted in such a way to enable to the individuals to protect their rights.

No. 2 – U-I-206/1992 and others – "Assessment of constitutionality of the Act on Croatian Citizenship"

In decision *U-I-206/1992 and others*[117] the Constitutional Court abolished Article 26 (3) of the Act on Croatian Citizenship [hereafter ACC]. In the explanation of such decision the Court underlined that the ACC partially regulates certain question of administrative procedure in acquiring and losing of citizenship. Thus, the matter of issue is Article 26 which stipulates that the Ministry of the Interior could refuse the request for the acquisition or termination of citizenship if the prerequisites are not met, unless otherwise specified by this Law (1); could refuse the request for the acquisition or termination of citizenship although all the prerequisites are met if it is of the opinion that there are reasons of interest for the Republic of Croatia because of which the petition for the acquisition or termination of the citizenship should be denied (2), and in the explanation of decision of refusing the request for the acquisition of citizenship is not necessary to provide reasons (3).

In concrete case the right to appeal is excluded, but is provided the complaint to the court in administrative dispute. The Constitutional Court found that the

[117] Decision U-I-206/1992, U-I-207/1992, U-I-209/1992 and U-I-222/1992 from 8 December 1993.

administrative dispute appears in two constitutional functions: right to appeal and right to judicial review of the legality of administrative acts.

Moreover, the Court stated:

"But how the individual could realize this right and how the court could realize its duty (control laws) when the Ministry of Interior is not required to specify (and explain) which one from the large number of law-based assumptions the individual did not fulfil?

Decision without explanation, decision which does not contain not even findings of fact, neither legal provisions nor reasons for non-accepting the request unlikely could be a valid ground for an effective remedy."

The Constitutional Court found that to achieve the constitutional goal - to protect the interests of the Republic (Article 16) must be coordinated with other constitutional values, the constitutional right to appeal from Article 18 and judicial review of legality of administrative acts (Article 19), that missing in Article 26 of the Act on Croatian Citizenship.

2.3.2 Deciding on the constitutional complaint

Decision U-III-4673/2008 – "Reformatio in peius"

In the decision U-III-4673/2008 the Constitutional court adopted the constitutional complaint against the judgement of the Administrative Court which refused the complaint against the decision of the Ministry of Environmental Protection, Physical Planning and Construction. The complainant pointed in the constitutional complaint that the adoption of additional paragraph in the decision of the first instance organ is violation of the principle *reformation in peius.*

In the Administrative court's view the core issue in the present case is 'whether the apartment has been assigned to the complainant or not?' If yes, it could acquire the tenancy in this case. However, the Court found that the complainant had no tenancy.

On the other side, the Constitutional Court found out that the only first instance administrative organ considered content of the decision from 1976 and the tenancy contract of 1976. Moreover, the first instance organ stated "this body interprets that inducement of F.M. (the complainant) in some acts as nescience of the person who was then working". Is it ignorance or other reasons for granting the apartment for two

people in the legal order in which it was allowed apartment assign only to one person, the Constitutional Court did not regard as constitutionally relevant. The Constitutional Court found as constitutionally relevant fact that "the error of public administration should not be at the expense of citizens".

In the explanations of its decision the Constitutional Court underscored that in the retrial the Administrative Court has to take in account these facts and legal view of the Constitutional Court. Moreover, the case has to be examined in the light of the principle of legality and the principle of legal certainty.

It could be concluded that the case-law has been recognized the importance of the administrative dispute as the fundamental form of the judicial review of the legality of the administrative acts.

3. People's Ombudsman institution

"[P]romoting and protecting human rights and freedoms" (Art. 2, Law on Ombudsman) are the fundamental goals of the People's Ombudsman institution in the Republic of Croatia.[118]

The Republic of Croatia, as seen in the preceding analysis, devoted significant attention to enforcing respect for good administrative practice by giving a firm constitutional basis to People's Ombudsman institution, by endowing it with full independence and by vesting in it broad competences. Under the constitutional perspective, further, the People's Ombudsman's attention is addressed to preserve, at the internal level, a respect of the rule of law, and at the external level, to ensure compliance with international law.[119]

The subsequent examination of enforcing respect for human rights in the Republic of Croatia through the People's Ombudsman's practice will offer an overview of the strengths and limits of this institution. Particular attention will be paid to the challenging aspects of the 'mantra' of People's Ombudsman's work.

Several questions arise with regard to this institution. What good administrative standards promote the People's Ombudsman institution? How the national legislation on the People's Ombudsman changed in the human rights promotion domain? Does the public administration actually follow-up the Ombudsman's opinions?

[118] *Zakon o pučkom pravobranitelju,* [The People's Ombudsman Act], „Narodne novine" br. 76/2012.
[119] See *supra* § 1.1. Constitution of 1990 .

3.1. People's Ombudsman Act

The first People's Ombudsman Act [hereafter: the POA] was adopted on 25 September 1992 and entered into force on 9 October 1992.[120] The POA represented a significant attempt at comprehensive reform of the individual rights protection vis-à-vis public administration.

It has two important dimensions. The first, the decision to bring the special law on the Ombudsman institution and to more precisely regulate its position marked the need and will of the Republic of Croatia to improve the human rights protection machinery.

The second aspect, the establishment of the Ombudsman office confirm the Croatian aspiration to become the EU member state.

According to the POA of 1992 the People's Ombudsman examines "individual cases of civil rights violations" committed by public administration, as well "other questions of interest for the protection of constitutional and legal rights" related to irregular performing duties by public administration.[121] The People's Ombudsman has, further, the right to access to all documents in the possession of the public administration as well as to those adopted by right of discretion regardless of their degree of confidentiality.[122] In relation to the last consideration, the People's Ombudsman, and deputies are bound by regulations on the secrecy and protection of data and after their terms of office, irrespective of the way in which they gained knowledge of these data.

Article 7 (2) and (3) provides one of the most important aspects of the People's Ombudsman's activity, and an undeniable component of its force, that the public administration must immediately and at the latest within 30 days, inform the People's Ombudsman of the measures taken on the occasion of his recommendations. Otherwise, the People's Ombudsman shall inform the Croatian Parliament and the public about this issue. As in the case of the European Ombudsman its decisions are not legally-binding but represent a rich source of principles in the field.

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[120] *Zakon o pučkom pravobranitelju*, [the People's Ombudsman Act], „Narodne novine", br. 60/1992. This Law was divided into the 5 chapters: 1. General provisions; 2. Jurisdiction and manner of work; 3. Procedural provisions; 4. Election and dismissal of the Ombudsman; 5. Transitional and final provisions.

[121] See Article 5 of the POA from 1992. Here, the term „public administration" refers to organs of the state authorities, bodies with public authority, and officials in those organs or bodies (*Ibidem*).

[122] Article 11 (1) of the POa from 1992.

Finally, the People's Ombudsman can initiate to the Croatian Parliament to review laws relating to the protection of the constitutional and legal rights of individuals.[123] This approach encouraged the spread of the Ombudsman's role in promoting good administrative practices in Croatia.[124]

The real turning point was 2012, the year in which entered into force the People's Ombudsman Act.[125] The Act was passed in the National Parliament on June 29, 2012 in the urgent procedure.[126]

Unlike its predecessor, the contemporary Act significantly gives the People's Ombudsman a more pro-active role in the promotion and protection of human rights.[127]

Thus, Croatian's authorities enhanced the definition of the People's Ombudsman's competences. According to Article 4 the Ombudsman "promote and protect human rights and freedoms and the rule of law by examining the complaints of the existence of unlawful practices and irregularities with respect to the work of government bodies, bodies of local and regional self-government units, legal persons vested with public authority and legal and natural persons in accordance with special laws [hereinafter: the bodies]."[128]

Further, it has expanded human rights guarantees, introducing the possibility of request to initiate the proceeding of a review of conformity of laws and other regulations and general acts falling within his/her competence with the Constitution

[123] Article 10 of the POA from 1992.

[124] It could be consider as potentially useful tool that allows scrutiny of the systemic problems that the Ombudsman noted. See J. Hucker, *Institucija pučkog pravobranitelja u Hrvatskoj: stručna analiza* [Office of the People's Ombudsman in Croatia: expert analysis], OSCE, Zagreb, 2003, p. 3.

[125] *Zakon o pučkom pravobranitelju*, [the People's Ombudsman Act], „Narodne novine", br. 76/2012.

[126] It is worth noting that during the 2011 has been prepared the text of the new People's Ombudsman Act. This Act was passed at the session of the National Parliament on 21 October 2011 and published in the Official Gazzete (See, "Narodne novine" no. 125/11). However, according to the decision of the Constitutional Court of 15 February 2012, this Act did not enter into force because the Constitutional Court found that it was "organic" law, which must be, according to Article 83 of the Constitution, adopted by a majority vote of all deputies. In this case from 153 deputies, 76 voted for the adoption of this law. See more: *Izvješće Odbora za pravosuđe o Prijedlogu zakona o pučkom pravobranitelju, s Konačnim prijedlogom zakona, hitni postupak, prvo i drugo čitanje, P. Z. br. 99* [The Report of the Judiciary Committee on the Draft People's Ombudsman Act, with the Final Proposal of the Act, emergency procedure, first and second reading, MA no. 99th]. Available at: http://www.sabor.hr/Default.aspx?art=48929.

[127] The Law on the Ombudsman of 2012 has noticeably a greater number of provisions. It is divided into the 10 chapters: 1. General provisions; 2. Principles; 3. Election of Ombudsman and deputies; 4. Powers and obbligations of the Ombudsman; 5. Proceedings of the Ombudsman; 6. Ombudsman's office; 7. Ombudsman's Council for human rights; 8. Cooperation of Ombudspersons in promotion and protection of human rights; 9. Financing of the Ombudsman; 10. Transitional and final provisions.

[128] Compare with Article 5 of the Law on the Ombudsman of 1992. See *supra* n. 579.

according to the Constitutional Act on the Constitutional Court of the Republic of Croatia and the Administrative Dispute Act (Art. 6 (2)).[129]

It created the Ombudsman's Council for human rights as advisory body with the role of establishing the strategic plans in the field of promotion of human rights and of ensuring the continuous cooperation between the Ombudsman, civil society, academic community and media (Art. 31).

Merging of the Centre for human rights to the Ombudsman office in order to strength role of the Ombudsman in promoting and protecting human rights.[130]

Cooperation of the general Ombudsman and special ombudspersons (Ombudsman for children, Ombudsman for gender equality and Ombudsman for persons with disability) in the field of promotion and protection of human rights in accordance with the principle of compatibility, mutual respect and efficiency in protection and promotion of human rights(Art. 32).[131]

3.2. People's Ombudsman's recommendations

The second part of analysis for the People's Ombudsman institution deals with the implementation of its opinions by public administration in Croatia. At issue here is whether the domestic legal framework discussed above is also capable of affecting the "political and social reality". For the purpose of our analysis, this means asking does the public administration follow-up Ombudsman's recommendations or not.

The present section will be based on the annual reports of the Ombudsman, on the reports on the occurrence of discrimination of the Ombudsman, on the progress reports adopted by the European Commission since 2005 and on the corresponding

[129] Thus, for example, the Ombudsman pointed out in its latest request from February 2012 to the Constitutional Court that Article 5 (2) of the Law on Foreigners is not alignment with Articles 18, 19 and 26 of the Constitution. In that sense, the Ombudsman recommended that previously mentioned Article 5 (2) must be abolish. See more at the Ombudsman's website: http://www.ombudsman.hr/hr/upozorenja-i-preporuke/zahtjevi-ustavnom-sudu-rh/262-zahtjev-ustavnom-sudu-za-ocjenu-ustavnosti.html

[130] Article 36 of the Law on th eOmbudsman. The previous Ombudsman Maličić wrote in his Annual Report that „the merger is one of the recommendations of two expert analysis resulting from the project entitled "Strengthening the institution of the Ombudsman," which is the United Nations Development Programme (UNDP) conducted in cooperation with the Ombudsman and the Human Rights Centre in 2010th The "Rationalization of human rights in Croatia" and "Analysis (projection) merger of the Office of the Ombudsman and the Human Rights Centre". Until the merger has been, on the one hand due to the long direction of the Centre for Human Rights to the effect that will be fully compliant with the Paris Principles and the UN on the other hand the necessity of strengthening the institution of the Ombudsman, particularly in the area of human rights." See: *Izvješće o radu za 2012. godinu,* [Annual Report for 2012], Zagreb, 2013, p. 106. Available at: http://www.ombudsman.hr/dodaci/Izvjesce%20puckog%20pravobranitelja%20za%202012.g..pdf.

[131] The Law of 2012, no longer foresees the merger of the offices, promoted by the previous draft of the law ("Narodne novine" no. 125/11).

Croatian national legal acts. I will consider two problematic aspects of the Ombudsman's good administration promotion activities: the focus on the minority rights – the "Roma issue" and excessive duration of the administrative procedures. The intent is to highlight the "dialogue" in the relevant areas between Ombudsman and public administration.

3.2.1. Discrimination by public administration: the „Roma Issue"

With regard to enlargement process, the Commission expressed its concern for implementation of the Croatian national standards in area as early as 2005. In its opinion on Croatia's progress, the Commission openly recognized that „[i]n the area of human rights and minorities an appropriate legal framework is in place. […] However, *implementation* of the Constitutional Law on National Minorities in particular *has been slow*. […] *Roma continue to face discrimination and the need to improve their situation* especially with respect to job opportunities and as well as creating a more receptive climate in the majority community *is an urgent priority*."[132] (emphasis added)

The first Croatian Anti-Discrimination Act entered into force on January 1, 2009.[133] This Act establish the Ombudsman as the central national institution responsible for the suppression of the discrimination in performing function by „state

[132] European Commission, *Croatia 2005 Progress Report*, COM (2005) 561 final, Brussels, 9 November 2005, p. 33. Available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1424_final_progress_report_hr_en.pdf.

Similar, conclusion could be found in the Croatia's request for the membership of the Council of Europe: "[t]he legislation considered (constitution, other constitutional laws, ordinary laws) is essentially consistent with the principles of parliamentary democracy, protection of fundamental rights and rights of minorities and the rule of law. While such legislation is a necessary precondition, it is not in itself sufficient to conclude that the legal order complies with the "rule of law" principle." Available at: http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=7445&Language=EN.

[133] *Zakon o suzbijanju diskriminacije* [Anti-discrimination Act], „Narodne novine" no. 85/2008, 112/2012. Before the adoption of the first Croatian Anti-Discrimination Act from 2009 the provisions guaranteeing anti-discrimination protection were contained in some other laws, among which the most important are the following: Constitutional Law on National Minorities, Labor Law, Gender Equality Act, Law on same-sex unions, Civil Service Law, Criminal Law, Law on Service in the Armed Forces of the Republic of Croatian, Law on Free Legal Aid, etc. It is worth noting that Croatia has acceded to significant number of international instruments, both within the UN framework and within the framework of the Council of Europe: the UN Covenant on Civil and Political Rights and the UN International Covenant on Social and Economic Rights (although with reservations); the UN Convention on the Elimination of All Forms of Racial Discrimination; the European Convention on the Exercise of Children's Rights, the Optional Protocol to the UN Convention on the Elimination of Discrimination against Women etc.

bodies, bodies of local and regional self-government units, legal persons vested with public authority, and to the conduct of all legal and natural persons."[134]

According to Article 12 of the Anti-discrimination Act the Ombudsman have a wide list of competences within its scope, such as receiving and examination of reports of discrimination, warn the public about the occurrence of discrimination, conduct mediation with a possibility of reaching an out-of-court settlement, etc.[135] The Act stipulates competences of the Ombudsman for the realisation of equal opportunities and regulates protection against discrimination on the grounds of race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, age, health condition and genetic heritage.

In the practice the most present type of discrimination by public administration, as pointed in the Ombudsman's report on discrimination from 2011, concern the Roma population.[136] This trend is evident from beginning of implementation of the Anti-Discrimination Act.[137]

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[134] Article 8 of the Anti-discrimination Act. Establishing the Ombudsman office as the central equality body is in accordance with Article 13 of the Council Directive 2000/43/EC of 29 June 2000 which obbliged Member States to „designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights." See more: *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,* available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML.

[135] Article 12 of the Anti-discrimination Act: "Within the scope of his/her work, the Ombudsman shall: 1. receive reports of all the natural and legal persons referred to in Article 10 of this Act; 2. provide necessary information to natural and legal persons that have filed a complaint on account of discrimination with regard to their rights and obligations and to possibilities of court and other protection; 3. if the court proceedings have not yet been initiated, examine individual reports and take actions falling within his/her competence required for elimination of discrimination and protection of rights of discriminated persons; 4. warn the public about the occurrence of discrimination; 5. with the parties' consent, conduct mediation with a possibility of reaching an out-of-court settlement; 6. file criminal charges related to discrimination cases to the competent state attorney's office; 7. collect and analyze statistical data on discrimination cases, 8. inform the Croatian Parliament on the occurrence of discrimination in his/her annual and, when required, extraordinary reports; 9. conduct surveys concerning discrimination, give opinions and recommendations, and suggest appropriate legal and strategic solutions to the Government of the Republic of Croatia."

[136] According to the latest census from 2001 Croatian's population has over 4 milio. The Roma population estimated 9.463 of the total. However, according to some non-official sources it is estimated that the number of Roma in Croatia is between 30.000 and 40.000. See more at the web site of the Croatian Government,http://www.vlada.hr/hr/uredi/ured_za_nacionalne_manjine/nacionalni_program_za_rome/obiljezja_roma_u_rh.

We agree with the Ombudsman opinion expressed in 2009 that the previous consideration represents" a serious warning that the Roma ethnic minority is not considered equal and that its members mostly express themselves as members of the dominant Croat ethnic group." See, Annual Report for 2009, Report on occurenc of discrimination, Zagreb, 2010, p. 51.

[137] See Izvješće o pojavama diskriminacije za 2011. godinu, [The Report on discrimination for 2011], Zagreb, June 2012, p. 35.

The major number of cases with regard to discrimination of Roma refers to violation of Roma children rights due to various reasons. For example, revoking of the parental rights, placing children in foster care due to neglect, violence in school committed by adults, violence among children within the same-age group in cases where the perpetrators were Roma children, etc.

Thus, for example, in the case *P.P.-28-02-797/11*[138] the two girls of Roma nationality, who regularly goes in the Trade High school, could not get possibility to work several hours in practice which is, among others, obliged within the course of the school. The complainants applied for a job in one store but their request was refused. The person which refused application denied that the reason for such decision were their Roma origin. The Ombudsman pointed on additional problem in this case, i.e. the attitude of school. In the Ombudsman's words "the school have very flexible attitude with regard to sending the students on practice (without previously without checking the available seats with the employer [...]). On February 2012 was finished the first instance process by adopting the complaint. The second instance procedure is on-going.

In order to ensure better integration of Roma population the Government of Croatia brought two important acts: "Action Plan for the Decade of Roma" and "National Program for the Roma".[139] Thus, the Action Plan for the Decade of Roma provided four areas in which is necessary make changes in order to remove a long-standing marginalization and discrimination of Roma. One of them is education which considers increasing of Roma students in schools. According to the last report of implementation of the Action Plan shows that both the number of enrolled and the number of graduate students of Roma population increasing.[140]

The Croatian legal standards with reference to minority rights – the Roma issues are now largely in line with those accepted in more mature European democracies. Nevertheless, the concerns expressed by the Commission since 2005 and restated in the recent 2011 are still relevant.[141]

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[138] Complaint P.P.-28-02-797/11, *Izvješće o pojavama diskriminacije za 2011* [The Report on discrimination for 2011], Zagreb, June 2009, pp. 33-34. See also for example, Complaint P.P. -1857/03, Report of 2011; Complaint P.P. -34-02/645/09 Report 2009.

[139] Action Plan for the Decade of Roma and National Program for the Roma could be found at: http://www.vlada.hr/hr/uredi/ured_za_nacionalne_manjine/akcijski_plan_desetljeca_za_ukljucivanje_roma_2005_2015.

[140] *Ibid.,* p. 42.

[141] The Commission stated in its report of 2011: „As for the Roma minority, there have been some further improvements in education,particularly in pre-school education ... However, the Roma still face discrimination, particularly regarding access to education, social protection,health, employment

De Vergotini explained the minority issues in the Western Balcan Countries in these terms: "Il *national building* porta ad imporre una sola lingua, una sola cultura, un solo sistema educativo con forte intoleranza verso la diversità."[142]

3.2.2. Excessive duration of the administrative procedures

One of the major problems in the communication between individuals and public administration concerns cases when the latter fails to bring the administrative act within reasonable time. Such trend is present since the beginning of the work of the People's Ombudsman Office in 1994.[143]

In the Ombudsman's practise the reference to violation of the duty of reasonable time-limit for taking decisions is mostly considered in relation to the a large number of second instance procedures which are not solved within legal term, unreasonably and unacceptably long due to non-efficiency of the procedures, i.e. „silence of administration", repeated cancellation of procedures and repetition of procedures even in cases where the courts are obliged by the law, as a rule, to adopt decision on the merits.

In the complaint *P.P.-290/129*, [144] for example, the complainant alleged that there was inordinate length of proceedings in the work of the Croatian Pension Insurance Institute [hereafter: the Institute]. Since the intervention of the Ombudsman the latter, after more than two years of not taking any action in the proceeding, brought the decision within one month. In this case as in the previous we found follow-up of the Ombudsman's recommendations.

It is worth noting that the Ombudsman Office established since 2009 cooperation and regular contacts with the Institution to the implementation of appropriate provisions regulating fulfilment, changes and termination of pension insurance rights and protection of the complainants guaranteed by the Constitution. It

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and adequate housing. Segregation persists in some schools. Progress towards ensuring that Roma children complete primary and secondary education *has been modest*." Croatian Progress REport, op. cit., pp. 12-13.

142 See: G. De Vergotini, Constituzionalismo europeo e transizioni democratiche, in M.C. Specchia, M. Carli, G. di Plinio and R. Toniatti (eds.) I Balcani occidentali. Le costituzioni della transizione, Torino, 2008, p. 13.

143 See the People's Ombudsman's annual reports since 1994. Available at the www.ombudsman .hr.

144 See Complaint P.P.-290/129, People's Ombudsman Annual Report [hereafter POAR] 2012, p. 19; See also similar cases: Complaint PP.-671/09 POAR 2010, p. 26; Complaint P.P.-1256/10 POAR 2010, pp. 28-29; Complaint P.P.-1111/10 POAR 2012, pp. 29-30; P.P. 59/06 POAR 2007 p. 51; P.P.-320/07 POAR 2007, pp. 51-52; P.P.-1436/06 POAR 2007, p. 52.

contributed that the number of complaints regarding excessive length of procedures has slowly decreased.[145]

Nonetheless, there are still represented the violation of the right to reasonable time-limit for taking decisions in the area. In the latest Annual Report of 2012 the People's Ombudsman pointed out that the number of received complaints regarding the excessive length work of the Institute.[146]

In the Ombudsman's report could be found "reason" for such situation. The Ministries and other administrative bodies state that the reasons for inefficiency and failure to respect legal terms lay in complex procedures, deficiencies in provisions and problems in terms of human and material resources. Despite the fact that the mentioned reasons may serve as an excuse for some administrative bodies or services, they cannot serve as an excuse for the entire state which has as its obligation and responsibility to ensure the conditions for solving administrative affairs within appropriate, that is, within a reasonable term.

The issue at stake here is that the Administrative Procedure Act does not contain an explicit provision related to this issue. As observed earlier (see *supra* § 1.3.2.7) general time-limit for bringing forth the decision is stipulated by the GAPA. But, the provision defining general period in Croatia is not complete, as this period is stipulated only for procedures launched by the parties, but not for those lodged *ex officio*. The Article 101 of the GAPA stipulates that the public authorized organ is obliged in cases of direct resolving upon the request of the party to bring forth the decision and submit it to the party without delay, at the latest within 30 days as from the date of lodging the duly request.

The "slow administration" presents one of the major risks for good administration and citizens' belief that their rights are protected.

[145] The comparable illustration of complaints according to the pension insurance legal area for the period 2008-2012 could be present in the following table:

Area	**2008**	**2009**	**2010**	**2011**	**2012**
Pension insurance	123	123	127	117	77

[146] See Annual Report for 2012, p. 18.

4. Conclusion

In the Croatian experience, from 1990, democratic and good administrative promotion has been linked with a strong rule of law dimension. The transition to a democratic rule of law system was the imperative of changing administrative law. The administrative legal framework has been radically changed by adoption of the General Administrative Procedure Act in 2010, the Administrative Disputes Act in 2010 and the Law on Public Administration in 2011 and other laws aimed to reinforce the efficiency and effectiveness of administration. Consequently, to ensure the better protection of citizen's vis-à-vis public administration the full jurisdiction administrative disputes have been recognized as administrative dispute in Croatia.

In the European Commission's words "Croatia's forthcoming accession is the result of 10 years of a rigorous process, […] EU membership is an additional incentive to continue reforms in Croatia. Building on the achievements to-date, Croatia is *expected to continue developing its track record in the field of the rule of law*, notably in the fight against corruption. EU membership also offers many and substantial opportunities for Croatia and the EU. These opportunities now need to be used, so that Croatia's participation in the EU will be a success – to the benefit of Croatia itself, *of the Western Balkans region*, and of the EU as a whole"[147] (emphasis added).

It could be concluded that the Croatia's ambition attempt to transform its public administration from "state administration" into modern and efficient public administration strictly related to the principle of legality is a successful, although still on-going process. After achieving the EU membership the country should continue the progress in such direction. As pointed out by Cremona, "certain values have become incorporated into the Union's identity to the extent that they are regarded as a condition of membership".[148]

[147] The European Commission, *Communication from the Commission to the European Parliament and the Council, Monitoring Report on Croatia's accession preparations,* COM (2013 171 final, Brussel 26.03.2013, pp. 14,15. Available at: http://ec.europa.eu/commission_2010-2014/fule/docs/news/20130326_report_final.pdf-

[148] M. Cremona, *Values in the EU Constitution: The External Dimension,* CDDRL Working Papers, Stanford IIS, 26/2004, p. 2.

Chapter 4 – Case study – Serbia

1. Legal framework

1.1. Constitutional bases

The year 2000 presents the historical turning point in the relations between the European Union and Serbia (initially the Federal Republic of Yugoslavia, from 2003 the State Union of Serbia and Montenegro, and from 2006 the Republic of Serbia) when the political changes resulted in promotion of democratic values in Serbia, the process where great trust was placed on the constitutional and administrative reforms as the key components for a successful democratic consolidation.[1]

In order to better understand the constitutional changes of 2006, a brief examination will be made of the previous Serbian Constitution of 1990 in the public administration domain and Strategy for administrative reform of 2004.

1.1.1. Constitution of 1990

The historical and political changes in the international environment after 1989 had a direct impact on writing of the Constitution of the Republic of Serbia from 1990[2] which broke up with the more than fifty years dominated socialist legal tradition. In the opening lines the Constitution proclaimed that "[t]he Republic of Serbia is a democratic State of all citizens who live in it, founded on the human rights and fundamental

[1] The European Commission also highlithed the 2000 as key year in relations between the EU and Serbia in its opinion on Serbia's application for EU membership. See: Communication from the Commission to the european Parliament and the Council, *Commission Opinion on Serbia's application for membership of the European Union,* COM (2011) 668 final, Brussels, 12.10.2011, p. 4.

[2] *Ustav Republike Srbije* [The Constitution of Republic of Serbia], Službeni glasnik Republike Srbije, broj 1/1990.

freedoms, rule of law and social justice."[3] Thus, the democratic principle receives broad recognition in this document.

The Constitution of 1990 emphatically affirmed the inclusion of some good administrative guarantees, such as damage liability of administrative action[4] and procedural protection of individual vis-à-vis public administration[5], which were provided much wider in the Federal Yugoslav Constitution of 1992 [see Chapter 2 § 1.3].

The fall of communism enabled also the renaissance of classical institutions of public administration's organization in Serbia. Thus, the Constitution of 1990 introduced ministries as a classical form of administration which represented the reversion to a pre-Second World War legal tradition that originated from the Kingdom of Serbia.[6]

Nonetheless, the democratic assumptions have proven to be misleading. These assumptions, commonly characterized by weak economic systems and strong authoritarian legacies, were profoundly divided both socially and politically. The public administration was still considered as the "State administration" model seen as an instrument of government power.[7] Thus, according to Article 94 of the Constitution from 1990:

> "The ministry applies laws, regulations and by-laws of the National assembly and Government, as well as the general acts of the President of the Republic, deals with administrative matters, carries out administrative supervision, and performs other administrative duties established by law."

This provision was further elaborated by the Law on Public Administration from April 1992[8] under Article 8 "affairs of the public administration" in the following way:

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[3] Article 1 of the Serbian Constitution from 1990.
[4] Article 22 of the Serbian Constitution from 1990.
[5] Article 3 of the Serbian Constitution from 1990.
[6] The Law on organization of central State administration from 1862 (*Zakon o ustrojstvu centralne državne uprave*) established ministries and Council of Ministers as two forms of public administration in the Kingdom of Serbia. This Law was on force until 1929.
[7] See more about the model of „State administration" in Chapter 2 § 3.2.
[8] *Zakon o državnoj upravi*, Službeni glasnik Republike Srbije, br. 20/1992, 48/1993, 53/1993, 67/1993, 48/1994, 49/1999. By adoption of this Law, the Law on the Public Administration of the Republic of Serbia from 1989, the Law on the Public Administration of Vojvodina from 1981 and the Law on the Public Administration of Kosovo from 1980 did not apply any more.

"The ministry directly applies laws, regulations and by-laws by adopting administrative and other acts, undertakes administrative and other measures, and performs administrative and other actions; ensures the enforcement of laws, decrees and by-laws by enacting regulations and conducting administrative supervision, and cares for their timely and lawful execution; deals with administrative matters regarding the rights, obligations and legal interests of citizens, legal persons or other parties; carries out administrative supervision: a) supervision of the legality of the activity of enterprises, institutions and other organizations, b) supervision of the legality of acts of enterprises, institutions and other organizations when, in accordance with the law, they deal with the rights, obligations and legal interests of citizens and other legal entities, c) conducts inspection; prepares laws and other regulations and general acts within its jurisdiction, in accordance with its responsibilities; performs tasks related to development, programming, organizing and promoting activity in the area of their competence; performs other duties specified by law."[9]

Finally, it is worth nothing that the Serbian Constitution of 1990 did not establish the Ombudsman institution, a fundamentally comparative instrument in promoting and enforcing respect for human rights. Bearing in mind the importance placed on human rights and from a quantitative point of view, approximately one-third of constitutional provisions were dedicated to protection of human rights,[10] such an oversight was the issue of serious concern.[11] It has to be note that a self-management variant of ombudsman was not unknown to the Yugoslav constitutional order, as evidenced by the (unfortunately) failed introduction of "social self-management Attorney" (known as the *Društveni pravobranilac samoupravljanja*).[12]

[9] Since 1990 until 2006 the executive power was dominant and without parliamentary control in practice (nonetheless the Constitution of 1990 provided the mechanisms of parliamentary control of the Government). See more: S. Samardžić, *Sistem vlasti u novom Ustavu Srbije,* [The System of Government in the new Constitution of Serbia], in Zborniku radova *Ustavni sud Srbije – u susret novom ustavu,* Ustavni sud Republike Srbije, Beograd, 2004, p. 92.

[10] The Serbian Constitution of 1990 had 136 Articles in total. Artt. 11 – 54 were dedicated to human rights and fundamental freedoms.

[11] S. Lilić, *Zašto je novi ustav Srbiju ostavio bez ombudsmana?*, [Why the new Constitution was left Serbia without Ombudsman?], in *Arhiv za pravne i društvene nauke,* 2-3/1991, p 271; On the other side, M. Jovičić has pointed to that the precondition for establishing the Ombudsman office is that public administration performs its actions on the relatively satisfactory way. In the case of Serbia problems of organization and proper functioning of administration is pervasiveness of Serbian administration. See: M. Jovičić, *Ombudsman,* [Ombudsman], in M. Jovičić, *Demokratija i odgovornost,* Izabrani spisi I, Beograd, 2006, p. 102.

[12] For an detailed reading on *Društveni pravobranilac samoupravljanja* see, D. Kulić, *Ombudsman I društveni pravobranilac samoupravljanja,* [Ombudsman and social self-management Attorney], Institut za pravna i društvena istraživanja Pravnog fakulteta u Nišu, Niš, 1985.

Clearly, at the beginning of the Nineties „the political, social and economic reality" in Serbia was not "ready" for deeply constitutional reforms.[13] The burden of authoritarian heritage was (is) widely emphasized in the socio-political framework of Serbia characterized by insufficiently developed constitutional and political morale.

As Peter Häberle has pointed out, the constitution is not merely the legal order primarily designed for lawyers, but also legal expression of cultural development.[14]

1.1.2. Administrative reforms: "Trends that cannot be avoided"

The complex and multifaceted argument concerning the administrative reforms relies on the fundamental premise that only good administration is successful administration. The main task of sacksful administration is protection of citizens' rights and achieving the best interests and benefits of society as a whole.

Having clarified this preliminary point about administrative reforms, we will continue our analysis by asking how effective administrative efforts have been in modifying the public administration in Serbia.

- Period 2001 – 2004

January 25th, 2001 marked the election of the first democratic Government of the Republic of Serbia intended to reform, among others, the institutional structure of the Serbian public administration. In February 2001 the Government brought forth *The Decision on founding Council for the Public Administration*,[15] whereas in early March of the same year it founded *Agency for improvement of the Public Administration*.[16]

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[13] The last decade of XX century was very stormy for the Republic of Serbia: armed conflicts, internal dictatorship and lack of multi-party system, international isolation and NATO intervention in 1999. Today a part of the European Union conditionality requires the adoption of reforms which are direct opposites of national democratic outcomes and preferences. These reforms will be tough assignments for Serbia's accession requirements with regard to Kosovo's status.

[14] P. Häberle, *Verfassungslehre als Kulturwissenschaft*, Duncker und Humblot, 2nd edition, 1998.

[15] *Odluka o obrazovanju Saveta za državnu upravu,* [The Resolution on foundation of the Council for the Public Administration], "Službeni Glasnik Republike Srbije", br. 15/2001. The Government brought forth this Resolution based upon Article 26 Law on Government of the Republic of Serbia ("Službeni Glasnik Republike Srbije", br.5/1991 i 45/1993). Article 26 states: "Consideration, preparation and submitting proposals on matters within the competence of the Government, coordinating the work of ministries and other bodies in the preparation of documents and other materials for the meeting of the Government, monitoring the implementation of its decisions, the Government established the Commissions and other permanent working bodies. The Government may perform certain tasks to *ad hoc* working groups. By act on establishing working groups are defining their tasks and composition."

[16] Resolution on foundation of the *Agencija za unapređenje državne uprave* [Agency for improvement of the Public Administration] was brought forth based upon Article 10 Regulation on secretariat and other

Since 2001, Serbia also began the Stabilization and Accession Process by forming the Consultative Task Force, whose purpose would be to enable Serbia and the European Commission to look into the issues in various aspects of social and economic life, additionally to encourage a more efficient approach to EU standards. However, the official negotiations started in October 2005 regarding the SAA between Serbia and the EU.[17]

The Council for the Public Administration was founded as a professional-advisory body of the Government of Serbia, with the task to follow up and study development of the public administration. Additionally, it could suggest measures related to the creation and improvement of public administration actions, in compliance with the authorization of the Government. Finally, the Council for the Public Administration was to carry out tasks related to work compliance of the ministry and specific organizations engaged with the development of the administration and also to lodge to the Government the opinions on the development proposals about the government administration submitted to ministries and specific organizations.

On the other hand, the Agency for improvement of the public administration was founded as the professional body of the Government. As per Article 1 of the *Regulation on general secretariat and other bodies of the Government of Republic of Serbia,* all agencies were defined as "the professional bodies collecting information and data, processing them and preparing programmes important to the improvement of work of the public administration bodies."[18] The basic tasks of the Agency were the preparation and suggestion of the programme for the improvement of efficiency and quality of work of the public administration and implementation of educational programmes for citizens and bodies of local self-administration for the improvement of the public administration.

The beginning of 2002 marked the adoption of the new law *Law on ministries*[19]*,* which terminated the previous one of 1991. The most important novelty introduced by the new Law, relating to the administration reform, was the foundation of the *Ministry for the public administration and local self-government*. In compliance to the Article 6 it was stipulated that the Ministry for the public administration and local self-government

departments of the Government of Republic of Serbia ("Službeni Glasnik Republike Srbije", br. 15/2001, 16/2001, 64/2001, 29/2002, 54/2002).

[17] S. Lilić, *European Integration Process in Serbia with reference to "jurisprudence research lines" in Serbia and Slovenia,* , 2008, p. 300.

[18] Regulation on secretariat and other departments of the Government of Republic of Serbia, *op. cit.,* see n. 15.

[19] *Zakon o ministarstvima*, [*Law on ministries*], "Službeni Glasnik Republike srbije", br. 27/2002.

carries out jobs such as, the organization and work of the ministries and specialized organizations, system of the state government; inspection of administration; labour relations and professional elaboration of the employed in the state bodies; follow up the staff needs in administration and direct pronouncement of citizens.[20]

The beginning of work of the Ministry marked the complete establishment of the institutional mechanism needed to carry out future reforms of the public administration in Serbia. Nonetheless, very soon it was obvious that the institutional network of the three different organs (the Ministry, Council and Agency) in practice cannot function well, the collaboration of those organs that should have brought to successful implementation of the public administration reforms was not possible within the condition where the particular authorizations of those bodies overlapped, whereas some duties were not covered by the authorization of any of those bodies. Thus, controversies remained due to the fine balance between reform ambitions and the final results.

But was the parallel existence of all these three institutions really necessary?

The decision to found the Ministry for the public administration and local self-government was not put under question. It has to be noted that by the founding of the special Ministry, the Government gave strong political support to the reform of the public administration and underlined the need for the systematic and permanent work within that filed.

This idea was based upon examples of some European countries, such as Holland, Germany, France and Greece, for which the duties relating to the system of the public administration and its reform were trusted to the Ministry of Internal Affairs. Whereas such a concept and technique had a lot of advantages, at that moment such a solution was not adequate due to the conditions of the Ministry of Internal Affairs in Serbia with inherited problems dating back from XX century.

The question of purposefulness both of the existence and work of the Council for the State administration, after 2002 and foundation of the Ministry was many times raised. The question of justification of the existence of the Council was asked primarily

[20] The Article 6 stipulates that: "the Ministry for the State government and local self-government carries out works of the State administration relating to the organization and work of ministries and specialized organizations; the system of the State government; inspection of administration; labour relations and professional elaboration of the employed in the state bodies, follow up of the employed in the state organs; follow up of staff needs; register books; seals; political and other organizations, syndicate organization excluded; direct pronounce of citizens; system of local government and territorial autonomy; territorial organization of the Republic; communal activities; elections for local self-government organs, and other activities as stipulated by the law."

as it was parallel with the foundation of the authorized Ministry; the question was opened on purposefulness of the further existence of the Agency for improvement of the public administration. In circumstances where the relevant Ministry already exists and performs the above quoted tasks, the existence of the Agency as the expert department became an inopportune solution. If during the period from 2001 to 2002 a need existed for the Agency then the need ceased to exist at the moment the Ministry was founded.[21]

It could be concluded that in period from 2001 to 2004 the fundamental reform within the field of the public administration in Serbia has not happened. Apart from the foundation of the separate Ministry, Council and Agency, which represent only formal-organizational change being a precondition to commence reforms, there were no substantial changes. The rules regulating the work of the public administration authorities, the public administration status, the rights and obligations of the state officials were basically unchanged in relation to the content of the rules from the Nineties. There was no systematic education of the staff employed in the administration, nor were steps taken towards the depolarization and professionalization in the bodies of the public administration.

The basic reason for the failure of the program on the reform of the State administration in this period, apart from the badly divided authorizations of the above quoted organs was insufficient political support to carry out state administration reforms. Out of the lack of political support there appeared another problem as the absence of collaboration and cooperation in undertaking activities to be carried out within the field of reform of state administration by the Ministry, Council and Agency. In practice all three institutions competed among themselves, instead of trying with combined work to achieve better results. For that reason during the work of the first reformed Government in Serbia, the strategy reform of the State administration was not approved. Such a failure automatically blocked bringing forth any action plan for implementation of concrete measures within the State administration reforms.

- Public Administration Reform Strategy in Serbia of 2004

[21] See: D. Šuput, *Seven years of implementation of the reforms in state government in the Republic of Serbia* [Reform of the State Administration in the Republic of Serbia: the first seven years of implementation], in *Legal life,* Volume II, 10/2007, p. 818 for bibliography 813-833.

In November 2004 the Serbian Government adopted the first far-reaching reform package, which introduced the possibility for significant changes in the public administration area.

The Public Administration Reform Strategy[22] [henceforth the Strategy], based on "general principles of the *European Administrative Space* and *good governance*, as well as *open government*" openly recognized the importance of administrative reforms with a final goal "to *provide high quality services to citizens* and to establish such public administration in Serbia which will significantly contribute to the economic stability and quality of life standards crucial for the quality and efficiency of economic and social reforms"[23] (emphasis added). It also contained an invitation to follow "the European partnership and future Stabilization and Association Agreement."[24]

The Serbian Government for the first time officially revised the general situation in the domestic public administration domain and made the list of priorities to be accomplished during the future years. Among these priorities the document cites the following as "trends that cannot be avoided": the need of understanding public administration "as a service to citizens, not as a powerful tool of government", openness and transparency of public administration, creation mechanisms of control and responsibility such as ombudsman institution and public control of administration through the right of access to documents.[25]

Driven by goals established in the Strategy, the Republic of Serbia adopted a set of new laws during the 2005: Law on Public Agencies,[26] Law on Government,[27] Law on Public Administration,[28] Law on Public Officials[29] and Law on Protector of Citizens,[30]

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[22] *Strategija reforme državne uprave u Republici Srbiji,* [Public Administration Reform Strategy], adopted by Serbian Government on November 2004.

[23] *Ibid.*, p. 6.

[24] *Ibidem*

[25] *Ibid.*, pp. 9 – 10; Realization of the new role, tasks and affairs of public administration requires implementation of different methods and instruments. The previuos system has been based on ordering and forbidding tipical for ex socialist countries. See: D. Milovanović, *Reforma uprave u uslovima tradicije,* [Administrative reform in transition], in M. Zečević (ed.), *Uticaj svojinske transformacije u političkog pluralizma na organizaciju i delatnost države*, Beograd, 2006, p. 111. za biliogra. pp. 107 – 117.

[26] *Zakon o javnim agencijama*, [Law on Public Agencies], "Službeni Glasnik Republike Srbije", br. 18/2005.

[27] *Zakon o Vladi*, [Law on Government], "Službeni Glasnik Republike Srbije", br. 55/2005.

[28] *Zakon o državnoj upravi* ,[Law on Public Administration],"Službeni Glasnik Republike Srbije", br. 79/2005.

[29] *Zakon o državnim službenicima,* [Law on Public Officials], "Službeni Glasnik Republike Srbije", br. 79/2005.

[30] *Zakon o Zaštitniku građana,* [Law on Protector of Citizens],"Službeni Glasnik Republike Srbije", br. 79/2005 i 54/2007.

as well as Regulation on principles for internal organization and systematization of workplaces in ministries and Government services.[31]

With respect to the Constitution, the Strategy highlighted that the constitutional framework of 1990 does not assume the sufficient legal bases for administrative reforms. Nonetheless, "it is more than obvious necessity to start with strategic reforms in this area."[32]

1.1.3. Constitution of 2006: the strength of public administration as a service to citizens

The new Constitution of the Republic of Serbia has been adopted by National Assembly on September 30, 2006 and then ratified by a popular referendum held on 28 and 29 October 2006.[33] The Law for the implementation of the Constitution has been adopted on 10 November 2006.[34]

The approach to the constitutional reform introduced numerous important changes relevant on public administration and protection of individual interests.

Thus the Serbian's authorities Openly proclaimed that public administration is independent, bound by the Constitution and Law and account for its work to the Government.[35]

Futher, it has been introduced a new institution in the constitutional legal order of Serbia; the Ombudsman (known as *Zaštitnik građana*). According to Article 138 *Zaštitnik građana* is "an independent government body that protects the rights of citizens and monitors the work of the public administration, the authority responsible for the legal protection of property rights and interests of the Republic of Serbia, as well as other agencies and organizations, enterprises and institutions entrusted with public powers."

*T*he concept of functions of public administration in Serbia was expanded by considering public administration as "a service to citizens". Thus, Article 137 openly recognized that "[i]n the interest of efficient and rational exercise of the rights and

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[31] *Uredba o izmeni i dopuni Uredbe o načelima z aunutrašnju organizaciju i sistematizaciju radnih mesta u ministarstvima, posebnim organizacijama i službama Vlade*, [Regulation on principles for internal organization and systematization of workplaces in ministeries and Government services], "Službeni Glasnik Republike Srbije", br. 38/2005.

[32] *Public Administration Reform Strategy*, *op. cit.,* p. 8.

[33] According to the official results of the Republic Electoral Commission more than 53% of citizens voted „yes" for the new Constitution of Serbia. Result are available at: www.rik.parlament.gov.rs.

[34] *Ustavni zakon za sprovođenje Ustava Republike Srbije,* [The Law for the Implementation of the Constitution of the Republic of Serbia], „Službeni Glasnik Republike Srbije", br. 98/2006.

[35] Article 136 (1) of the Serbian Constitution of 2006.

obligations of citizens and of meeting their needs and interests to life and work, certain tasks may, by law, be entrusted to be performed by the autonomous province or local governments. Particular public powers may, by law, be delegated to enterprises, institutions, organizations and individuals. Public powers may be delegated by law to specific bodies when they perform regulatory functions in certain areas. The Republic of Serbia, autonomous provinces and local governments may establish public services. Activities and duties for which public services are established; their organization and operation shall be prescribed by law."

Finally, the principle of rule of law has been enhanced under the Article 198 titled "Legality of the Administration" that "[i]ndividual acts and actions of state bodies, organizations with public powers, bodies of autonomous provinces and local self-government must be based on law. The legality of final individual act that concern the rights, obligations or lawful interests may be argued before the court in administrative dispute proceedings, if in a particular case the law has not provided different judicial protection."

1.2. General Administrative Procedure Act:

Since the adoption of the General Administrative Procedure Act [hereafter the GAPA] in 1997 (the last Yugoslav law on administrative procedure), the Republic of Serbia has not passed the new law in this area.

However, with regard to the enlargement process, the European Commission expressed its concern for Serbian administrative standards. In Serbia's 2010 Progress Report, the Commission openly recognized that "the legislative framework remains incomplete" because "the law on administrative procedures has not been adopted yet."[36] Further, in the Commission's opinion on Serbia's application for membership of the European Union in 2011, "[t]he adoption of a new Law on Administrative Procedure, *aimed at introducing simplified procedures* in order to reduce the caseload, is still pending"[37] (emphasis added).

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[36] European Commission, *Serbia 2010 Progress Report, Enlargement Strategy and main challenges 2010-2011,* COM (2010) 660, Brussels, 9 November 2010, p. 9.

[37] European Commission, *Analytical Report - Accompanying the document* - Communication from the Commission to the European Parliament and the Council - *Commission Opinion on Serbia's application for membership of the European Union,* COM (2011) 668, Brussels, 12. October 2011, p. 16. Available at: http://ec.europa.eu.

In the Public Administration Reform Strategy in Serbia of 2004, the great trust in the reform process is placed on improvement of administrative legislature which includes, among others, the General Administrative Procedure Act.[38] Consequently, the Action Plan for Implementation of Administrative Reform in Serbia for period 2004 - 2008 provided the adoption of the new GAPA during the last quarter of 2004. However, the new Law on administrative procedure has not been passed as of yet, with the exception of "technical" amendments in relation to non-existent federal institutions.

Finally, on 23 February 2012, the Serbian Government adopted the Proposal of the new GAPA which goal is to ensure "proportionality in meeting the protection of private and public interest in administration; to increase transparency and improve the efficiency and effectiveness of administrative procedures; harmonization of procedures and administration of the Republic of Serbia with the European standards of administrative practice".[39]

Focusing on the current GAPA in the Republic of Serbia, the present section aims to examine its features with respect to good administrative values. In doing this, I will draw a parallel with the Proposal of the GAPA from 2012 [henceforth the Proposal] in order to demonstrate, if there are, modifications in the area.

1.2.1. Administrative principles

General Administrative Procedure Act of 1997 is the basic procedural law which provides a set of guiding principles of administrative procedure with particular focus on the strict legality and protection of individual rights and interests.[40] In regard to this aspect, the purpose of administrative procedure is establishing of efficiency, achieving the truth, principle of conducting hearings, principle of admission of evidence, principle of independent decision-making, principle of two instances (the right to appeal), principle of finality of decisions, principle of cost effectiveness, principle of providing assistance to the parties and right to use one's language.

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[38] *Public Administration Reform Strategy in Serbia of 2004*, *op. cit.*, p. 24.

[39] See more at http://www.drzavnauprava.gov.rs/newsitem.php?id=1771; The full text of the Proposal of the new GAPA is available at http://www.zakon.co.rs/predlog-zakona-o-opstem-upravnom-postupku.html.

[40] See: *Zakon o opštem upravnom postupku sa objašnjenjima, sudskom praksom, primerima za primenu I registrom pojmova,* [General Administrative Procedure Act with explanations, case law, examples of application and Index], (predgovor I. Krbek), Beograd, 1967, p. 4.

Principle of legality is the foundation of administrative procedure in Serbia. According to Article 5 (1) of the GAPA, Article 4 of the Proposal, the general duty of the public administration is to observe the law. It is the essential rule, which is capable of comprising other principles of administrative procedure. In particular, the legality ensures that administrative authorities are not biased when performing their discretionary powers. Thus, according to Article 5 (2), "[i]n administrative matters in which an authority is legally empowered to make discretionary decisions, the decision shall remain within the scope and the purpose for which the powers have been given."[41] An essential guarantee of impartial treatment are rules foreseen under the Title "Exclusion" according to which an official who has personal, family or other interests in the decision making process should not participate in taking it.[42]

The GAPA, unlike the provisions of the Code of Good Administrative Behaviour of the European Ombudsman, as has been argued already, adopts the fundamental doctrinal concept of "an organ" of the administration in Serbian law which provides possibility of exclusion of the whole organ or a single official according to the logical interpretation *a majory ad minus*.

The legality as opposite to analogy has been confirmed by the Supreme Court of Serbia. In the case *Uvp. 119/79*,[43] for example, the Court recognized that "if administrative procedure is to establish an obligation, it must be strictly provided for by a regulation. Establishing an obligation to a party by analogous application of regulation contradicts the principle of legality."

The importance of the *principle of protection of the right of citizens and public interest protection* has been recognized under Article 6 of the GAPA, Article 7 of the Proposal, as an obligation of the public bodies to enable "as much as possible the protection and exercise of the rights and legal interests of the parties to the procedure", by ensuring that the "exercise is not detrimental to the rights and legal interests of other persons or in contravention of the legally established public interests."

The formulation of the protection of individual interests in the GAPA of 1997 crowns a long process of its legal recognition in the Serbian, (i.e. Yugoslav), legal order.

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[41] The Supreme Court of Serbia in the case U 5226/80 clearly pronounced that an organ in performing its discretionary power, independently of obligation to motivate decision in concrete case, is obliged to indicate all facts that may be of relevance for resolving the concrete case.

[42] See Art. 32 – 38 of the GAPA of 1997. The Proposal of 2012 expanded the list of reasons for exclusion of an official in administrative procedure. Thus, it introduced paragraph 5) of Article 47 "when there are other circumstances that cast doubt on his impartiality".

[43] *Vrhovni sud Srbije*, [the Supreme Court of Serbia], Uvp. 119/79. Since 2008, the Supreme court of Serbia changed its name in the Supreme Court of Cassation. See *infra* §

It was proclaimed first, under the GAPA of 1930, as a duty of parties to take care about their interest. Since 1956, the GAPA significantly specifies that in the course of an administrative process the public administration should ensure *ex officio* to party to realize and protect its rights and legal interests. Finally, the novelty of the GAPA from 1997 underlines more detailed regulation of this principle. Thus, under Article 6 (2) the legislator provides that an official, taking into account the existing facts, finds or determines that a party or other participant in the procedure has a legal base for exercise of a right or a legal interest, should bring this to their attention. In addition, it also has a duty to make it possible for the parties to easier achieve their obligations provided by law.[44]

However, when compared with the Article 7 (3) of the Proposal it could be noted that the drafters of the latter included here the *principle of providing assistance to the party* by proclamation that "the organ conducting the procedure should ensure that the ignorance and illiteracy of the parties and other participants in the procedure do not prejudice the rights they enjoy under the law."[45]

With respect to the above mentioned rule of assistance to the party, we will underline that this principle is provided under Article 15 of the GAPA from 1997. This right assumes fair and proper administration. However, it is an undefined clause, which gives the opportunity to the courts in creation of suitable standards. Thus, in the case *U no. 6500/73*, the Supreme Court of Serbia established that: "[i]f the complaint demands discussion of legality of the application of the rules under which the claim was brought up, but in the meantime new rules came into force which are more favourable for the party, then the organ is responsible, when resolving the complaint, to explain to the party how to exercise their right under the new more favourable rules. This is covered by the Article 5 (4) and articles 14 and 15 of the General Administrative Procedure Act.

Further, in the opinion of the Supreme Court from 1998 "if the administrative organ fails to give legal advice to an uninformed party to put forward a specified request to accept relation rights, up to the moment of bringing forth the disputed decision, and thus, due to that failure, the uninformed party has not put out such a

[44] The purpose of the principle of protection of the rights of citizens and public interest protection, today provided in Article 6 (3) as a duty to make it possible for the parties to achieve easier their obligations provided by law, has been recognized by the Supreme Court of Serbia from Seventies (for example, cases U. br. 485/73, U. br. 7934/73 and U. br. 1263).

[45] Article 6 of the Serbian GAPA from 1997 do not correspond neither to the Article 6 of the Croatian GAPA of 2010. The main difference lines in the proportionality between private and public interests openly recognized in the Croatian law. The lack of the proportionality is one of the critical issues of the administrative procedure in Serbia as it will be demonstrated later.

request, which means that the administrative organ was not deciding on the right of the party, due to such a failure, the administrative act may be disputed."[46]

Principle of efficiency is generally recognized and essential principle from the standpoint of good administration. In the Serbian legal order it has been introduced by amendments of the GAPA approved in 1977 as requirement for "successful and quality protection" of individual rights and interests in an administrative procedure (Art. 7).

An additional guarantee of administrative efficiency is the rule stated in Article 89 (1) as the duty of the public administration to act within a reasonable time. If the time-limits are not determined by law or regulation then an official should determine it, with respect to the circumstances of the concrete case (Art. 89 (2)).[47]

It has to be noted that the time-limit is a mandatory requirement on administrative action in the Serbian law. It could be set in hours, days, months or even years (Art. 90).

Article 17 (1) of the European Ombudsman's Code of Good Administrative Behaviour and Article 17 (2) of the Serbian Ombudsman's Proposal of the Code of good administration,[48] offer a progressive solution since it proclaims that a decision on every request or complaint to the institution is taken within the reasonable time-limit, without delay, and in any case no later than 'two months' from the date of receipt.[49] Albeit, this rule is not absolute and allows for a prolongation in the case of the complexity of the issue, this solution is welcomed.

Unlike the GAPA, the Proposal of 2012 established the principle of efficiency together with the *principle of cost-efficiency*[50] which guarantees performing in the most expedient way an administrative procedure and without growing costs for the party.[51]

The establishing of the principle of cost-efficiency should not influence the proper and complete determination of the facts and circumstance in the concrete case and bringing of lawful decision, i.e. *principle of truth*.[52]

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[46] See Opinion of the Supreme Court Už. br. 4837/98.

[47] Article 89 of the GAPA provides:

"1. Time limits may be specified for taking certain actions in the procedure.

2. Where the time limits are not specified by law or other regulation, they shall be set by the officer conducting the procedure in view of the circumstances of the case.

3. The time limit set by the officer conducting the procedure, as well as the time limit specified by regulations, for which the possibility of extension is provided, may be extended upon a petition of the interested party submitted prior to the expiry of the time limit, provided however that there are valid reasons for the extension."

[48] See infra § 3.2.

[49] See Chapter 2 § 1.3.2.1.

[50] The same solution offers the Croatian GAPA of 2010. See more Chapter 3 § 1.3.

[51] Principle of efficiency and cost-efficiency – Article 8 of the Proposal from 2012; Principle of cost-efficiency – Article 14 of the GAPA from 1997.

One of the most important and fundamental principles of an administrative procedure is *principle of conducting hearings* based on the procedural subjective right *audi alteram partem* well known in all European countries. Unlike the court procedure, however, the administrative procedure excludes contradiction and the principle of party hearing is expressed as the hearing of party on whose rights and duties it is being decided on in the process. Its formulation under Article 9 (1) of the GAPA is based on the assumption of giving a possibility to the party to express its opinion on the facts and circumstances which are of importance for issuing a decision.[53] The exception could be made only in the cases provided by law (Art. 9 (2)).[54]

The importance of the right to be heard is underlined in Article 133 of the GAPA dedicated to the procedure of deriving proof of evidence by the authorized official. The official is responsible to offer the opportunity to the party to give statement on circumstances and facts quoted in the investigation proceeding, on proposal and given proof of evidence, to participate in the process of derivation of proof of evidence and to be informed about its results.

The case law acknowledged the existence of the principle of party hearing when the process has been renewed *ex officio*. Thus, in the *judgment Us 77/84*,[55] the Federal Court stated that "[p]rocess may be renewed *ex officio*, but the party must be given the opportunity to make a statement on new evidence based on which the process got renewed and to use all rights of the party in the process and protect its law-protected interests."

Finally, the GAPA provides the possibility to use ordinary or extraordinary legal remedies in the case of infringement of principle of party hearing, if not the party is not given the opportunity to express its opinion on the questions that pertains the

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[52] Article 8 of the GAPA from 1997; Article 9 of the Proposal from 2012. According to the opinion of the Supreme Court expressed in the case Už br. 4752/61 the proper and complete determination of all facts and circumstance is the obligation of the accused body whether the complaint indicated them in the administrative procedure.

[53] "When the second instance organ upon the deciding as per the complaint carries out different factual conclusion based upon new factual state from the one being brought forth by the first instance organ, the responsibility of the higher organ is to enable the party to participate in the enquiry procedure and to give the utterance upon the result of that enquiry procedure", see the judgement of Federal Supreme Court Už br. 4948/59; Similar, in the judgement of the Federal Supreme Court br. 7329/64: „The principle of party hearing should be applied also in the process of decision making upon the complaint where the second instance organ alone establishes qualifying facts, whereas the second instance organ should enable each party to pronounce upon the facts and circumstances relevant for the bringing forth of the decision."

[54] Article 11 of the Proposal from 2012 corresponds to the Article 9 of the GAPA from 1997.

[55] *Presuda Saveznog suda* Us 77/84.

realization and protection of his/her rights and interests.[56] Further, the party could conduct the administrative dispute.

Principle of independent decision-making put forward in the GAPA under Article 11 is founded on the principle of legality. The individual has a right to an independent organ which in performing its duties observes the law. The independent treatment considers that "authorized official is independent in establishing circumstances and facts as a basis for applying regulations to a specific case."[57] This points to the fact that the official should not be guided by influence of other higher authorities in the concrete case. On the other hand, the principle of independence does not exclude the influence of general acts on deciding in the concrete case. For example, if the Government expresses its opinion that the requests for a permit to carry a weapon should be prohibited for individuals under 25 years.

The last consideration brings as the main difference between judicial independence, *sine ira et studio*, and administrative independence. The first is much wider and excludes not only the influence in the concrete case but also the general one.

The Proposal of 2012 does not provide principle of independent decision making.[58]

As regards the scope of administrative procedure, the GAPA clearly provides the *two instance protection of individual interests*. Thus, an individual has the right to appeal against the decision issued in the first instance (Article 12(1)). The right departs significantly from the wording of the Constitution of Serbia, Article 36, that "equal protection of rights before courts and other state bodies, entities exercising public powers and bodies of the autonomous province or local self-government shall be guaranteed. Everyone shall have the right to an appeal or other legal remedy against any decision on his rights, obligations or lawful interests."

The exception of principle of two instances could be provided only by law in the case when the protection of legality is secured in some other way (Art. 12 (2)). The

[56] Article 227 of the GAPA from 1997.

[57] Article 11 (2) of the GAPA of 1997; "The body whose decision was annulled is attached by opinion of the court and the court objections to the proceedings. If in the new procedure conducted after the cancellation of decision was present new evidences, the body is required to consider the new evidences and on the basis of all the evidence bring the decision which could be different from the view would suggest that judgment based on facts and evidence from the first procedure,"see the judgement of the Federal Supreme Court Už no. 845/58.

[58] The Croatian GAPA of 2010 guarantees the principle of the independet decision making in Article 9. See Chapter 3 §

Patent Law of 2011, for example, provides that the decision issued by the competent organ is final and only administrative dispute could be directly initiated.[59]

In the case of the "silence of the administration" the GAPA openly guarantees the right to appeal which could be filed directly to the second instance body (Art. 236).

The Proposal also provides the right to appeal but in a more detailed way with regard to the "silence of the administration" issue. Thus, Article 13 (2) states that "when the silence of the first instance organ, in accordance with the GAPA (Article 121 (1)) or special law does not consider as approval of the request, the party has the right to appeal if the law does not exclude the appeal as an administrative matter." Against the silence of the first and second instance organ which could not be considered as acceptance by special law in matters in which no appeal is allowed (final decision), administrative dispute could be initiated.[60]

Interestingly, the new solution of the Macedonian GAPA regarding "silence of the administration" institute, as one of the most important changes from September 2008, introduced that silence of the administration becomes acceptance.[61]

The right of every person to use one's language in administrative procedure is a guarantee of respect of fundamental individual rights of language neutrality. It is also constitutional principle that "[e]veryone has the right to use his/her language in the proceedings before the court, other state body or organisation performing public powers, when his/her right or duty is decided on" (Art. 199 (1)). Unfamiliarity with the language of the proceedings may not be an impediment for the exercise and protection of human and minority rights (Art. 199 (2)). It has to be noted that the obligation stemming to public administration authorities and courts as well.

Article 16 of the GAPA stipulates that if the legal case is not carried out in the party's language or other participants who are domestic citizens in the legal procedure, the legal translator should be provided for the translation of the legal process into their language, as well as sending the invitation and other documents written in their language using its letters. If the case may be as with foreign nationals, it should be provided for them to follow the legal process by the legal translator and to use their language in that legal process.[62] In addition, the

[59] Article 42 of the Patent Law of 2011 ("SLužbeni Glasnik Republike Srbije", br. 99/2011).

[60] Article 121 (2) of the Proposal from 2012.

[61] Macedonian General Administrative Procedure Act of 2005, *op. cit.,* Article 129 (2). For an detailed reading of the "silence of the administration" institute in Macedonia, see B. Davitkovski and A. Pavlovska-Daneva, *The novelties in the Macedonian Law on General Administrative Procedure,* in *Law and Politics,* Vol. 6, 1/2008, pp. 21 – 28.

[62] "Propuštanje organa da stranci uz učešće tumača obezbedi mogućnost upotrebe svog jezika je takva bitna povreda pravila postupka koja je mogla biti od uticaja na rešenje stvari." the judgement of the

Proposal has expanded this principle on the deaf, blind or mute individuals for whom communication and monitoring of the process through an interpreter should be secured.[63]

Interestingly, the right to use one's language does not include the right to official correspondence in one's language (Art. 41 (7) of the EU Charter). According to the case of the Federal Court Uss no. 15613/77 submitting the document to the party of the disputed decision written in one of the national or ethnical languages of Yugoslavia which is not the language of the party , "does not represent violation of the proceeding rule of influence to the decision of the case, if in the prior legal procedure it had been enabled to the party to speak up in its language relating to all circumstances and facts revealed in that legal procedure, actually that were affirmed."

The principle of admission of evidence is based on impartial and careful evaluation of all proof of evidence in the concrete case by the public official. It is stipulated in the same way in Article 10 of the GAPA and Article 12 of the Proposal. According to the judgment of the Supreme Court, in the case Už br. 10551/65, the organ is obliged in repeating of the procedure to evaluate not only new proofs of evidence but also the old one. Then based on the result of the overall presentation of evidence it shall bring its decision.

It has to be noted that the GAPA does not enshrine the right of access to one's file and right to a motivated decision among essential principles of an administrative procedure.[64] However, the GAPA deals with these rules, namely with the review of documents and informing on the procedure (*razgledanje spisa i obaveštavanje o toku postupka*)[65] and the explanation (*obrazloženje*) as integral part of an administrative decision.

According to Article 70 (1) the parties have the right to inspect the case file and to transcribe or photocopy the necessary documents at their own expense. The inspection and transcription or photocopying of documents is supervised by the official. With respect to the third parties the GAPA openly recognized this right if they made credible legal interest (Art. 70 (2)).[66] Here, Article 15 of the Proposal is a step

Serbian Supreme Cort U. 645/67. See: A. Dončić, *Aktuelna sudska praksa u oblasti upravnog prava,* [The current case law in the field of administrative law], Beograd, 1996, p. 9.

[63] Article 16 of the Proposal from 2012.

[64] With regard to this, it is worth noting that the new Proposal of the GAPA provides three new principles: principle of protection of legitimate expectations (Art. 5), principle of proportionality (Art. 6) and right to access to documents and data protection (Art. 15).

[65] The right to review of documents and informing on the procedure is provided under the Title IV "Communication betwen authorities and parties".

[66] According to Article 17 (4) "[t]he record of the deliberation and the voting, official reports and draft decisions or the documents treated as confidential may not be inspected, transcribed, or copied if it

forward. It provides as general administrative principle that public administration is obliged to ensure to the parties access to documents under the conditions provided by the law and with respect to the data protection.[67]

Further, the GAPA guarantees that every decision has to be reasoned.[68] The formulation of the duty of the public administration to state reasons is essential for protection of individual rights by making it feasible to challenge a decision, on the one side, and reviewing of its legality, on the other. According to the case law, bringing forth the decision without an explanation represents a fundamental violation of the legal procedure rules leading to abolition of administrative act in complaint procedure.[69] Apart from that, it simplifies administrative procedure and enforces transparency of the Serbian public administration.

Finally, with respect to the right to compensation for damage done by the public administration the GAPA addresses its protection in particular legal situations: a) the damage caused in the investigation process (Art. 187 (4)); b) if due to the postponement of the execution irreparable damage might occur to the party (Art. 221 (2)); c) indemnification for the damage incurred due to special abolition of the decision (Art. 256 (4) and (5)); and d) compensation for the damage due to temporary conclusion on security (Art. 283).

Judging from the words of the GAPA we arrive to conclusion that the administrative procedure in Serbia recognizes rights and obligations comprehended under the "umbrella" right to good administration in Article 41 of the EU Charter. However, it could be considered that many aspects of good administration do not have status or content as the ones in the European Union context.

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would jeopardise the purpose of the procedure or if it is contrary to the public interest or the justified interest of one of the parties or third parties."

[67] The Croatian GAPA in Article 11, as has been already argued, stipulates the right to access to to necessary files, prescribed forms, website of the public organ and other information, advice and technical assistance.

[68] Article 196 (3) provides that "[w]ritten decisions shall contain the preamble, wording (text), rationale, notice of legal remedy, name of the authority, number and date of the decision, signature of the officer and stamp of the authority. In the cases provided for under the law or other regulation, decisions need not contain all of those elements. If a decision is processed mechanographically or electronically, it may have a facsimile or an electronic signature instead of a signature and stamp."

[69] According to the case *U 5037/61* of the Serbian Supreme Court "with latter issuance of explanation such a deficiency was nor repaired, as the explanation must be the integral part of the resolution thus enabling the control if the factual state was correctly estimated and also the corresponding material rule was applied; whereas, bringing fourth the decision without explanation, would enable a practice of randomly chosen resolutions and later creation of explanation to justify the already brought forth resolution." See: Z.R. Tomić and V. Bačić, *Komentar Zakona o opštem upravnom postupku sa sudskom praksom i registrom pojmova,* [Commentary of the General Administrative Procedure Act with case law and register of terms], 6th edition, Službeni list Savezne Republike Jugoslavije, Beograd, 1997, pp. 277 – 278.

Having acknowledged this open secret, in the following section I will examine the influence of the procedural time-limits on the work of the public administration. In particular, I intend to underline the challenging legal aspects that the "silence of the administration" presents for the promotion of good administration in Serbia.

1.2.2. "Form is the sworn enemy of arbitrariness, the twin sister of liberty"

The well-regulated procedure is essential in guaranteeing citizen's rights in relation to public administration. As von Ihering has pointed to, the "form is the sworn enemy of arbitrariness, the twin sister of liberty."[70]

The objective of giving time limits for the obligation of acting of public administration organs is to acquire efficient procedure and general discipline of the official authorities,[71] as well as the rights protection of parties in legal procedure.

The organ carrying out legal procedure is obliged to bring forth the decision and submit it to the party at the latest within a month as from the date of duly lodging the request, that is as from the date of launching procedure as per the official duty, as in the interest of the party, if the case may be that prior to the bringing forth of the decision it is neither necessary to carry out extraordinary inquiry procedure, nor there exists other reasons preventing bringing forth of the resolution without delay. In other cases, the organ is obliged to bring forth the decision and submit the same to the party, at the latest within two months.[72] To protect parties against slow action of the administration organ it is also proscribed the duty of the second instance organ when resolving upon the complaint, to bring forth the resolution and submit to the party when it is possible, at the latest within two months as from the date of lodging the complaint.[73] Special rules stipulate that the prescribed time limits may be shorter, but their extension should not be stipulated.

One more way of protecting the party from the inefficient work of public administration organs is the possibility to lodge a complaint against the institute of "the silence of administration". None bringing forth and non-submit of the decision to the party is legally equalled with the refusal of the party's request as stipulated by the General Administrative Procedure Act, in that case it is entitled to, if against the first

[70] R. von Ihering, *Geist des Römischen Rechts auf den verschiedenen Stufen der Entwicklung II,* 471 (3 ed. 1874).
[71] For example, time limit for bringing forth permission on execution of the decision brought forth in legal procedure as per the official duty. (Art. 268 (2) of the GAPA).
[72] See Article 208 (1) of the GAPA from 1997.
[73] Article 237 (1) of the GAPA from 1997.

instance decision of the relevant organs a complaint is allowed, and if in the specific legal case the complaint is not in advance excluded, to lodge a complaint. If the case may be that the complaint is not allowed, the party may directly launch administrative case.[74] Time limit for such a complaint due to non-issuance of the resolution does not have a time limit norm, therefore it cannot be opportune. But, the complaint may be considered as premature, if being lodged prior to the stipulated time limit.[75]

When the decision is not brought forth within the prescribed time limits by the second degree organ, the party may launch a legal case. The action against the silence of administration may not be opportune, but may not be lodged prior to the expiration dates as stipulated by the Article 24 Administrative Disputes Act. As an example, the following explanation issued by the Supreme Court of Serbia is quoted hereto:

> "The refusal to issue the act on urban conditions represents the administrative decision making, so not bringing forth the act relating to the lodged claim is considered to be good reason to lodge the claim to the authorized second degree organ – the ministry authorized for urbanism, as if the claim is rejected, as stipulated by provisions of the Article 208 (2) General Administrative Procedure Act. Only if the organ does not make the decision within 60 days or in legally stipulated shorter time limit, that means not bring forth the decision within further 7 days upon the repeated request, the conditions would be acquired as stipulated by provision of the Article 24 Administrative Disputes Act, to lodge the charge against the Supreme Court of Serbia for 'the silence of administration'."[76]

The acting of the official within the legal time limits is in clear correlation with keeping efficient administrative procedure: non observance of proscribed time limits for undertaking procedural actions results in extremely long procedure. Consequently, the legal solution stipulating chastisement for the official organ carrying out the procedure actions that are due to his/her fault came to non-accomplishment of some procedure actions. Whereas, for the follow up of the resolving legal cases within the stipulated time limit, The Ministry of Justice and State Government is authorized.[77]

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[74] Article 208 (2) of the GAPA from 1997.
[75] See n. 75.
[76] Enclosed to the explanation to the judgment issued by the Supreme Court of Serbia U. 5238/05.
[77] Article 10 (2): "The Ministry of Justice and State Government carries out activities of the state government also relating to: the system of the state government and organization and work of

Law on Constitutional Court[78] stipulates the possibility of lodging constitutional complaint in case of violation of right for fair process within reasonable time limit. Thus, to lodge the constitutional complaint against the specific act or action of the state organ or organization with entrusted public authorizations, confirming or depriving of human or minority rights and freedoms as quarantined by the Constitution, all legal means should be exhausted or not stipulated, that is that the legally stipulated exclusion of the right to their court protection.[79] But when the complainant suffers the violation of the right to lodge the complaint relating to the process in reasonable time limit, the constitutional complaint may be lodged even though all legal means have not been used.[80]

ministries and specific organizations; the Commissioner, administration inspection; administrative procedure and legal case; elections for the republic organs; labor relations in the state organs; professional improvement of the employed in the state organs; master files; official use of language and letter; seals, political and other organizing, except for the trade union; direct voting of citizens; integral voting register, as well as other things as stipulated by the law " *Zakon o ministarstvima*, [Law on Ministries], "Službeni Glasnik Republike Srbije", br. 72/2012.

[78] *Zakon o Ustavnom sudu*, [Law on Constitutional Court], "Službeni Glasnik Republike Srbije", br. 109/2007, 99/2011.

[79] Article 82 (1) of Law on Constitutional Court.

[80] Article 82 (2) of Law on Constitutional Court.

1.3. Law on Free Access to Public Information of 2004

Promoting higher democratic standards in the Serbian legal order has been confirmed in 2004 by adoption of the Law on Free Access to Public Information [hereafter LFAPI].[81] This progressive step forward is in line with the constitutional principle that "Serbia is committed to European principles and values".[82] The right to access to documents is, further, guaranteed in Article 51 (2) of the Constitution as "everyone has the right to access to information and data that are possessed by State bodies or organizations with public authority."[83]

The LFAPI stipulates rights to access to public information in possession of public administration, with the aim to protect public interest to be informed and realize free democratic legal order and open society.[84]

The term "information of public interest" is used to define any data possessed by public administration and related to anything about the public has a justified interest to be informed about. Such information is considered of public interest either if its source is an organ of public authority or any other person. Further, it is not important if the holder of the information is paper, film, electronic media, etc.; neither the date of obtained information, manner of coming to the information, nor the similar characters of the information.[85] However, this right is not absolute. The LFAPI provides exclusion of the right to access to documents in particular situations in protection of life, health, security, judiciary, national defence, national and public safety, national economic welfare and classified information,[86] as well as in case of protection of privacy.[87]

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[81] *Zakon o slobodnom pristupu informacijama od javnog značaja*, [the Law on Free Access to Public Information], "Službeni Glasnik Republike Srbije", br. 120/2004, 54/2007, 104/2009, 36/2010; The National Assembly of the Republic of Serbia adopted the Law on November 2004, after a strong campaign of numerous non-governmental organization, which started in 2002. Actually, the Law adopted in 2004 was based on the model law of 2002 created by the Center for Advanced Legal Studies (CALS), an NGO from Belgrade. See: D. Milenković, *Priručnik za primenu Zakona o slobodnom pristupu informacijama od javnog značaja,* [Manual for the implementation of the Law on Free Access to Public Information], Cicero, Beograd, 2010, p. 13.

[82] Article 1 of the Serbian Constitution from 2006.

[83] Adoption of the law on access to information by countries in the region: Croatia - 2003; BiH - 2000; Macedonia - 2006; Montenegro - 2005 and Slovenia – 2003.

[84] Article 1 of the Law on Free Access to Public Information of 2004.

[85] Article 2 of the Law on Free Access to Public Information of 2004.

[86] According to Art. 9 the public administration will not give access to document if it would thereby:

"1. Expose to risk the life, health, safety or another vital interest of a person;

2. Jeopardize, obstruct or impede the prevention or detection of criminal offence, indictment of a criminal offence, pretrial proceedings, trial, execution of a sentence or enforcement of punishment, any other legal proceeding, or unbiased treatment and a fair trial;

To achieve the right to access to documents the Law established the Commissioner for Information of Public Importance and Personal Data Protection [henceforth the Commissioner],[88] as an independent public organ.

In order to better understand the implementation of Commissioner's recommendations in practice (see *infr*a §), in the present section, I will focus on the rules and procedure of access to public information.

The public organ is responsible, without any delay, the latest within 15 days as from the date of receipt of the application, to inform the applicant on possession of the information, to put for perusal the document that contains the asked information, to issue a copy or forwards the copy of the document. The copy of the document is considered to be forwarded to the applicant as on the date of leaving the archive department of the organ from which the information was claimed.

If the organ satisfies the claim, it will not issue a special decision, but is obliged to make an official note about it. But, if the organ refuses completely or partially to satisfy the claim then it is responsible to issue the decision in writing on refusal of the claim with an explanation and to indicate the possibility of appeal.[89]

The applicant might lodge a complaint to the Commissioner (Art. 22) within 15 days from the date of the submission of the decision issued by the public organ in the following cases: 1) if the public organ: refuses to notify the applicant that they possess specific information of public interest, fails to put for perusal the document with requested information, fails to issue or forward a copy of the document, or if they fail to do it in the prescribed time limit; 2) if the public organ fails to reply within the prescribed time limit to the request of the applicant; 3) if the public organ makes

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3. Seriously threaten national defense, national and public safety or international relations;
4. Substantially undermine the government's ability to manage the national economic processes or significantly impede the achievement of justified economic interests;
5. Make available information or a document qualified by regulations or an official document based on the law as state, official, commercial or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and override the access to information interest."

[87] Article 14 provides that "public authority shall not grant an applicant his/her right to access information of public importance if it would thereby violate the right to privacy, the right to protection of reputation or any other right of a person who is the subject of information, except where:
1) The person concerned has given his/her consent;
2) Such information relates to a person, event or occurrence of public interest, especially in case of holder of public office or political figures, insofar as the information bears relevance on the duties performed by that person;
3) A person's behaviour, in particular concerning his/her private life, has provided sufficient justification for a request for such information."

[88] Since bringing forth the Law on Data Protection (Zakon o zaštiti podataka ličnosti, "Službeni Glasnik Republike Srbije" br. 97/2008, 104/2009), the Commissioner for Information of Public Importance became Commissioner for Information of Public Importance and Data Protection.

[89] Article 16 of the Law on Free Access to Public information from 2004.

conditions for the issuance of the document copy asking for the requested information which overleaps the sum of necessary costs of making such a copy; 4) if the public organ does not put for perusal document containing the requested information in a way stipulated by the law. Against the resolution of National Assembly, President of the Republic, Government of Serbia, Supreme Court of Serbia, Constitutional court of Serbia and Republic Public Prosecutor a complaint cannot be lodged (Art. 22(2)). Against these decisions a legal procedure may be lodged, as stipulated by the law, about which the court shall officially inform the Commissioner (Art. 22(3)).

For the procedure in front of the Commissioner provisions of the General Administrative Procedure Act are applied. These provisions are related to the resolution of the second instance organ as per the complaint (Art. 23). The Commissioner brings forth the decision without any delay, the latest within 30 days from the lodging of the complaint as he enables the public organ to give written statement, prior to enabling the government organ to give a written statement if needed to the applicant. The Commissioner refuses the complaint which is not permissible, untimely and pronounced by an authorized person. The public organ proves that he acted in compliance with its obligations as stipulated by the law (Art. 24). The law stipulates that a legal proceeding may be lodged against the decisions by the Commissioner.

1.4. Law on Public Administration of 2005

Among the legislative innovations introduced by the 2005 reform package was the adoption of the new Law on Public Administration,[90] which revised its predecessor of 1992.

The Law of 2005 provides an innovative understanding of public administration tasks and relation to the citizens.[91] In particular, two distinctive elements of the new Law with regard to the good administration values are: *modification* and *strength*.

- *Modification*

One of the most important features of the new Law is modification of traditional understanding of public administration as the instrument of government towards the services of citizens.

In fact, the Law considers contemporary models of administrative actions based on the concept of social functions of the state in which greater importance is placed on services to citizens. Even still, the Law does not disregard the enforcement of laws by making administrative decisions.[92]

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[90] *Zakon o državnoj upravi*, [Law on Public Administration], „Službeni glasnik Republike Srbije", br. 79/2005, 101/2007 i 95/2010.

[91] For the purpose of the complete organization of public administrative functions the Law on Public Administration is divided in the XII chapters: 1. Basic provisions; 2. Principles of work of public administration; 3. Public administration taks; 4. Organization of public administration; 5. Internal supervision; 6. Special provisions of holders of public power; 7. Conflict of competences, deliberation upon appeal, exemptions; 8. Relationship between public administration and other organs; 9. Transparency of work and relationship with citizens; 10. Civil servants; 11. Office management. Implementation of provisions; 12. Transitional and final provisions.

[92] See: Z. Lončar, Law on Public Administration, Official Gazette, 2005, Belgrade, n. 2 in S. Lilić, *Strategy of Administrative Reforms in Serbia in the Context of European Integration,* in *Hrvatska i javna komparativna uprava,* 4/2011, p. 1114.

According to this Law public administration participate in the shaping of the Government policy;[93] monitoring of situation;[94] enforcement of laws, regulations and by-laws;[95] supervision,[96] ensuring of public services;[97] encouraging of developing tasks[98] and other professional activities such as collecting and examining data from their scope of work, prepare analyses, reports, information and other materials and perform other expert work which contributes to the development of fields of their scope of work. [99]

In performing these tasks the public administration is guided by a set of principles:

a) Independence and legality. Public administration is independent in performing of its tasks and actions which have to be in accordance with the Constitution, law, other legislation and general acts.[100]

b) Expertise, impartiality and political neutrality. The principle recognizes that public administration has a duty to act in accordance with the professional rules, to be impartial and politically neutral. Moreover, to provide for everyone equal legal protection in exercise of rights, obligations and legal interests.[101]

c) Efficiency in exercise of parties' rights. Public administration authorities obliged to enable the parties to promptly and efficiently exercise their rights and legal interests.[102]

d) Proportionality, Respect of parties. When deciding in an administrative procedure and undertaking administrative actions, public administration is obliged to use means that are the most favourable for a party, providing that the means can achieve the purpose and goal of the law. The principle, further, obliged public administration to respect the person and dignity of parties.[103]

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93 Article 12 of the Law on Public Administration from 2005.
94 Article 13 of the Law on Public Administration from 2005.
95 Articles 14 – 17 of the Law on Public Administration from 2005.
96 Article 18 of the Law on Public Administration from 2005.
97 Article 19 of the Law on Public Administration from 2005.
98 Article 20 of the Law on Public Administration from 2005.
99 Article 21 of the Law on Public Administration from 2005.
100 Article 7 of the Law on Public Administration from 2005. This principle is in accordance with Article 136 (1) of the Constitution and Articles 5 and 11 of the GAPA.
101 Article 8 of the Law on Public Administration from 2005. The political neutrality of public administration, or more precise the de-politicization, is underscored among the six desirable aims of the Serbian Reform Strategy of 2004. The six desirable aims are: 1. decentralization; 2. de-politicization; 3. professionalization; 4. rationalization; 5. modernization; 6. regulatory reform and public policy.
102 Article 9 of the Law on Public Administration from 2005.
103 Article 10 of the Law on Public Administration from 2005.

e) Transparency. The work of public administration should be transparent. Public administration is obliged to enable the public to have access to their work in accordance with the law regulating free access to information of public importance.[104]

The previous analysis demonstrated that the affairs of the public administration in the Law on Public Administration is normatively defined by contemporary standards in this area. Nevertheless, the real effectiveness or impact in realizing declared goals remains to be seen.

- *Strength*

We can consider "strength" as the other, citizens-oriented, side of performing public administrative tasks aiming at establishing the duty of fair and transparent relation between individual and public administration.

For the purpose of our inquiry, I will present a brief comparative analysis of guiding public administration duties with respect to the issue highlighted under the Title IX, "Transparency and relation with citizens", of the Law on Public Administration from 2005.[105]

Public administration activity is based on duty to inform the public about its work through the means of public information or other relevant instruments. Officials who are authorised to prepare information and data are responsible for their accuracy and punctuality. Unlike the Article 77 of the Croatian Law on Public Administration[106] the Serbian Law on Public Administration does not considered the duty of public administration to enable access to documents and data protection. Rather, the lack of one of the most important aspects of transparency is regulated in the special Law on

[104] Article 11 of the Law on Public Administration from 2005. Similar principles could be found in the Code of behaviour of civil servants of 2008 (*Kodeks ponašanja državnih službenika*, "Službeni Glasnik Republike Srbije", br. 29/2008). Albeit, the word code may be rightly associated with the act of soft-law, this act represents the source of the classical rule. The Code was brought forth directly on the provision basis of the Law on the civil cervants (*Zakon o državnim službenicima*, "Službeni Glasnik Republike Srbije", br. 79/2005, 81/2005, 64/2007, 116/2008, 104/2009) what directly points its legal liability is the fact that the behaviour contrary to the provisions of the Code represents lighter violation of labour obligations, that is heavier violation when stipulated by the specific rule. (See: Art. 2 of the Code on behaviour of civil servants and Art. 108 of the Law on civil servants). The Code was brought forth to define closely standards of integrity and rules for the state officials employed with the state administration organs, departments of the Government and information to public on behaviour to be expected by the civil servants (Art. 1). This document stipulates issues on legality and impartiality of the civil servants, political neutrality, protection of public interest, prevention of conflict of interest, treatment of a present, entrusted assets and information, protection of privacy, conducting with parties, superiors and other civil servants, keeping reputation of the organs, and etc. See: Art. 3 – 18 of the Code of behaviour of civil servants.

[105] See Artt. 76 – 83 of the Law on Public Administration from 2005.

[106] See Chapter 3 §

Free Access to Public Information brought one year before the Law on Public Administration.

Another duty is related to the ministry and a special organisation to undertake public debate in the procedure of preparation of a law which essentially changes the legal regime in one area or which regulates issues of particular relevance for public.[107] Public debate about what and how will be modified in the legal order is certainly oriented toward the promoting of good administrative values and strengthening the role of citizens in the area.

Fair and impartial treatment is affirmed by providing duty of public administration to inform, in a proper way, the parties on their rights and obligations and ways of exercising the latters, on their scope of work, on public administration authority which is supervising the work of the authority in question and ways of making a contact with this authority, as well as on other data important for publicity of work and relationship with parties.

Unlike the Croatian Law on Public Administration, here, upon the request of natural and legal persons, public administration give non-binding opinions on interpretation of provision of laws and other general acts in the time-limit of 30 days.

With respect to public administration handling of complaints it is clear that the Serbian Law is progressive. Thus, it is obliged to enable to everyone adequate ways for the submission of complaints about their work and about improper conduct of officials. In case of a submitted complaint it is obliged to respond in a time-limit of 15 days from the day the complaint was served, if the person submitting a complaint requires an answer. Moreover, public administration should examine the issues covered by complaints at least once in 30 days.[108]

Finally, the 2005 Law provided public administrative duty on an adequate relationship with parties and their receiving during working hours.

In the case of the Serbian Law on Public Administration of 2005, the modification and strength of the role of citizens is enhanced by the administrative reforms and structural linkage between public bodies and citizens. Thus, it could become one of the key legal instruments in achieving good and successful administration.

[107] Article 77 (1) of the Law on Public Administration.
[108] Compare with Article 84 of the Croation Law on Public Administration . See: Chapter 3 §

1.5. Administrative Disputes Act of 2009

The guarantee of good administration principles in the Serbian legal framework can also be found in a final law of our analysis: Administrative Disputes Act [hereafter the ADA].

The linkage between good administration and administrative dispute seems to be a prerogative of protection of fundamental individual rights which "are only truly respected when the legal order concerned makes them enforceable against those who have breached them."[109]

The Serbian Strategy Paper of 2004 stressed that the public administration reform is complex and long process, especially in countries in transition, in which the government both at central and local level, as a rule, is weak and burdened by a series of problems accumulated over many decades.[110] One of the reform goals is modification of administrative legislation which includes also Administrative Dispute Act. Let me underline again that Serbia is obliged, immediately after signing the Stabilisation and Association Agreement, to begin the process of harmonisation of national legislation with the EU legislation. This important and demanding task includes also reforming the legislature on administrative disputes.

Although the Action Plan for Implementation of Administrative Reform in Serbia for period 2004 -2008, has been provided the adoption of the new Law on Administrative Disputes during the last quarter of 2004 (after the planed adoption of

[109] W. Van Gerven, *Remedies for Infringements of Fundamental Rights,* in *European Public Law, op. cit.,* p. 261.
[110] *Public Administration Reform Strategy*, *op. cit.,* p. 6.

the GAPA) it was brought forth on December 2009.[111] As pointed by the President of the Administrative Court in Serbia "by adoption of the new Administrative Disputes Act before adoption of the new General Administrative Procedure Act we created a house without a foundation".[112]

In the *Explanation of the Proposal for the new Administrative Disputes Act*,[113] Serbian authorities underlined:

The requirement of harmonization of the Administrative Disputes Act with the Constitution and international standards, such as principles and rules guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 with additional Protocols.[114]

Respecting of the Recommendation Rec (2004) 20 of the Committee of Ministers to member states on judicial review on administrative acts from 15 December 2004.

Urgent and important harmonisation of the Administrative Dispute Act with the Law on Courts from 2008, with particular reference to jurisdiction and the system of legal remedies in the administrative dispute.

Inevitability changes of systematics in the Administrative Disputes Act, in particular in relation to consistent and clear separation of content and organization issues from those having to do with procedure of the administrative dispute.

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[111] *Zakon o upravnim sporovima*, [Administrative Disputes Act], "Službeni Glasnik Republike Srbije", br. 111/2009. In fact, the new legal circumstances in relation to the legislative within the field of administrative disputes were created by approving the *Constitutional Chapter of the State Union of Serbia and Montenegro* (*Ustavna povelja Srbije i Crne Gore* [the Constitutional Chapter of the State Union of Serbia and Montenegro], "Službeni list Srbije i Crne Gore", br. 1/2003). The former Federal Republic of Yugoslavia ceased to exist, together with its last Constitution of 1992, as well as the existing legislative (For an detailed reading of *Constitutional Chapter of the State Union of Serbia and Montenegro*, see S. Lilić, *Ustavna povelja državne zajednice Srbija i Crna Gora (teorija, praksa, zakonodavstvo)* [Constitutional Chapter of the State Union of Serbia and Montenegro (theory, practice and legislative)], Savremena administracija, Beograd, 2003). In that context at the level of the State Union the Federal Law on administrative disputes ceased to exist of 1996, whereas as long the member states bring forth new rules from this field the Republic law shall be applied (See: Lj. Pljakić, *Zakon o upravnim sporovima u praksi,* [Administrative Disputes Act in practice], in *Pravni informator,* 2/2007). Montenegro brought fourth its new Law on administrative disputes in October 2003 (*Zakon o upravnom sporu,* "Službeni List Republike Crne Gore" br. 60/2003). Upon the referendum took place on the independence of Montenegro on May 21, 2006 the State Union of Serbia and Montenegro ceased to exist. At the end of 2008 Serbia brought fourth new Law on legal procedure, thus the previous Federal Law on administrative disputes of 1996 was the outlaw.

[112] S. Bojović, "Administrative Court in Serbia", the lecture held at the master studies at the Faculty of Law in Belgrade on 27 November 2012.

[113] *Obrazloženje predloga Zakona o upravnim sporovima,* available at: http://www.srbija.gov.rs/vesti/dokumenti_pregled.php?id=101854.

[114] It has to be noted that the Commission itself explicitly recognized that "[t]he European Communities and the Council of Europe share the same basic values. Membership of the Council of Europe and of the European Convention for the Protection of Human Rights and Fundamental Freedoms has become an implicit condition for accession to the European Union", see the European Commission, Communication, *The External Dimension of the EU´s Human Rights Policy: from Rome to Maastricht and Beyond,* COM (95)567, 22.11.1995, p. 4.

In the next paragraph we will see in which ways the Serbian Administrative Disputes Act of 2009 protects fundamental citizens' rights. In particular, we will analyse the means of protection of good administration which offers the possibility of fulfilling proclaimed goals and enhancing protection of individual's vis-à-vis public administration.

1.5.1. Goals: Protection of subjective citizens' rights and the rule of law

In the Serbian legal order the administrative dispute is a constitutional category. As per Article 198 (2) of the Constitution, the legality of the final individual acts deciding on a right, obligation or legally grounded interest is the subject to reassessing before the court in an administrative proceedings, if other form of court protection has not been stipulated by the Law.

The main goals of the Administrative Disputes Act from 2009 are judicial protection of subjective rights of citizens and legal entities, and the rule of law.[115] The Administrative Court are competent for administrative dispute.[116]

The administrative act, in sense of the ADA of 2009, is a single legal act to be used by the authorized organ, by the direct application of the rules to resolve on particular right or obligation of personal or legal entity that is of the other party in the legal matter (Art. 4).[117]

Administrative matter, in sense of the ADA, is "particular undisputable situation of public interest out of which directly from the public rules comes the need for the future behaviour of the party to be authoritatively defined".[118] This formulation has provoked argumentative critics of the professional auditorium, as the explicit quotation of the authoritativeness as the mark of administrative matter, means that the

[115] Article 1 of the ADA from 2009.

[116] Article 8 of the ADA from 2009. According to the experiences of other countries which demonstrates that the judicial control of the work of public administration is more efficient and better if it is performing by specialized courts, the Republic of Serbia introduced in 2001 the specialized Administrative Court competent only for control of legality of administrative acts. the beginning of the work of this court because of the financial problems of its establishment, has been postponed to January 2007. In the meanwhile the judicial control exercised by higher courts and the Supreme Court of Serbia. See: *Public Administration Reform Strategy*, *op. cit.,* p. 60.

[117] Although inspired by the public criticism of the professional audience in the final text of the new Law on administrative disputes (in relation to its draft) a number of imperfections was removed, there remained such imperfections being the reason that the new law complies with approved European standards in the matter of administrative dispute (about disvantages of the ADA see infra § 1.5.2). See more: S. Lilić, *Nacrt Zakona o upravnim sporovima Srbije u kontekstu evropskih standarda,* [Draft of the Law on legal procedures in the context of European standards], in *Legal capacity of Serbia for European integrations,* Faculty of law, Belgrade, 2009.

[118] Article 5 of the ADA from 2009.

authors of the new Law do not support the transformation of the public administration to the "service for citizens" in sense of the Strategy Paper of 2004, but as the administration is the "instrument of government". The authority of the legal act should not be absolutes and spread to those cases where the authoritative obviously does not exist as any legal decision making is not authoritarian. Therefore, it is just the Law on free access to public information that stipulates the procedure in front of the government body to "apply provisions of the law designating general legal procedure" (Art. 21). Based on this (Artt. 15 and 16), the claimant of the information submits written application to the organ to acquire rights to access information, whereas the organ is responsible to notify the claimant on the possession of the information or to put to perusal the document containing the requested information. If the organ fulfils the request, it "will not issue special resolution, but make an official note about it" (Art. 16). It means that the organ during the administrative dispute made decision upon the application of the party (and "resolved the administrative matter"), whereas not acting as "government imposing something, allowing or prohibiting", but as an entity who "gives citizens public services".[119]

The exception of the rule that administrative dispute may be initiated only against individual administrative acts, exists in the case of the "silence of the administration". Article 15 of the ADA states that "administrative dispute may be lead when the public authority has not adopted an administrative act on the request or appeal of the party".

The "silence of the administration" could be considered as even more severe form of endangering of citizens right than bringing of refusing decision by public administration. The latter enable using of ordinary and extraordinary legal remedies against such decision but judicial protection is necessary also when the claim is not resolved at all or when it is delaying with bringing of the decision.

It is possible that a special rule provides that silence of the administration becomes acceptance. For example, the Law on Competition of 2009[120] provides that "if the Commission does not issue a decision on the application within time-limit [...] or does not adopt a decision in the investigation of concentration *ex officio* within time-limit [...], it will be consider that the concentration has been approved."

[119] Compare: S. Lilić, *Upravno pravo – Upravno procesno pravo, op. cit.,* p. 316.
[120] Zakon o zaštiti konkurencije, [Law on Competition], "SLužbeni Glasnik Republike Srbije", br. 51/09.

Nonetheless, the "silence of the administration" presents one of the most critical aspects of good administration. In particular, if we have in mind that public officials often refer to the "right to silence of the administration" in practice.

The progressive solution offered by the Macedonian GAPA which provides silence=acceptance, might be find its place in the Serbian GAPA, too. In short, I am arguing that, silence=acceptance could be powerful instrument in affecting the public administration in terms of good administrative promotion and the rule of law.

1.5.2. Disadvantages

With regard to the enlargement process, the European Commission expressed in Serbia's 2010 Progress Report that "the Administrative Disputes Act of 2009 is not fully in line with European standards".[121] Further, in the Commission's opinion on the progress of Serbia in 2012 states that "the Administrative Disputes Act *still needs to be fully aligned with European standards for judicial review of administrative acts*"[122] (emphasis added).

The Administrative Disputes Act, as it has been already argued, has important role in judicial protection of citizens vis-á-vis public administration. It introduced a number of progressive solutions in the Serbian legal order: expanded administrative dispute on the individual acts against which is not provided judicial protection, opportunity to submit the complaint in electronic form,[123] introduced the complaint for establishment[124] and suspensive effect of complaint, etc.

Nevertheless, the motive of "urgency" in its adoption in 2009 brought serious deficiencies in relation to certain legal institutions and legal-technical quality of the new Law.

Thus, the ADA provides the set of extraordinary legal remedies such as request for review of a court decision, procedure repetition and legal protection against court decisions in connection with repetition of procedure.[125] But it does not provide the

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[121] European Commission, *Serbia 2010 Progress Report*, COM (2010) 660, Brussels, 9 November 2010, p. 9. Available at: http://ec.europa.eu.

[122] European Commission, *Serbia 2012 Progress Report*, COM (2012) 600 final, Brussels, 10 October 2012, p. 8. Available at: http://ec.europa.eu.

[123] However, the practice does not allow submission in electronic form because of the lack of digital signature. The Administrative court is also obliged to respond in electronic form, but from the same reason

[124] The complaint for establishment includes party's right to seek to establish a) that the act which has been canceled was again applied, and 2) that illegal act is without legal effect.

[125] See Artt. 49 – 65 of the ADA from 2009. For an detailed reading of administartive dispute in Serbia see, Z. Tomić, *Upravni spor i upravno sudovanje u savremenoj Srbiji – neki reformski problemi i pravci noveliranja,*

appeal as ordinary legal remedy against judicial decisions in administrative dispute. Such disadvantages have an additional weightiness if we have in mind that the reason for "urgency" was a beginning of work of the new Administrative Court from 1st January 2010.

Using of broad concepts such as special petition (known as the *poseban podnesak*) instead of "formal notice" or "request for the adoption of an administrative act by the Administrative court" are examples of wording disadvantages of the new ADA.

The second problematic feature of the ADA from 2009 relates with the basic aim of administrative reform policy in Serbia – achieving good and open administration.

Article 5 of the ADA defines the administrative matter as individual indisputable situation of public interest in which the need to define future behaviour of the party with authority and legality stems directly from legal regulations. Nevertheless, listing authority as a characteristic of the administrative matter reduces the execution of administrative works to mere execution of administrative power which defeats the transformation of the traditional public administration into a "service for citizens". For example, it is not possible to coerce someone to vote because that would effectively transform the "right" to vote into an obligation. An organ cannot decide not to acknowledge the right to vote, if all other legal requirements are met, because such a decision would be unlawful. An organ can only issue a declarative administrative act on acknowledging the right to vote.[126]

[Administrative dispute and administrative proceedings in modern Serbia - a reform issues and trends], in *Zbornik radova Pravnog fakulteta u Splitu,* god. 47, 1/2010, pp. 21 – 35.

[126] See: J. Jovičić, *Administrative Law in Serbia*, in R. Scarciglia (ed.), *Administrative Law in the Balkans*, *op. cit.,* CEDAM, Padova, 2012, pp. 152 – 153.

2. Judicial review of administrative actions

What is instead radically new in the present case is taking on administrative full jurisdiction dispute into the judgements of Serbian Administrative Court and the active role that these judgements would hope to play in promoting efficient protection of citizens' rights in Serbia.

Two elements, lying at the background of this process: first, it forsakes the heritage of the past according to which the administrative dispute is only dispute on legality. In particular, it will prevent "Ping-Pong" effect between executive and judicial power, and enable to the Administrative Court to play an important role to engage in judicial activism.

Second, it will help to align the Serbian legal culture with the EU standards of reliability, predictability and efficiency of public administration.

In this section I will present: a) an overview on the court's organization in Serbia; b) selected judgments of the full jurisdiction administrative disputes having a strong relevance for good administrative values, and c) an profoundly examination of the institute of "silence of the administration", one of the most present form of maladministration in the jurisprudence.

2.1. Organization of the Courts

As per the recently adopted Law on Courts (at one time as the "set of jurisdictional laws" of 2008),[127] the jurisdictional court power is unique within the territory of Serbia. The jurisdiction in Serbia belongs to courts of general and extraordinary authorizations. The general jurisdiction courts are basic courts, higher courts, courts of appeal and the Supreme Court of Cassation. Courts of extraordinary

[127] *Zakon o sudovima,* [Law on courts], "Službeni Glasnik Republike Srbije" br. 116/2008, 104/2009, 101/2010, 31/2011 – i dr. zakon, 78/2011 – i dr. zakon, 101/2011. Addoption of the Law was an important step in the judiciary domain which is key priority of the of the European Partnership. Efforts need to be made to ensure the independence, accountability, and efficiency of the judicial system. In the Serbia 2007 Progress Report, the Commission stated:

"The Constitutional Court has not been operational since October 2006 as a new court President has not been appointed. The provisions of the new constitution relating to the election of the Constitutional Court have not been implemented. These shortcomings in the functioning of the Constitutional Court have created a legal vacuum for judicial oversight of the legality and constitutionality of adopted legislation."Additionaly, "[a]ppellate and administrative courts have not yet been established and the planned deadline for entry into force of the relevant legislation has been postponed. This has had a negative impact on the efficiency of the administration of justice. The Supreme Court has had to carry out the functions of an appellate court."

jurisdiction are Commercial courts, Commercial appellation court, Magistrates courts, Higher magistrate's courts and Administrative courts (Art. 11).

Commercial appellation court, Higher magistrate's court and Administration court are founded for the territory of the Republic of Serbia, with setting in Belgrade. Higher magistrate's court and Administrative court may have departments out of the seating, as stipulated by the law, where they permanently judge and undertake other legal activities (Art. 13). Moreover, the Law on courts stipulates that the Supreme Court of Cassation is directly higher court for the Commercial appealing court, Higher magistrate's court, Administrative court and Court of appellation (Art. 15(1)). The Administrative court judges in administrative proceedings and carries out other actions as stipulated by the law (Art. 29) whereas the Supreme Court of Cassation, Commercial appellation court, Administrative court and Higher magistrates court commence with work as on 1st January 2010 (Art. 89). From that date, Administrative court took all pending cases of the Supreme Court of Cassation and higher courts, according to Art. 77 (1) of the Administrative Disputes Law and Art. 29 (1), 89 and 90 (1) of the Law on courts.

2.2. Selected cases of full jurisdiction administrative dispute

In this section, I will examine two important judgments of the administrative full jurisdiction dispute having a strong relevance for good administrative values: the cases 2 Ui 88/10 (2009) and II-4 Už. 384/12 (2012). In these cases the Administrative

Court for the first time used the institution of full jurisdiction dispute and contributed to more effective legal protection of citizens[128].

With respect to these judgements, I will primarily illustrated the core circumstances and facts of the each case and then analyse their content delivered by the Administrative Court.

No. 1 – 2 Ui 88/10 (2009): *"Unreasonable delay"*

Efficiency of administrative action is one of the pillars of the concept of good administration. As mentioned before, "slow administration is bad administration".[129]

The core issue of the *2 Ui 88/10 (2009)* case deals with the legitimate interest of the party on the execution of the judgment of the Supreme Court of Cassation and thus with the individual interest which a public administration has to respect in performing its actions.

Data:

On May 2005 the Belgrade City Institute for the Protection of Cultural Monuments brought the decision to refuse the appeal of Jelica Todorović [hereafter: applicant] against the first instance decision of the Institute for Protection of Cultural Monuments Valjevo.[130] The applicant's demanded issuing a decision on the conditions for the implementation of technical security measures to legalize the constructed object which the first instance organ did not allow.[131]

The applicant, further, issued proceedings in the Supreme Court of Casation seeking a rescind the decision of Belgrade City Institute for the Protection of Cultural Monuments.

In 2008 the applicant's claim was accepted by the Supreme Court of Cassation.[132] It supported the applicant's demand but the Belgrade City Institute failed

[128] In this part of work I borrowed the method of analysis from V. Volpe, See V. Volpe, op. cit., and in particular chapter 4 "Judging democracy - The European Court of Human Rights".

[129] Opinion of Advocate General Jacobs. See: case C-270/99 P, *Z v. Parliament*, [2001], ECR I-9197, para. 40.

[130] Decision no. 78/05 of the Institute for Protection of Cultural Monuments Valjevo.

[131] Decision 0203 no. 21/1800 from 25.07.2007 - Belgrade City Institute for the Protection of Cultural Monuments.

[132] Decision U. 7498/07 of the Supreme Court of Cassation from 11.12.2008

to comply with the decision of the Supreme Court, the highest Court in the Republic of Serbia whose judgements are "final, enforceable and generally binding".[133]

On July 2009 the applicant submitted to the Supreme Court the requirement for execution of its judgement from 2008. Thus, the Court required of the Belgrade City Institute to state reasons for that behaviour but it failed again to comply with the decision of the Supreme Court.[134]

On December 2011 the applicant renewed its demand to the Administrative Court for implementation of the Supreme Court's judgement.[135]

Examination:

Deciding on the request of applicant in present case, the Administrative Court ask for the Belgrade City Institute for the Protection of Cultural Monuments to state, within five days, reasons why did not commit the judgment of the Supreme Court of 2008 and decision of the same court of 2009 to motivate why did not bring the administrative act, i.e. decision on the execution of the judgment.

According to Article 63 (2) of Administrative Dispute Act of 1996 (today Article 71 (3)) the public authorities are obliged without delay, or within 7 days to inform the court about the reasons for not bringing the administrative act.

Finally, on 11 February 2011 the Belgrade Institute for the Protection of Cultural Monuments replay to the Court with statement that they were not able to bring the administrative act because some documents of the case "were lost" during the expedition of records of the Supreme Court, in particular the decision of the Institute for Protection of Cultural Monuments Valjevo, the appeal of the applicant and the Expertise opinion.

Eight months later, on 24 October 2011, the Belgrade Institute informed the Administrative Court about successful reconstruction of records of administrative procedure but the judgements of the Supreme Court was still missing.

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[133] Article 166 (2) of the Constitution from 2006. Since 1990, there has been significant progress in the quality of constitutionalisation of constitutional authority functions. See: A. Fira, *Ustavni sud u Ustavu Republike Srbije,* [Constitutional Court in Constitution of Serbia], in *Arhiv za pravne i driuštvene nauke,* 2-3/1991, from p. 318. Similar in Lj. Slavnić, *Jemstva ustavnosti u novom ustavnom uređenju Republike Srbije,* [The Guarantees of constitutionality in the new constitutional order of the Republic of Serbia], in *Arhiv za pravne i društvene nauke,* 2-3/1991, p. 326; and D. Stojanović, *Ustav i političko zakonodavstvo Republike Srbije,* [Constitution and political legislation of the Republic of Serbia], Niš, 1991, p. 118.

[134] Decision of the Supreme Court of Cassation no. Ui 95/09 from 31.07.2009.

[135] From 1st January 2010 the Administrative court took all pending cases of the Supreme Court of Cassation and higher courts. see supra § 2.1.

In time-limit of four days the Court send the copy of the judgment to the Institute which was stated in an invoice that is located in the file and was returned to court on 4.11.2011.

In the Court's understanding the applicant request is legitimate:

> "The Belgrade City Institute for the Protection of Cultural Monuments did not comply with the judgement of the Supreme Court of Serbia U. 7498/07 from 11.12.2008 and according to this court [Administrative Court] the reasons stated in the letter from 11.02.2011 do not justify failure to act in the execution of the above judgment of the Supreme Court of Serbia, albeit the law provides that the competent authorities should issue a new administrative act without delay and not later than 30 days of receipt of a court judgment, whereas in files of the case shows that the documents of accused body were completed on 04.11.2011."

Additionally,

> "The accused body, although required, is not acting in the sense of Article 61 of Administrative Disputes Act, and to set out, from the fallacies of appeal against the decision of the first instance has no basis in the record, to the Administrative Court [...] *decided* as purview." (emphasis added).

At least two aspects emerge from the judgement:

First, the Court recognized that the competent organ did not respect the principle of legality and its obligation to exercise the judgement of the Supreme Court.

Second, there is an instance of unreasonable delay on the part of the public institution. The Court took account of the circumstances of the case to determine whether the delay was justified. As in the case-law of the European Courts, here too, the obligation to act within reasonable time is connected with the principle of duty of care and legitimate expectation on the applicant's part.

The right to a speedy handling of one's affair is not only essential for good administration but also for administrative justice. It could be concluded that in the present case administrative efficiency was not achieved. Albeit, the Administrative Court did not openly stated, without a doubt this the case maladministration.

A very interesting example in terms of administrative effectiveness and the perception of the impartiality of the public administration comes from a case of 2012, which in its basic facts had strong similarities with the previous case, the Ui 187/2012.

The relevant fact in this case is that the Serbian Republic Fund for Pension and Disability Insurance did not enforce the judgement of the Higher court of 2005 and thus did not brought decision for the payment of pensions. The applicant contended in particular that despite the fact that the public organ did not respect time-limit of 30 days, she addressed the new demand to the organ with request to comply with judgement.[136]

No. 2 – II-4 Už. 384/12: Motivation of decision promotes transparency

The peculiar political situation in the past and the history of authoritarian regimes has deep roots in the Serbian society. The case *II-4 Už. 384/12* encompasses one of the critical dimensions of the above-mentioned problematic aspects of the Serbian political structure. In fact, I intend to demonstrate how the breach of good administrative principles could affect the creation of the electoral results.

Data:

On 6 May 2012 were held the Serbian parliamentary elections simultaneously with provincial, local, and presidential elections. These elections accompanied numerous irregularities mostly with regard to the procedure which were discussed by the Administrative Court.[137] According to the dates presented at the official website of the Serbian Administrative Court more than 50 complaints from all parts of Serbia were addressed to this Court for infringement of electoral rights.

In the *II-4 Už. 384/12* case Milan Blagojević [hereafter the claimant] as the member of the Election Commission - Tehnička škola [hereafter the Commission] put objection on the election process due to improper behaviour of the Commission.

Since the second instance organ, Election Commission – Prokuplje, refused its objection,[138] the claimant submitted the appeal to the Administrative Court on 11 May 2012

[136] The major number of complaints is regard to the unpaid pensions. As the president of the Administrative Court pointed: "The Administrative Court is the only court that protects the interests of "little" man in relation to the "arbitrariness" of public authority. See: Interview of Slađana Bojović, in *Večernje novosti,* 19 September, 2011, available at: http://www.novosti.rs/vesti/naslovna/aktuelno.69.html:345801-Sladjana-Bojovic-Stitimo-male-ljude-od-drzave.

[137] The most "famous" elections are certainly the one from 2000 when fall the regime of Milosevic. The number of irregularities of these election confirm the data that there were more voting papers than adult citizens in Serbia.

[138] It has been refused by decision no. 013-31/12-02 from 9 May 2012.

by alleging that the Commission breach Article 35 of the Law on Local Elections[139] and Article 74 of the Law on Election of Parliament Deputies.[140] The claimant also stated that in the electoral box was found 20 voting papers more than number of voters which came to vote on 6 May thus he proposed repeat of the elections.

Examination:

After deciding that the appeal was timely, the Administrative Court requested from the second instance organ to send all documentation of the relevant case.

On 18 May 2012 the Election Commission – Prokuplje sent all documents as well as response to the appeal, where stated that "it remains by the explanation of first instance, and believes that repeat elections would not change the electoral results because the number of votes is equal to the election ballots and voting repetition would only cause the cost of printing the new ballots and other election materials."

The Administrative Court found that explanation of the decision of first instance organ is not complete – "the Commission does not state sufficient and clear reasons neither legal acts for rejecting the complaint".

This point to the fact, that the right to a motivated decision, as essential part of the right to defence is not respected. Let me remind again, that the duty to state reason of decision has two objectives. First, gives an opportunity to the individual to challenge a given measure. Second, gives an opportunity to the Court to exercise the judicial review of the controversial decision.

Thus, in the present case the Court itself established all the facts and found that in the Record on the work of Commission was put the objection of the claimant (that 20 voting papers more than number of voters which came to vote on 6 May). But, there is no statement in the Commission record neither in official records verified by the Commission, that the Commission having examined the direct election materials distributed to the polling station.

According to Article 35 (1) of the Law on Local Elections upon concluding of the voting the polling board should commence determining votes at the polling station. Paragraph 9 of the same Article recognizes that "[i]f it is determined that the *number of*

[139] *Zakon o lokalnim izborima*,"Službeni Glasnik Republike Srbije", br. 129/2007, 34/2010 - odluka US i 54/2011.

[140] *Zakon o izboru narodnih poslanika*, "SLužbeni GLasnik Republike Srbije" br. 35/2000, 57/2003 - odluka USRS, 72/2003 - dr. zakon, 75/2003 - ispr. dr. zakona, 18/2004, 101/2005 - dr. zakon, 85/2005 - dr. zakon, 28/2011 - odluka US i 36/2011 i 104/2009 - dr. zakon.

ballot papers in the ballot box *is greater than the number of electors who voted*, or the ballot box does not contain the control ballot paper, the polling board shall be dismissed and a new one appointed, and voting at such polling station *should be repeated*" (emphasis added).

Article 36 (1) of the Law on Local Elections provides that once the voting results are determined, the polling board should enter into the record of its work: the number of received ballot papers; number of unused ballot papers; number of invalid ballot papers; number of valid ballot papers; number of votes won by each of the electoral lists; number of electors pursuant to the electoral register excerpt and the number of electors who voted. The polling board record should contain also remarks and opinions of polling board members, of electoral list nominators and of joint proxies of electoral list nominators, as well as all other facts relevant to the voting. All members of the polling board are obliged to sign the record of the polling board's work.[141]

Article 55 (1) of the Law on Local Elections provides that, if the court accepts the appeal, it will annul the decision or action in the process of nomination or election of councillors. Paragraph 2 of the same Article provides that "when he finds the contested decision must be annulled, if the nature of the case allows and if the facts provide a reliable basis, the court might *meritoriously resolve dispute*", thus, "*the court's decision will replace the annulled act*" (emphasis added). Paragraph 3 of the same Article further provides that the Electoral Commission is then obliged to repeat appropriate action or elections.

The Administrative court meritoriously resolved the dispute and obliged the Electoral Commission – Prokuplje to repeat the elections.

A strong positive signal was sent by the Administrative court to the more effective legal protection of citizens' right in Serbia. Using of the institution of full jurisdiction leads to quicker dispute resolution. This tasks is of "decisive importance and comes at a time when human rights are well recognized and protected and when the government by law has obligations towards many public interests that those seeking justice refer to or protest against, depending on the situation."[142]

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[141] Article 36 (3) of the Law on Local Elections.

[142] See Z. Pičuljan, *Primjen ai evolucija upravnog spora pune jurisdikcije,* in *Zbornik radova Pravnog fakulteta u Splitu,* god. 47, 1/2010, pp. 63 – 64.

2.3. "Silence of the administration"

The exception of the rule that administrative dispute may be initiated only against individual administrative acts, exists in the case of the "silence of the administration". It is one of the most critical aspects of good administration and in the practice one of the most dominant.

According to Article 19 of the ADA when the second instance organ, within the time-limit of 60 days or the time-limit stipulated by law, did not bring the decision on appeal against the first instance organ, and does not make it further, within seven days after the repeated request, the party might initiate administrative dispute as the appeal is denied. The same rule applies when the first instance organ did not bring the decision and the appeal is not provided.

From the formal point of view *stricto sensu*, in the situation of the silence of the administration is not possible to conduct the administrative dispute because of the lack of the administrative act. The administrative act is *condition sine qua non* for initiating of the dispute.[143] Nevertheless, in order to protect subjective citizens' rights the ADA introduced a legal construction, silence of the administration, based on two elements: *fictio* that the administrative act exists and *presumptio legis* that the appeal, i.e. request is refused.

In the Serbian Supreme Court's opinion from 1968 the administrative dispute could be conduct when the decision on the request is not adopt "only in the case of the failure of the administrative act, but not in the case of failure some other acts or which could not be solved in the administrative proceedings on the rights and obligations of the applicant."[144] Thus, the Supreme Court confirmed that the administrative act is the basic assumption of an administrative dispute.

Similar, could be find in recent case law of the Supreme Court of Serbia. Thus, in the *U.8461/2007* case of 2009 the claimant applies to the Republican Property Directorate to register him as the proprietor of the real estate on which he is already

[143] S. Popović, *Upravni spor u teoriji i praksi,* [Administrative dispute in theory and practice], Beograd, 1968, p. 153.

[144] See: Opinion of the Supreme Court of the Republic of Serbia U-6578/67 in Z. Tomić, *Komentar Zakona o upravnim sporovima*, [Commentary of the Administrative Disputes Act], Službeni Glasnik Republike Srbije, Beograd, 2010, p. 355.

registered as the holder of the right to use them. The Court pointed out that according to the existing legal framework and the contents of the claimants request that the decision of the Republic Property Directorate is not administrative act. Thus, the Court stated:

> "The decisions on the claimant's request are not the administrative act because such decision does not resolve on the concrete claimant's right in the administrative matter to which adoption preceded the administrative procedure."

In concrete case the transfer of state ownership of real estate owned by a legal entity with the consent of the Property Directorate was the act of disposal not the administrative act. Thus, the Supreme Court held that there was no silence of the administration.[145]

Analysing the jurisprudence of the Supreme Court it could be found that the term "administrative act" encompasses an non exhaustive list of decisions. For example, the administrative act is the decision of refusing the objection on resolution that the proprietor is obliged to pay costs of using the building land,[146] the decision on annul the public auction,[147] certificate of domestic origin of the products issued by the customs,[148] urban planning permit,[149] the decision of the community assembly of cessation of the hospital,[150] etc.

The requirement for the conduct of administrative dispute based on the silence of the administration exists also in the case when the public authority did not bring the decision on the claim submitted by the Commissioner for Information of Public Importance and Personal Data Protection.

In the case *U.2229/06* the Supreme Court of Serbia held that according to Article 22 (1) of the Law in Free Access to Information[151] the legal situations when the

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[145] See also the case U. br. 3531/2002, the Supreme Court of Serbia; case U.3825/2005, the Supreme Court of Serbia. the decision of the Supreme COurt of Serbia U. 6265/2007 from 20 March 2008;

[146] See the judgment of the Supreme Court of Serbia Uvp I 74/04 from 10 May 2006.

[147] See the judgment of the Supreme Court of Serbia U.1897/03 from 17 September 2004.

[148] See the judgment of the Supreme Court of Serbia U. 3096/05 from 25 January 2007.

[149] See the judgment of the Supreme Court of Serbia U. br. 2855/97 from 20 January 1999.

[150] See the judgment of the Supreme Court of Yugoslavia Uis. br. 2571/71 from 21 April 1972.

[151] The applicant might lodge a complaint to the Commissioner (Art. 22) within 15 days from the date of the submission of the decision issued by the public organ in the following cases: "1) if the public organ: refuses to notify the applicant that they possess specific information of public interest, fails to put for perusal the document with requested information, fails to issue or forward a copy of the document, or if they fail to do it in the prescribed time limit; 2) if the public organ fails to reply within the prescribed time limit to the request of the applicant; 3) if the public organ makes conditions for the issuance of the document copy asking for the requested information which overleaps the sum of necessary costs of

procedure on request for access to information of public importance is two instances and that appeal could be submitted to the Commissioner within 15 days. Article 22 (2) guarantee if the right to appeal is excluded than could be conduct the administrative dispute. On the latter the Court *ex officio* informs the Commissioner. Thus, the Court highlighted that "in concrete case the claimant did not complied with the court order because did not submitted the proof of evidence that after the expiration of the deadline for deciding his appeal urging, i.e. asked authorities to decide within 7 days on its appeal [...] and the Supreme Court dismissed the appeal."[152]

The "silence of the administration" presents one of the major risks for good administration and citizens' belief that their rights are protected. Sometimes, the public authorities are willing, from different reasons, to not bring the decisions or to extend their duty to bring the decision. The only progressive solution to annul such "bad" administrative behaviour, as has been already argued, is in providing the silence as acceptance of the decision.

making such a copy; 4) if the public organ does not put for perusal document containing the requested information in a way stipulated by the law."

[152] See the judgment of the Supreme court of Serbia U. 2229/06 from 14 February 2007.

3. Ombudsman Institution

The introduction of the Ombudsman institution in the Serbian legal order was considered of priority importance for the European Union. In the Commission's view such human rights institution "need to be established at all necessary levels and strengthened".[153]

The Republic of Serbia began to manifest a growing attention towards Ombudsman institution in 2002 by adoption of the Law on Local Self-Government[154] that in Article 126 provided a possibility of establishing the city attorney (ombudsman) at the local level. Such an opportunity has so far used the very small number of municipalities and cities. Further, the Law on Establishing Competencies of the Autonomous Province[155] of 2002 introduced the right of the Province to create ombudsman institution. Consequently, Vojvodina brought the Decision on the Provincial Ombudsman at the end of 2002[156] and on 24 September 2003 has been elected the first Vojvodina's Ombudsman.

Finally, on September 2005, Serbia, the last of all ex-Yugoslav Republics, adopted the Law on Protector of Citizens (Ombudsman).[157] The existence of this institution has been further confirmed by the Constitution of the Republic of Serbia in 2006. The first Serbian Ombudsman (known as the *Zaštitnik građana*) has been elected by Parliament on 23 July 2007 and its office officially started to work on 24 December 2007.

The establishing of the ombudsman in the Republic of Serbia represents one of a series of multiple transplants that this institution experienced.[158] Originally born as a

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153 European Commission, *Serbia and Montenegro 2005 Progress Report*, COM (2005) 561 final, COM (2005) 558 final, Brussels, 9.11.2005, p. 8

154 *Zakon o lokalnoj samoupravi,* [The Law on Local Self-Government], „Službeni Glasnik Republike Srbije", 9/2002.

155 *Zakon o utvrđivanju određenih nadležnosti autonomne pokrajine*, [the Law on Establishing Competencies of the Autonomous Province], „Službeni Glasnik Republike Srbije", br. 6/2002.

156 *Odluka o pokrajinskom ombudsmanu*, [Decision on the Provincial Ombudsman], „Službeni list Autonomne pokrajine Vojvodine", br. 23/2002.

157 See supra n. 32. For a detailed description of origins of the term *Zaštitnik građana* through an comparative analysis see, D. Milkov, *Zaštitnik građana Republike Srbije,* [Protector of citizens in the Republic of Serbia], in *Collected papers,* Faculty of Law Novi Sad, Novi Sad, Vol. XLII, 1-2/2008, pp. 203 – 205.

158 On the legal transplantation of ombudsman institution see, H.Y. Cheng, *The Emergence and Spread of the Ombudsman Institution*, in *The Annals of the American Academy of Political and Social Science*, Vol. 377, 1968, pp. 20 – 30. For a detailed reading of the reasons of introduction of Ombudsman institution in Serbia see, Z. Jovanović, *O neophodnosti uvođenja Ombudsmana u naš pravni sistem*, [The necessity of introducing the Ombudsman in our legal order], in S. Bejatović (ed.), *Slobode i prava čoveka i građanina u konceptu novog zakonodavstva Republike Srbije,* knjiga III, Univerzitet u Kragujevcu, Pravni fakultet, Kragujevac, 2004, pp. 217 – 227.

Sweden institution it took then various forms on the European continent and evolved in something new at each transplants.

As Franklin and Braun has been pointed:

> "Institutional models […] do not remain the property of their originating countries but become, instead part of a broader global political culture from which all are free to take and borrow as they choose. […] The real challenge is to make these borrowed institutions relevant to unique national cultures and historical experiences."[159]

Following the last statement, I will focus on the Ombudsman role related to the promotion of good administration in Serbia. For this purpose, I will present implementation of the Ombudsman's recommendations in the practice.

3.1. Follow-up of the Ombudsman recommendations

The Proposal of the Code of good administration [hereafter the Code] represents the general framework of proper administrative behaviour (good administration) of public administration in Serbia, which includes professional and ethical standards in the performance of official duties and establishing the communication with the citizens.[160]

The scope *ratione personae* of the Code are 'citizens' regardless of their nationality and residence, as well as groups which maintain communication with public authorities and officials. As mentioned above, the Code applies to all elected, appointed and nominated persons, as the state officials, employees and other persons [henceforth: public officials] when carrying out duties and actions of the state organs, other organs or organizations, companies with entrusted public authorizations [henceforth: public authorities].

The Code's provisions create an broad list of different principles, standards, procedural and substantive rules which correspond to the ones provided in the European Code of good administrative behaviour: lawfulness, absence of discrimination, proportionality and appropriateness, absence of abuse of power, impartiality and independence, objectivity,

[159] D.P. Franklin and M.J. Baun, *Conclusion*, in D.P. Franklin and M.J. Baun (eds.), *Political Culture and Constitutionalism: A Comparative Approach*, M.E. Sharpe, Armonk, New York, 1995, p. 224. Citation found in the V. Volpe. op. cit., p. 257.

[160] Article 1 of the Proposal of the Code of good administration.

consistency and respect of legitimate expectations, fairness, courtesy, correcting mistakes (corresponds to principle of courtesy in the EU Code), language and letter, acknowledgement of receipt and indication of the competent official, transfer and correction of petition, citizen's right to be heard and to make statement, reasonable time-limit for taking decision, duty to state the grounds of decisions, indication of the possibilities of appeal, notification of the decision, data protection, requests for information, requests for public access to documents, keeping of adequate records, right to complain for infringement of the Code, publicity of the Code and monitoring of the implementation of the Code.[161] The latter is the only new aspect of good administration provided by the Serbian Code according to which the public authorities are obliged to submit to the Ombudsman reports on the application of the Code each even year, up to 31st December. The report should contain statistic data about circumstances and facts which are relevant for the promotion of respect for citizens' right to good administration.[162]

Leaving aside the analyse of previously mentioned principles, which was detailed done in the Chapter 1 § 1.3.2.1, in the present part of research, I will point to specific systemic issues in relation to proceedings before the Serbian Ombudsman as the legal institute for promoting and enforcing respect for human rights in the country. In other words, this fact raises the question with regard to the efficient implementation of the Ombudsman's recommendations in the practice.

3.3. Lack of judicial reforms: "imminent risk for good administration"

Driven by the European Union conditionality Serbia is challenged with the difficult tasks of reforming its judiciary system and building the institutional capacity of its justice system.

[161] See Artt. 3 – 27 of the Proposal of the Code og good administration. Here, too, the Code is lacking of any kind of categorization for these principles, standards and rules.

[162] In the Ombudsman's annual reports the area of good administration is divided into the 13 areas: 1. Human rights, public administration. local self-government, entrusted affairs to the local-self government and Kosovo and Metohija; 2. Education, sport, culture, infromation and intelectual property; 3. Labour; 4. Social security; 5. Helath; 6. Interior affairs; 7. Judiciary; 8. Forreign affairs; 9. Defence; 10. Planning, construction and cadastre, natural disasters and restitution; 11. Tax administration; 12. Agriculture, trade, forestry, water management, environment, infrastructure, energy, mining, transportation, hydrometeorology, stockpiles; 13. Finance, economy, regional development, privatization, directorate for property, national office for employment, bankruptcy and public procurement department. This areas of good administration are, in generally, consistent with the relevant ministries of the Government of the Republic of Serbia.

December 2008 saw the passing of a new set of judicial laws by the Parliament of Serbia, which introduced "a broad reform of the judiciary".[163] These reforms were brought forward in accordance with goals set forth by the National Judicial Reform Strategy[164] and the provisions of the 2006 Constitution of Serbia. This new set of laws includes the following: Law on the High Judicial Council, Law on the Public Prosecutor's Office, Law on the Organization of Courts, Law on Judges, Law on the State Prosecutorial Council and the Law on the Seat and Territory of Courts and Public Prosecutors' Offices.

The new High Judicial Council has eleven members as prescribed by the Constitution. Three e*x officio* members are the Minister of Justice, the President of the Supreme Court of Cassation and the President of the Parliamentary Committee for Judicial Affairs. The remaining eight members are to be elected by the Parliament of whom six shall be judges. By giving judges majority of seats in the Council should in theory reduce the political influence within the Council. Additionally, it makes sure that judges are properly and sufficiently represented.

The previous High Judicial Council was responsible for the nomination of the members representing judges in the first instance of the new High Judicial Council. The new High Judicial Council was not bound by the courts proposal and the whole process was an exception to the rule. According to the Commission of the European Communities, "This appointment procedure does not provide for sufficient participation by the judiciary and leaves room for political influence."[165] Great concern is raised regarding this process since the new High Judicial Council will be responsible for putting in place the selection procedure for all judges.[166]

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[163] Commission of the European Communities, *Serbia 2009 Progress Report*, Brussels, 14.10.2009, SEC(2009) 1339/2, p. 11. *Source*: https://webgate.ec.europa.eu/olacrf/20091014Elarg/SR_Rapport_to_press_13_10.pdf.

[164] Vlada Republike Srbije, Ministarstvo pravde, *Nacionalna Strategija za reformu sudstva*, [National Judicial Reform Strategy], April 2006. Available at: www.mpravde.gov.rs.

[165] Commission of the European Communities, *Serbia 2009 Progress Report*, Brussels, 14.10.2009, SEC(2009) 1339/2, p. 11. *Source*: https://webgate.ec.europa.eu/olacrf/20091014Elarg/SR_Rapport_to_press_13_10.pdf.

[166] The Venice Commission stated that: **"**The principle of stability of judges is expressed in the new Constitution in a more precise way than in the previous draft Constitution dated from 2004. Article 146 states that a judge shall have permanent tenure. This should be understood as appointment until retirement. Despite the general rule on "a permanent tenure of office", the Constitution has maintained the previous principle to elect judges for the first time for a 3 year term. The previous draft provided for a 5 years term The change is in line with the Venice Commission's suggestions that "a reduction of the excessive five years period would alleviate the problem of "temporary judges" (CDL-AD(2005)023 p.14). Another positive change is that the decision on their confirmation in post following the probationary period is no longer taken by the National Assembly but by the High Judicial Council as requested by the Venice Commission. Concerns with respect to the independence of judges during a probationary period will always remain. Nevertheless, the Constitution now provides safeguards in this

The complexity of evaluating the criteria for reappointment of judges provides an opportunity for the decision to be politically influenced. Knowingly leaving room for political influence created a risk politicizing the judiciary and raised serious concerns with the Serbian Judges Association. Therefore the Association filed an appeal with the Serbian Constitutional Court to assess the legality of the reappointment procedure. In July 2009 and in response to the appeal the Serbian Constitutional Court concluded that the reappointment procedure was constitutional.[167]

The Serbian Ombudsman, after the 2009 (re)election of judges by the High Judicial Council, received 178 complaints in regards to the election process. Main objections were raised because the decisions made did not include a proper justification or explanation. All non-elected judges received an identical written explanation which stated that they did not meet the required criteria to be elected. No concrete explanations were brought forward explaining the reasons of non-election. Instructions on the legal remedy were also missing with regards to the decisions made by the High Judicial Council. Even though the legislations states there is a right to appeal in case of cessation of judgeship. Additionally, complaints were raised against the lack of proportional representation of national minorities in courts where population minorities exist.[168]

In accordance with Article 25 (5) of the Law on Ombudsman, the Ombudsman informed the High Judicial Council about initiating a review and assessment of the legality and integrity of the judge election process.[169]

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respect and the need to evaluate the practical abilities of persons to be appointed as judges seems compelling in a country where people with limited experience are appointed as judges." See: European Commission For Democracy Through Law - Venice Commission, *Opinion on the Constitution of Serbia,* , Opinion No. 405/2006CDL-AD(2007)004, Strasbourg, 19 March 2007, p. 14. Found in : S. Lilić, *Independence of the Judiciary and the High Judicial Council in Serbia,* in *Diritto Publico Comparato ed Europeo,* 4/2010.

[167] For an detailed reading of High Judicial Council in Serbia and its independence see, S. Lilić, *Independence of the Judiciary and the High Judicial Council in Serbia,* in *Diritto Publico Comparato ed Europeo,* 4/2010.

[168] "Judicial reform in Serbia has been seriously challenged by the non-transparent procedure for the reappointment of judges and prosecutors instituted in 2009. More than 800 judges, out of 3.000, were not reappointed, and the objective criteria for reappointment, which had been developed in close cooperation with the Venice Commission, were not applied, leaving much room for high-risk political influence. Judicial reform is a key precondition for the protection of human rights and also a European Partnership priority that needs to be addressed in order for Serbia to become part of the EU. However, little progress has been achieved, even after pressure from the international community, and a re-assessment of the decisions is still pending. At the same time, the backlog of cases in domestic courts is quite considerable, with, for instance, the Constitutional Court alone facing a backlog of some 7.000 pending cases, including the appeals filed by judges and prosecutors who have not been reappointed." See: Human rights in Serbia http://www.civilrightsdefenders.org/country-reports/human-rights-in-serbia/

[169] Article 25 (5) of the Law on Ombudsman provides that the Ombudsman might initiate proceedings before it has exhausted all legal remedies if the complainant would sustain irreparable damage or if the

The Ombudsman determined a set of oversights by the High Judicial Council in the judges' (re)election procedure. First, the candidates who were discharged from the function of judge were denied were denied the opportunity to explain themselves regarding how they meet the requirements to be re-elected. Second, the High Judicial Council withheld concrete details of the reasons why the candidates were not elected. Third, instructions on a legal remedy were withheld. Finally, there was a lack efficient and effective measures for ensuring national minorities have a proper representation in courts located in regions where the minority population exists. The Ombudsman, as his duty, submitted a recommendation to the High Judicial Council to restore the above identified omissions.[170]

The Ombudsman did not receive a response to the recommendation from the High Judicial Council even though they have a legal duty respond in a timely manner. Bearing in mind the significance of the omissions and their consequences the Ombudsman informed the National Assembly of the Republic of Serbia, the Government of the Republic of Serbia and the general public about the failure of the High Judicial Council to fulfil its legal duty.

The European Commission confirmed the Ombudsman's findings by stating that there were serious omissions in the process of re-election of judges and prosecutors even though there was progress made in satisfying requirements in regards to the accession process.

3.4. Right to social security: "Thanks to Ombudsman . . ."

The majority of complaints, in which there was an issue of maladministration by institutions, concerned the area of social security.[171] In particular, on April 2011, the

complaint relates to violation of the principles of good administration, especially the "incorrect behaviour of the public administration, non-reasonable time-limit or other infringements of rules of ethical behaviour of public administration." This provision is the basis for initiating the largest number of control procedures for legality and regularity of the Ombudsman, as is the case in other countries that are familiar with this institution.

[170] See: *Redovan godišnji izveštaj Zaštitnika građana za 2010. godinu* [Regular annual report of the Ombudsman for 2010], Republika Srbija, Zaštitnik građana, 48 – 220/11, Beograd, 15.3.2011, p. 51.

[171] According to the statistics 10,77% of all complaints arrive from the area of social security, health and retirement and disable insurance. On the other hand, from the area of security arrive only 0,19% of

Ombudsman, after previously implemented control procedures of regularity, addressed to the Retirement and Disability Insurance Fund of the Republic of Serbia [hereinafter: the Fund] recommendations to correct the mistakes incurred in the work which, according to their frequency, could not be considered as mistakes of individual organizational units.

The issue at stake here was mostly the violation of the right to reasonable time-limit for taking decisions. Article 17 (1) of the Proposal of the Code lays down that public authorities and officials are obliged that "a decision on every request or complaint to the institution is taken within the reasonable time-limit, without delay, and in any case no later than *the time-limit stipulated by the law*" (emphasis added). The same rule applies for written answer from public officials and for answer to administrative notes. However, this rule is not absolute. Article 17 (2) allows prolongation in the case of the complexity of the issue when the matter cannot be decided "upon within a *two months*, the officials should inform the citizen thereof as soon as possible." (emphasis added). This point to the fact that the Serbian Ombudsman, as the European Ombudsman too, underlined two months as reasonable time-limit for taking decisions.[172]

However, in the Ombudsman's practice it could be found that the applicants are waiting for a decision several months or even years. In the complaint no. 22615, for example, the complainant received the Fund's decision on the right to the family retirement after four years. Further, the applicant commented that thanks to a "help from Ombudsman" the Fund fulfil its obligation.[173]

In dealing with the cases in regards to the Fund, the Ombudsman affirmed also the violation of duty of keeping of adequate records. According to Article 24 of the Proposal of the Code the public authorities should "keep adequate records of their incoming and outgoing mail, of the documents they receive, and of the measures they

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complaints. See: *Redovan godišnji izveštaj Zaštitnika građana za 2011. godinu* [Regular annual report of the Ombudsman for 2011], Republika Srbija, Zaštitnik građana, 22 – 13/12, Beograd, 15.3.2012, p. 139. The fact that the majority of complaints are related to social and economic rights is confirmed also in the Report of Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), see Parliamentary Assembly, The honouring of obligations and commitments by Serbia, Doc. 12813, Council of Europe, 9 January 2012, para. 52, available at: http://assembly.coe.int.

[172] According to Article 17 "[i]n this case, and if a citizen accepts the reasons and decide not to immediately take advantage of available remedies for the 'sillence of the administration', a definitive decision shoul be notified to the citizen in the shortest time."

[173] *Redovan godišnji izveštaj Zaštitnika građana za 2011. godinu*, *op. cit.,* p. 85. See also complaint no. 22172 from 2010; complaint no. 22175 from 2010; complaint no. 16341 from 2011; complaint no. 23091 form 2011; complaint no. 27453 from 2011; complaint no. 1498 from 2012; complaint no. 5900 from 2012. Nota bene: all complaints are available at the official Ombudsman's website www.ombudsman.rs.

take". In particular, the Ombudsman underscored that the public authorities do not have proper records of contributions paid, the date of acquisition and termination of the insured, the insurance period, the amount of their contribution, which fund the obligation to submit the required data shifted to the citizens, and the citizens have borrows paid contributions. Bearing in mind the observed lacks, the Ombudsman recommended to the Fund to keep accurate and updated records of the insured persons, and payments to the right, and check the accuracy of data entered in the register for the application, as provided by law.[174]

This issue is still very present in the practice. Thus, on 29 November 2012 the Ombudsman brought recommendation regarding the violation of the principles of good administration caused by the Fund. The applicants alleged that the Fund has submitted complete required documentation to the Ministry of Internal Affairs without keeping of adequate records.[175]

The Ombudsman has received also a number of complaints about the lack of the administrative principle of providing assistance to the party and to indicate of the possibilities of legal remedy.[176] Moreover, it could be found cases where the Fund's officials openly expressed resentment towards applicants because of complaints about their work to the Ombudsman. As a consequence of the latter, some of employments stated that the required rights would be realized before, if were not addressed to the Ombudsman.[177]

Driven by the Ombudsman's recommendations, the Retirement and Disability Insurance Fund of the Republic of Serbia took necessary measures to resolve problematic issues, in particular, with respect to the reasonable time-limit for taking decisions. One of the reference documents in the area are certainly Instructions on compulsory notification of the parties brought by the Found on 14 June 2011. The purpose of these documents is informing citizens about the impossibility of resolving their claims within the provided time-limit. The results of 2010 and the first five

[174] See, for example, complaint no. 5882 from 2008; complaint no. 7279 from 2009; complaint no. 8733 from 2010; complaint no. 12235 from 2012; complaint no. 14834 from 2012.

[175] See complaint no. 31156 from 2012.

[176] *Redovan godišnji izveštaj Zaštitnika građana za 2011. godinu, op. cit.,* p. 88.

[177] With respect to this cases the Ombudsman stated that "[i]n order to overcome the aforementioned shortcomings in the work of the Director of Fund will send written notice to all organizational units that will remind them that people should not suffer any consequences, nor should be in any way criticize the fact that the use of their legal rights, and addressed to the Ombudsman or provide information relevant to the process that leads to the Ombudsman. It is necessary to act contrary to the obligation to protect and respect the rights of citizens is a disciplinary sanction." *Ibid.,* p. 88.

months of 2011 show that the number of requests that are resolved in due time increased and the number of pending requests decreased.[178]

Regarding the issue of failure to provide assistance to the party and unfair behaviour to the parties, the Fund also taken actions to improve the operation and improvement of the legal aid agencies and officers themselves who provide help and who are in direct contact with the citizens, and in this respect continues with the continuous insistence of the Directorate of the Fund has undertaken measures and disciplinary measures against employees which their work duties do not execute properly.

All these elements seem to confirm the Ombudsman's efficacy in affecting the work of the Fund.[179] The human rights and good administration-oriented nature of the Ombudsman institution should contribute a qualitative reform of the entire domestic public administration.[180]

In the next section, I will analyse the role of the Commissioner for access to information and data protection in promoting of one of the most important aspect of good administration – transparency.

[178] *Ibid.*, p. 89.

[179] Since the Ombudsman made recommendations, he informed the Fund on received complaints concerning the identified gaps. Fund has provided a list of 40 complaints received from the referral recommendations (April 2011). Of these 40 complaints, 7 refers to the commitment of citizens to refund the excess amount of the pension, which occurred due to a failure in the work of the Fund, while the remaining 33 related to an unreasonably time-limit od decision making. *Ibidem*

[180] It is worth noting that according to the last information is recorded the growing trend of the citizens complaints. The Ombudsman's Communication from June 2012 states that in the five years of working of the Ombudsman office 40.096 citizens adressed for help. Since January 2012, 5.728 of citizens complained to the Ombudsman. The latter is considered as record addressing in the five-month period compared with the previous years. See more at www.ombudsman.rs.

4. Commissioner for information of public importance and data protection

The last instrument of good administration promotion is the Commissioner for information of public importance and data protection [henceforth the Commissioner] which plays an increasingly effective role in the oversight of the administration.[181]

As mentioned above the Commissioner has been introduced in the Serbian legal order by the Law on Free Access to Public Information of 2004. Since 2008 it expanded its competencies in the data protection domain.

The Law on Free Access to Public Information stipulates two modalities of administrative disputes: a) in case that against the decision of the National Assembly, the President of the Republic, the Government of Serbia, the Supreme Court, the Constitutional Court, the Administrative Court and the Republic Public Prosecutor a

[181] See: European Commission, Communication from the Commission to the Europea Parliamnet and the Council, *Commission Opinion on Serbia's application for membership of the European Union*, COM (2011) 668 final, p. 7. Available at: http://ec.europa.eu.

complained is not allowed,[182] and b) the administrative dispute against the decision, that is against the conclusion of the Commissioner brought forth in relation to the complaint lodged by the applicant for the information.[183]

Both modalities of the administrative disputes as per the Law on Free Access to Public Information provoked relevant legal controversies as explained Mr Šabić in the course of our conversation (see Annexes). Consequently, the Commissioner at a number of times in his reports, statements for public and in his addressing to media warned about the special circumstances in connection to free access to public information and administrative dispute. Those public warnings of the Commissioner relates both to the possibility of carrying out administrative dispute against the decision of the organ where the complaint to the Commissioner is not allowed (Art. 22(3)), and especially in situation of non-existence authorization of the organ of public government to commence an administrative dispute against the decision by the Commissioner complied with Article 27 Law on Free Access to Public Information.[184]

a) *Commence of administrative disputes when against the resolution of the National Assembly, the President of the Republic, the Government of Serbia, the Supreme Court and the Constitutional Court and the Republic Public Prosecutor the complaint to the Commissioner is not allowed.*

As it was stated by the Commissioner in his *Report on execution of the Law on free access to public information for the year 2007,* the court protection in legal procedure in front of the Supreme Court of Serbia was provided in relation to legality of decisions taken by the Commissioner, as well as the decisions of the above quoted highest state organs, against whose decisions the complaint to the Commissioner is not allowed brought forth in the procedure of decision making relating to the right to have access to information.

Factual presumptions for this mode of protection have existed as from the date of coming into effect of the Law. Since then up to the end of 2007 six complaints have

[182] Article 22(3) of the Law on Free Access to Information from 2004.

[183] Article 27 of the Law on Free Access to Information from 2004. As per Zakon o izmenama i dopunama Zakona o pristupu informacijama od javnog značaja, [*The Law on modifications and amendments of the Law on free access to public information*], "Službeni Glasnik Republike Srbije", br. 104/2009, "The legal procedure to acquire right to free access to information of public interest is urgent" (Art. 6(3)).

[184] Reports, public statements and statements for media are available to the Commissioner for access of public information on web site http://www.poverenik.org.rs.

been submitted to the Supreme Court against the highest organs whereas 76 against the resolution of the Commissioner, relating to them 48 judgments were brought forth.[185]

In relation to the request by the Beta Agency to the Commissioner to make comments on deprivation by the representative of the Government, to give information on existence and content of the Government Decision stipulating that the payment of million dollars for "the case M. Kovacević", the Commissioner gave the statement as follows: (February 2, 2009): "I do not possess reliable information on that decision, I got the information from media. I do share the opinion that media speculate with information of public interest, however I warn that very often it is an unnecessary limitation of public right is causing speculations. For the mentioned case, nobody has addressed me with formal request for the protection of free access to information. If somebody has been addressing me I should not have been able to act as per such a complaint as the Government is one of 6 governmental organs for which Article 22 Law on free access to public information stipulates that against them a complaint is not allowed to the Commissioner for the information, but the protection of the right is provided in legal procedure in front of the Supreme Court of Serbia."[186]

b) *The launching of administrative dispute against the decision that is against the conclusion of the Commissioner which was brought forth apropos the complaint submitted by the Claimant for information.*

As quoted by the Commissioner in *Report on free access to public information for 2007* in reference to information received by the Supreme Court of Serbia and available information of the Commissioner Department, based upon the Law on free access to public information, the Supreme Court since the application of the Law has received 82 charges, out of which 76 were against the resolution of the Commissioner, 4 charges for the non-action of the Serbian Government as per the lodged claims and 1 charge for each for non-action as per the lodged claim to the National Office of the President of Republic and the Republic Public Prosecutor. Out of 76 charges lodged against the Commissioner (7 in 2005, 35 in 2006 and 34 in 2007), the Supreme Court resolved 49 charges: rejecting 19 charges as baseless, 23 charges were rejected, for 2 charges

[185] Republic of Serbia, Commissioner for information of public interest, *Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaj za 2007 godinu,* [Report on application of the Law on free access to public information of 2007], Belgrade, March 2008, p. 2.
[186] Commissioner, *Izjava*, [Public announcent], February 2, 2009.

abrogated the procedure and accepted 5 charges, whereas the resolution by the Commissioner was cancelled for formal reasons.[187]

"It is extraordinary indicative that a great number of charges against the decision by the Commissioner were submitted by the organ of public government. It is the question about something that might be explained either as a complete ignorance or deliberate breach of elementary legal standards. During the process to access of information it is decided on the right of the Claimant for the information, but not about the right of the government organ. The government organ from which the information is asked for is not the party but first degree organ in procedure. It does not have and cannot have right to lodge a charge against the decision of the second instance organ. Although it is the issue that students of law should know, we witness the nonsense that some of our organs behave as they do not know, ignoring even the fact that the Supreme Court of Serbia have about 20 cases which it has been resolving up to now regarding these charges, rejecting them as illegitimate. Such wasting of tax-payers money and time of the Supreme Court is additionally worrying, as for the lodging of illegitimate charges it is tried to use somehow "legal justification" for not giving the requested information. Moreover, the giving of the information is postponed up to the court decision, taking into account that the proceeding in front of the court will normally last for longer period of time. It is also another legal nonsense, as it should be known that the lodging of the charge for legal procedure, even if the charge is allowed, by its nature does not postpone the execution of the final resolution. It might be possible that in number of cases it may happen to be (intolerable) elementary ignorance, but for sure there is something more poignant – deliberate ignore of legal standards. No matter what the cause might be, it must be undisputable that the obligation of the democratic government is to prevent simulation of the guaranteed public right as stipulated by the Constitution and Law to undertake adequate measures by the authorized executive organs – from education to responsibility."[188]

Similarly, it is stated by the Commissioner in the *Report on application of the Law on free access to public information for 2008*[189] in which, referring to the data given by the Supreme Court of Serbia and available information of the Commissioner Department, based upon the Law, in 2008 the Supreme Court received total of 23 charges, out of

[187] Republic of Serbia, Commissioner for public information, *Report on application of Law on free access to public information for 2007*, Belgrade, March 8, 2008, p. 11-12.
[188] *Ibidem*
[189] Republic of Serbia, Commissioner for information of public interest, *Report on application of the Law on free access to public information of 2008,* Belgrade, March 2009, p. 11.

which 10 against the resolution of the Commissioner, 3 charges against non-action, 5 for non-action, actually for reject of the request to access information submitted to the Supreme Court of Serbia and Supervising Council to that court, one charge against the National Assembly and one against the Republic Public Prosecutor and two against first degree organs. Out of 10 charges against the resolutions brought forth by the Commissioner, two were submitted by the first degree organs whereas one of them was rejected, about the other the Supreme Court has not decided yet. Out of 8 outstanding charges submitted by the information Claimants against the resolution issued by the Commissioner, two were resolved whereas one charge was rejected, the other was approved.

Out of 10 charges lodged against the highest state organs, the Supreme Court resolved only one which is proclaimed against the Government of Serbia rejecting the charge for formal reasons. The outstanding 3 charges lodged against the first degree organs, as per data received by the Supreme Court, are also not resolved. In comparison with 2007 when 34 charges against the resolution by the Commissioner were lodged, out which 13 were lodged by the government bodies to whom the Commissioner had imposed to forwards the requested information to the Claimant, in 2008 it is obvious that the number of charges against the resolutions of Commissioner decreased, especially those being submitted by the first degree organs, which is a positive sign having in mind the motif of their lodging and that the first degree organs in those cases are not authorized to submit the charge. However, it might be reasonably assumed that the actual reason for lodging inadmissible charges was not lack of knowledge, but by lodging charges the first degree organs actually wanted to postpone the acting as per the imposition of the Commissioner.[190]

In the *Report for public of March 2008,* the Commissioner estimated that the indisputable obligation of the government in all, partially in irregular circumstances, is to provide application of guaranteed rights and freedom by the Constitution. It is of special importance to act in appropriate manner when fulfilment of those rights and freedom are challenged by the acts that might be understand either as a complete ignorance or deliberate breach even of elementary legal standards in this field. In relation to the previously quoted, the Commissioner stated as follows: "When talking about realization of free access to information, the illustration are the examples that the charges against the resolution of the Commissioner were submitted by significant

[190] *Ibidem*

number of government organs. In the process of access to information it is decided on the right of the information Claimant, but not on the right of the government organ. The government organ from which the information is requested is not a party but first degree organ in procedure, whereas the Commissioner for information is the second degree. Thus the first degree organ, does not have and cannot have right to lodge a charge against the resolution of the second degree organ. Whereas such an issue must have been known even by the law students, we witness the nonsense that some government organs behave as if they have not been aware of it, ignoring even the fact that the Supreme Court of Serbia in 20 odd cases in which it had been resolving such cases. ."[191] In *Public announcement of October 2006*, the Commissioner stated that: "no matter to relative imprecise, the quoted provision (Article 27) the right to launch administrative proceeding is guaranteed only to citizens, journalists, medias, actually to the claimants of information, persons whose right was to be resolved. The organ resolving such a right, complied with the rule that the first degree organ may not carry out legal procedure against the second degree, is not entitled to lodge a charge. It is also stipulated in stands expressed in decisions of the Supreme Court on refusal of such a charge."[192]

In his interview with media, the Commissioner stated that "to lodge such a charge is the expression of incorrect understanding of the Article 27 of the Law quoting: *Against the resolution of the Commissioner administrative proceeding may be launched* as, although it was not explicitly quoted, the right to launch the procedure is reserved exclusively for the entity that asked for the information. In the process to access to information it is to be decided on the right of the entity who asked for the information. The one, who rejects such a request, does that as the first degree organ of government and obviously, an administrative procedure cannot be carried out against the resolution of the second degree organ, which is the Commissioner. Up to now, the Supreme Court has rejected all charges of the government organs against the resolution of the Commissioner as unauthorized. However, such charges continue to be lodged, obviously, with the idea to postpone in such a way the giving of the information."[193]

As per the explanation of the Supreme Court of Serbia to reject the charge[194] it is quoted: "from the previously quoted it comes that, as per the provisions of the Law

[191] Commissioner for public information, *Public announcement,* March 11, 2008.
[192] Commissioner for public information, *Public announcement,* October 9, 2006.
[193] See: *Hiding information from them,then lodge legal proccedeing against them* , in *Glas javnosti,* February 3, 2007.
[194] Explanation of the Supreme Court of Serbia on rejection of charge; U. 8071/05 of March 8, 2006.

on free access to public information, the lodging of the request and acquire of right to access to public information is legal matter, so the request have access to public information by application of provisions of the Law on general legal procedure. The government organ, from which the information is asked, against which decision it is permitted to lodge a complaint, has the position of the first degree organ. As per the provision Articles 1 and 2 Law on general legal procedure and Article 5 Law on administrative proceedings ("Official Herald of Federal Republic of Yugoslavia", no. 46/96) and legal understanding of this Court, the government organ resolving upon the request of the access to public information has the procession position of the first degree administrative organ, therefore in that matter it may not at the same time have the position of the party, nor to be the prosecutor in the legal case. The provision of Article 12 of ADA stipulates that the prosecutor in a case might be a physical entity, legal entity, or other party, if he thinks that the legal act violates any right or interest based upon the Law. In the concrete case, the Commercial Court in Belgrade is not the Party, as by the resolution of the Commissioner for information of public interest of the Republic of Serbia it was not deciding about any right or interest of the court based upon the Law, but it was deciding on the duty of the Commercial Court in Belgrade, as being the authorized organ of public government, acting upon the request of the party, the Claimant of the information. For that reason, the Commercial Court does not have legal interest to lodge a charge; therefore it has not legitimacy in the legal proceeding."

In contemporary democracies free access to public information is a precondition for quality and efficient instrument of work control of public government by the public, especially citizens.

The constitutional and legal framework in Serbia explicitly stipulates right to free access to public information and regulates procedure to acquire such fundamental human right. In that context, the Law on free access to information of public interest stipulates corresponding legal means to guarantee legal protection in obtaining this right. Apart from the complaint to the Commissioner in cases when the public government organ rejects request to access to information or does not act accordingly, there is a stipulated possibility of court protection in legal procedure.

However, the practice relating to legal procedures and acquiring right to free access to public information shows that there exits numerous situations in which the institute of administrative procedure is incorrectly used by the public government organ, especially in cases where they launch legal procedure against the resolution of

the Commissioner, although they are not authorized to do so. This practice makes damage to the effective obtaining the right to free access to public information by citizens and other claimants of information.

Having in mind years long practice of unauthorized launching of legal procedures against the resolution of the Commissioner, and considerable number of such cases, as well as numerous public warnings of the Commissioner relating the matter, it might be supposed that the authors of the new Administrative Disputes Act of Serbia were familiar with all circumstances in connection to this type of legal cases. Still, it remains unclear why among the provisions of the new Administrative Disputes Act there were not stipulated provisions to do the repair in a very clear and unambiguous way these serious defects in acquiring the rights of citizens to have free access to public information and prevent unauthorized launching of legal procedure by public government organs that are actually responsible for giving such information.

5. Conclusion: "What is to be done?"

Good administration, having at its core citizens' rights, represents today the dominant model of modern public administration.

Since 2000, the Republic of Serbia, dealing with the heritage of the past and the model of administration "as an instrument of government" undertakes reforms efforts to achieve "public service" model of administration. However, we can argue that, the public administration in Serbia is "on the way to be good" but the dynamics of reforms are slow and uneven.

In the European Commission's opinion on Serbian progress in 2012 public administration reform is proceeding "at a slow pace and is hampered by insufficient political commitment. The legislative framework needs to be completed and fully aligned with international standards. Implementation of the existing laws and strategy needs to be improved. Merit-based recruitment and promotion systems should be

developed and implemented. The follow-up of the recommendations of independent regulatory bodies needs to be stepped up."[195]

Serbia has an obligation to its citizens to take steps in achieving European administrative standards by implementing the principles of rule of law, reliability and predictability, transparency, accountability, economy, efficiency and effectiveness. "These are the steps that lead to European and international integration, to which Serbia and its citizens aspire."[196]

Nonetheless, it must not be forget that the transitions are often found in a constitutional mismatch between what the official documents and establish the level of social consciousness necessary to ensure their implementation.

[195] See: European Commission, *Serbia 2012 Progress Report*, COM (2012) 600 final, p. 9.

[196] See: Vlada Srbije, *Akcioni plan upravnih reformi 2009 – 2012*, [Action Plan for Implementation Administrative Reform for 2009 - 2012], p. 13. Available at: http://www.drzavnauprava.gov.rs/pages/ar ticle.php?id=1923)

CONCLUSIONS

In 2010, during the first year of my Ph.D. studies, I went in Siena to visit the Town Hall and to see remarkable frescoes of Ambrogio Lorenzetti on good and bad government followed by subsequent text:

> "This holy Virtue [Justice], wherever she rules, induces to unity the many souls [of citizens], and they, gathered together for such a purpose, make the Common Good their Lord; and he, in order to govern his state, chooses never to turn his eyes from the resplendent faces of the Virtues who sit around him."[1]

Additionally,

"Turn your eyes to behold her, you who are governing, who is portrayed here [Justice], crowned on account of her excellence, who always renders to everyone his due. Look how many goods derive from her and how sweet and peaceful is that life […] where is preserved this virtue who outshines any other."[2] (emphasis added)

These two statements, written more than six hundred years ago, emerge two important aspects of good administration: first, it is a concept accompanied by the justice. Second, it promises benefits to society which government respects the justice.

The principle of good administration has particular importance for the Western Balkan countries where the socialist experience and wars in the Nineties left a deep roots in the politics and administrative structures.

[1] The text within the lower border of the frescoe of Ambrogio Lorenzetti *Allegoria del buon governo*, Town Hall of the city of Siena, english translation found in R. Stefanini, *Inscriptions in the Sala dei Nove, Notes, Transcriptions, and Translation,* in R. Starn and L. Partridge, *Art of Power: Three Halls of State in Italy 1300-1600*, University of California Press, Berkeley-Los Angeles-Oxford, p. 265.

[2] The text within the frescoe of Ambrogio Lorenzetti *Effetti del buon governo in campagnia,* Town Hall of the city of Siena, english translation found in F. Nevola, *Siena: constructing the Reneissance city*, Yale University Press, New Haven and London, 2007, p. 4.

While for the other post-communist countries the European Union's door has been "conditionally" opened from 1993, for the Western Balkan countries in 2000, have been officially announcement their acceptance into the "European family".

The European Union through various programmes of assistance and supervision supports these countries to achieve democratic standards by transformation of their legal orders. The main EU instrument for harmonization of divergent administrative systems and a benchmark for evaluating candidate's achievements in the reform of public administration represents the concept of the European Administrative Space. The outcomes of the thesis confirm that the only formal part of this concept are the administrative principles recognized under the right to good administration enshrined in Articles 41 and 42 of the EU Charter of Fundamental Rights which could have served as a minimum standard throughout all the Member States, leading to convergence.

Driven by the European conditionality Croatia radically reformed its legal order and established normative formants in the area. In the last five years were adopted the new General Administrative Procedure Act, Administrative Disputes Act, the Law on Public Administration and other laws that should lead to an efficient and accountable public administration. The administrative principles have been modified and harmonized with the content of the fundamental right to good administration.

The European Commission Monitoring Report on Croatia's accession preparations underlined, as it has been already argued, that Croatia fulfilled increasingly formalized Copenhagen criteria, but still the process is on-going. The outcomes of the thesis confirm that Croatia has to make important future interventions in transparency domain by adopting the new Law on Right to Access to Information of Public Importance and introducing the specialized body such as Commissioner for the Information of Public Importance in order to provide complete and adequately protection to the citizen's rights vis-à-vis public administration.

The case study of Serbia confirms that the country made progress forward. As the main achievements in public administration domain could be considered the adoption of the Law on Free Access to Public Administration of 2004 (declared as the best law in the world in the area), and the Law on Public Administration of 2005. Judging from the words of the GAPA we arrive to conclusion that provided administrative principles recognizes rights and obligations comprehended under the "umbrella" right to good administration in Article 41 of the EU Charter. However, the

outcomes of the thesis show that the legislative framework is still incomplete and not fully aligned with the international standards. The General Administrative Procedure Act since 2004 Strategy reform plans wait its turn to be adopted and the Administrative Disputes Act is not in line with the present GAPA. The administrative procedures are very complex and slow which directly affects the quality protection of individual's rights and interests.

It could be concluded that the reform of public administration is on going process that require deep social, cultural, political and moral changes in these societies. Only then the good administration values could been fully recognised and implemented. Because, in the words of Mocavei:

"Many people still feel authority, and many officials, consciously or not, still behave like masters, or else they simply refuse to act out of an inherited fear of taking responsibility [...] The most basic elements of the law are not yet part of society's education and most have not the slightest idea how to react to protect their rights if they find themselves on the spot when stopped by a policeman, say, or when questioned by a state bureaucrat.[3]"

[3] M. Mocavei, *Legal culture in Romania,* in *East European Constitutional Review,* 7/1998, p. 79.

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INTERVIEWS

Interview with Prof. Luís Miguel Poiares Pessoa Maduro

1. Prof. Maduro, the Commission Communication on the Charter of Fundamental Rights of the European Union from 2000 highlights that "it enshrines certain new rights which already exist but have not yet been explicitly protected as fundamental rights, notwithstanding the values they are intended to protect, such as the protection of personal data and the principles of bioethics or the right to good administration".

Further, in the Explanations relating to the Article 41 (right to good administration) states:

"The right to good administration is based on the existence of the Union as subject to the rule of law whose characteristics were developed in the case-law which enshrined inter alia good administration as a general principle of law."

I would like to ask you, do you think that in some aspects the EU Charter goes further (with respect to fundamental rights). And if yes, in what aspects?

There are three different things through which we can assess this; first is the scope of protection of fundamental rights that is the „catalogue of rights". Second one is standard overview that is the degree of protection afforded to each one of these fundamental rights. The third one is the scope of application that is to whom does apply the charter.

It's difficult to know, because the court never really did a list before, it always was referring to the common constitutional transitions. It is certainly the case that charter may have some rights there that otherwise the court might not have recognized as arising from the common constitutional transitions but I'm not sure. On the other hand, I also think that it's still possible for the court to find that there is a fundamental right in the European Union legal order that is recognized as part of the common constitutional traditions of the member states and articles 6 and 7. That goes beyond what is in the charter. What we know is the following, is that, once the charter existed even when it was not legally binding the court was already referring to the charter as the best source to determine what were the common constitutional traditions, so the courts seemed to have perceived in the charter a kind of effort to determine what were those common constitutional traditions.

2. Prof. Maduro, With regard to the case law, it is clear that the General Court, unlike the Court of Justice, has demonstrated much more activism in protection of the fundamental right to good administration. Already, after its adoption in 2000, the General Court in max.mobil Telecommunication Service case used the principle to its full potential. It recognized that

"the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the

Member States". On the other hand, the first reliance on the right to good administration by the Court of Justice was in 2006.

In your opinion why the Court of Justice has been waiting so long?

First, the court is always more prudent and it's natural for the higher court to let lower courts sometimes to experiment on some areas before then adopting and embracing that. And it's not that the court of justice had not recognized that, maybe if you are looking at the judgements, I think if you look at the opinions of advocate generals you will see… For example, what is clearly the case is there are different possible explanations. One is, don't forget, that the general court has much more administrative law cases than the European Court of Justice, it works as an appeal court in that instance. Those issues, including reference to legal administration take longer to arrive at the court of justice and they are decided first at the general court. The second aspect is that aspect of prudence, taking a little bit of time, and what you see is that the court of justice waited thought the advocate generals started to make reference to the charter even when it was not legally binding. The court waited much longer before doing that. And it's just the court to a certain extent testing, seeing how the legal community reacts. That is natural in higher courts that let it take a little bit more time to let things solidify, so I'm not surprised for that. You see this at national level many times as well.
There is an important aspect that you will see is that an important aspect that you will see. The fact that there is now a right to good administration that is in the charter, even if we could say that such a right already resulted from common constitutional traditions, makes a difference for how the court will apply it and how often it will do it. Because the court is much more legitimate, it feels much more at ease to enforce that right and enforce it even with a stronger degree of judicial scrutiny if it is basing it on the basis of the charter and not simply appealing to this general, undetermined concept of common constitutional traditions.

3. Prof. Maduro, you were Advocate General in the case Sweden in 2007. In your Opinion you interpreted the Article 4 (5) of the Regulation No. 1049/2001 in the context of the fundamental right to access to documents and concluded that it cannot be recognized as a right of veto for the Member States. On that occasion the Court decided that the institution is itself obliged to give reasons for a decision to refuse a request for access to document. Could you tell me what you remember of the debate? Was it really evident for the Court that in the Sweden case there had been an infringement of the Regulation Article 4 (5)?

That is something I cannot answer, for two reasons. First, I am not a part of the deliberation among the judges. Second, even if I was, the code of conduct of members of the court prevents us to discuss the deliberation that took place in court cases. Paradoxically, I am more at ease discussing cases where I was not the Advocate General than those where I was.

4. One of the research questions in my analysis of good administration in the European Union context is what falls in the process of its constitutionalisation?
In the context of the double constitutional life of the EU Charter you wrote that "the Charter of Fundamental Rights represents the Constitutional paradox. It reflects an emerging trend to agree on the use of the language of constitutionalism in European integration without agreeing on the conception of constitutionalism underlying such language." What do you mean by that?

What I'm saying that in the particular case of the charter there was an agreement to have a charter of fundamental rights, but let's say there were two sets of visions, very different, on what that charter should serve for. For some the charter should be mostly an instrument to control and limit the powers exercised by the European Union. By instituting the charter we will control what the court will do because it will no longer be this vague criteria, it will be a list, a political process defined. The second reason is that the court will have an instrument that they will have to enforce clearly with respect to the EU political processes in imposing limits to it and what they can do and to guarantee that the institutions act respecting fundamental rights as national institutions do.
There was another vision of the charter and it is still very present, that basically conceives the charter as this repository. So the charter will be the document embodying the fundamental values of the process of European integration and in this light then the Charter becomes one more instrument of the European integration.

Interview with Prof. Nikiforos Diamandouros

1. Prof. Diamandouros, the European Ombudsman office is a body that has today more than 20 years of expertise in good administration promotion. I would like to ask you, on the basis of your experience, what are the main strengths and what are the main limits of the European Ombudsman's good administration promotion?

In terms of the strengths of the Ombudsman; the European Ombudsman benefits from the fact that it was modelled after the Danish proposal and therefore the Danish model. It has a very broad mandate, the mandate has been strengthened under the Lisbon Treaty to include all the institutions, bodies, offices and agencies of the European Union including the European Council which was not an institution before which now is under the Ombudsman mandate. So the only exclusion is the Court of Justice or the Courts in their judicial capacity. It is also important to note that the Ombudsman has the authority to supervise the Parliament which is hardly applicable anywhere else and the Ombudsman himself, my predecessor, made a determination to limit the Ombudsman himself to administrative issues concerning the Parliament and not political issues. But this is something that the Ombudsman himself introduced so it's a very broad mandate, it covers all institutions, it covers more than the usual Ombudsmen who do not have authority over the Parliament. I would not consider any kind of a major weakness or limitation, there is a point that has not yet been clarified in the law and in the case law and that is whether the Ombudsman can intervene before courts. This is not explicitly provided in his Statute, on the other hand the treaty of Lisbon explicitly provides that all institutions, offices, agencies and bodies may intervene before the court, therefore this would presumably include the Ombudsman, and ultimately it is for the court itself to decide whether to give leave to an institution to appear before it, that is a moot point. I think it would be important for the Ombudsman to be able to have that power. So far we have not sought to do that, and it would be for the courts in fact to respond, my own sense is that this is something that can be done, but I don't consider it necessarily a limitation but it is something that has to be tested at one point or another at the appropriate moment with an appropriate case.

2. I noticed a follow-up on your opinions from the more recent annual reports. How do you know if EU institutions and officials implement your opinions or not?

This is a good question. For 7 years now the Ombudsman has been issuing on an annual basis a report on the follow-up given by the institutions to the various recommendations or critical remarks that he makes. And that is important because the critical in further remarks that we make, the further remarks being that you find no

maladministration but you make suggestions for improvement. The follow up to critical and further remarks also provides that within 6 months of my issuing the report the institutions have to come back to me and tell me what they have done to make certain that this problem will not arise again. This year for the first time we issued our first ever compliance report. As of next year the old follow-up report and the compliance report will in fact be merged into one report. The compliance report gives us the possibility to be able to find out to what extent the institutions comply with my recommendations and the other old figure we came up with after very careful statistical examination is that the decisions comply at a level of 82%. That of course is a statistical average, there are institutions that have 100% compliance others could have 60, 65, 69 per cent but it's also important to note that the European Commission which is the largest, it's about two thirds of the entire civil servants of the European Union, also has a degree of compliance of 82%. I think that is the answer to your question that the institutions seem to comply with the Ombudsman's decisions in more than 4 out of 5 cases.

3. Prof. Diamandouros, in your speech on the occasion of the 10th anniversary of the European Ombudsman institution, you stressed that "each year the number of complaints increases and you will hardly be surprised to hear me say that I find this reassuring. I firmly believe that more complaints do not reflect worsening performance on the part of the institutions. For me, they rather offer clear proof that citizens feel that it is worth their while exercising their rights. Their action will help to improve the situation". In your opinion, did the situation improve? Does the number of complaint increase? Are this deeply changes in area of good administration in the last 10 years?

This is very interesting question. Since 2005, the number of complaints has gone down and I consider this to be an improvement. Why is that? Because, the major problem with the number of complaints historically to the EU Ombudsman was that a very large number of complaints came to us for the wrong reason, meaning, that there are two conditions which have to be met for a complaint to be admissible. First you have to have a breach of EU Law or an EU regulation and second by an EU institution. Now it's very difficult for most people however well informed that they are to understand that if there is a breach, let's say, of a EU Law in a Member State automatically it does not mean going to European Ombudsman because if there is a breach of EU Law at (let's leave Italy aside, Italy does not have a national Ombudsman so it's a problem, ok) but if you have a breach of National Law at a member state, unless it involves a European institution then you have to go to a National Ombudsman because subsidiarity requires that you deal with it at the national level. Most people don't understand that so the result is that between 65 and 70 per cent of all the complaints that come to me should have gone to the National Ombudsman. So when I made that speech in 2005, which was the year immediately following the accession of the 10 new Member States it had a very significant increase in complaints but we also had an even greater increase in the number of inadmissible complaints because the new Member States did not know enough not to come to us with the right reason. Since then what we did in 2010, I believe but you can check that, we introduced into our website a very powerful interactive guide in 23 languages which allow anyone who wants to complain to go into the website and to be guided by questions and answers of the interactive guide and answer by the mouse to determine what is the

appropriate institution that can handle the case. The result is we had about 25% decline. However paradoxical this is, the decline in the number of complaints is an indication of improvement in our performance because we are able now to help more and more citizens go to the right place the first time around. Last year through the interactive guide we had about 20,000 people who were helped. So that's the answer, the answer is we have had a fewer cases now about 2,500 but more cases that are admissible inside the mandate than before and the other thing is, it has also resulted in a significantly higher number of admissible complaints that my staff is dealing with.

4. Turning now to the issue of the standards that the Code of Good administrative Behaviour predicts I found and highlight in my thesis that the Code is an excellent example which shows that unlike the relevant legal norms (primarily the EU Charter), the Ombudsman's principles of good administration require much more from the administration. I underlined in my thesis that the lawful behaviour and the proper behaviour are not synonyms.

It is a very important point that you are making there, which is the way we phrase it usually is that an illegal act of the public administration is automatically maladministration, but the opposite is not necessarily the case. It is entirely possible for the civil service to act legally and yet breach the principles of good administration, therefore good administration is broader than the Law and that's why you have the distinction between legality and good administration.

5. With regard to the right to access to documents I noticed that the European Ombudsman provided a significant contribution in terms of transparency of the EU institutions and bodies. In accomplishing this task the Ombudsman did not only develop the norms of soft law, but also motivated institutions to adopt the rules which will follow in daily contact with citizens.

With regard to the transparency, however, the more recent case of 2012 the Commission's refusal to give access to documents concerning the United Kingdom opt-out from the Charter of Fundamental rights demonstrates resistance to the openness of administration. Do you have an explanation for this distrustful attitude of Commission to implement wider transparency?

This is a very important case but I have news for you. Since you saw this information, the Commission has now given the documents therefore in other words it has complied with the request of the complainant which was the NGO called ECAS (European Citizen Action Service) and therefore there is compliance there and the documents have been given.

6. In this case actually, generally there is historical resistance of openness in the administration. I was wondering do you have an explanation for this distrustful attitude of the Commission to seek the wider transparency? Transparency may be the most critical aspect of good administration today, do you agree?

Yes, I agree with you, but because you talk about historical dimension let's put it in historical perspective. The historical perspective is that transparency in the European Union as a legal concept is essentially less than 18 years old. It did not appear in the horizon before 1995 when Finland and Sweden joined the Union and they introduced this full notion of transparency. For them it's a much older tradition, goes back to the 18th century in Finland and Sweden, but clearly in the European Union it is post Maastricht therefore the Regulation 1049 which concerns transparency, access to documents, is 2001. So, it's 12 years old. So from that perspective there has been a very very important evolution and very important development of opening up so it is in fact a case today that the European Union in general is extremely transparent. And because the degree of transparency is very high. Now, this having been said, indeed there are issues there and the issue is again to be understood with the fact that if you have 10 years of this legislation, the Regulation 1049, against 50 years of no transparency then you have to appreciate the fact the civil service is learning about transparency with very many of them came into the system in the old regime where the rule was that documents are confidential and can be given out at the discretion of the institution. With the regulation we turned the whole thing completely around and we have new rules; all documents in the possession of the institutions are by definition public and must be given out unless for very specific exceptions written in the law and nothing else. So this is the context in which to see that with this kind of context the answer is that there are in the institutions lingering and continuing hesitations; so the Commission is not an exception; the Commission is the biggest institution and therefore it has the most complaints. This particular case that you mentioned shows that it has actually learned more because it said no at the beginning and then it gave them. So I am satisfied that the Commission and the institutions are in fact learning and beginning to give, to allow for more transparency. This however does not in any way imply that the European Ombudsman as an institution or myself as an individual can relax about it. In other words, we continue to ask for more transparency where that is possible but we also are mindful of the fact that transparency is not an end in itself. Transparency is an end to more accountability it's an end to a better democracy and therefore you have to balance, as the case law of the courts says, transparency on the one hand with the right to privacy or data protection. And we have important case law, most notably the well-known case of Bavarian Lager, which essentially says that you have to balance the regulation on access to the regulation on data protection, the Regulation 1049 to the Regulation 45 when deciding. So the long answer to your question is, yes there are instances in these institutions and in the Commission where there is resistance to increasing transparency; yes there are areas of continuing controversy and difference of opinion between the institutions and the Ombudsman about particular areas. And these have to be acknowledged that they have historical roots because until 2001 everything was in fact confidential but therefore the major advance has been that we are opening up the horizon and the field of application increasingly to the benefit of the citizens.

7. Finally: on the base of your experience, what has been the greatest success in the European Ombudsman institution in promotion good administration in the European Union context?

It is very difficult to identify one success as the greatest success. I think, it would be better to say to you that the Ombudsman has been pushing forward a cumulative process of increasingly advancing the frontiers of good administration, pushing back the problems concerning maladministration. In that realm clearly the Code of good administrative behaviour is a very major achievement because it provided clear, succinct and easily identifiable rules, in fact I can show you but you cannot record it, (he shows a website) but this is the prototype of the new addition of the Code which will come out in the next two months and it's not changed at all in terms of basic principles, it has a different forward but the basic principles remain exactly the same. So this is one major achievement. From then on I think the major achievements are the Ombudsman's capacity to be able to profit from the now legally binding Charter of Fundamental Rights.

Yes, the right to good administration - Article 41.

Article 41 is now legally binding on all the institutions and therefore there is legal force to that, so that is a major impetus, assistance and help to the Ombudsman. I think it's also important to record that the Ombudsman's efforts to try and reach out to the citizens and institutions and educate the institutions about their obligations to serve their citizens is another achievement. In July 2012 we published a small leaflet that you can find on the website called "Public Service Principles for EU Civil Servants" again trying to promote ethical principles of good behaviour. So these are the major achievements promoting transparency, pushing the frontiers of transparency and accountability and of ethical behaviour, educating the civil servants about their need to be attentive and to apply both the land good administration and fundamental rights and the increasing compliance of the institutions to our recommendations.

Interview with Mr. Rodoljub Šabić

1 Mr. Šabić, the Commissioner for Information of Public Importance is a body that has nearly 10 years of expertise in the promotion of the right of free access to information of public importance in Serbia. What are, on your opinion, the main benefits and what are the main constraints to promote the right to free access to information of public importance?

The Law on Free Access to Information of Public Importance is the only Serbian law that will probably be declared the best in the world. In an independent expert report, drawn up by the European organization Access Info Europe and the Canadian Organization Centre for Law and Democracy, this law narrowly defeated neighbour Slovenian law that was otherwise largely the basis for the development of our law. So we have a normative framework that is high quality. The law is based on the excellent liberal ideas and has a very broad approach. Therefore it is a very solid foundation for the realization of rights. The other question is of course the operation in practice. You know, a good law in Switzerland and in the UK and a good Serbian law does not mean the same thing. Some mechanisms of the law here do not work even close to the way they should. The first thing is the quality which is evident since the public has recognized that this is a very good tool for democratic control of government. For now the Commissioner is probably best recognized for his anti-corruption potential, judging by the orientation and concentration requirements. Although the claims and complaints related to all aspects of life are possible, but the lion's share is concentrated on money, privatization, public procurement, etc. The number of cases, you can verify on my website, is huge and constantly growing which shows that the institution established itself as one in which citizens have confidence and that is very important and something I always stress. You know, it would be logical that a journalist or a professional would recognize some tools, but the fact that regular people are working with the Commissioner shows the main quality. However, the biggest problems relating to the implementation of the law has to do with what I said at the beginning, i.e. The application of laws in Serbia is one mindset that is still far from understanding the rule of law. The main problems we have in the area of enforcement of decisions of the Commissioner and the responsibility for breaking the law.

2 Do you think that the Serbian public is sufficiently aware of the right to free access to information of public importance? Does the public use that right? In the period from 2004 until now is there a trend of increasing public interest in the exercise of this right?

Sure. Today is completely normal to ask for access to information, and even very often without the need for intervention by the Commissioner, they receive information that four or five years ago no one would dare to ask. It confirms all reviews conducted by foreign observers and experts that Serbia in this respect has probably done the most in the region. The percentage of successful interventions by the Commissioner is of over 90%. I'm sure many colleagues from Western democracies would envy me. You know, nowhere can you obtain everything you request. Even without access to basic resources I handled a

promotional campaign which was unprecedented. The whole story now is to improve the process.

3 By reading your reports, I noticed that you pointed out that most of the demand is coming from the citizens. However, at least according to your report from 2011 the statistics, show that the requirements of the Access to Information are satisfied first for the media, NGOs, political parties, and lastly for the citizens.

It is the fear of the media and specialized organizations such as Transparency Serbia or some other respected authority. What is not indicated is that up to two thirds of the cases that I receive I do not have to formally order the requested information. Very often, right after my request to the authority to clarify why they denied the right, the authority says "fine we will give you the requested information".

4 Mr. Šabić, I came across interesting information in document written by the Open Society Institute in 2006 in connection with the exercise of the right of free access to information of public importance. The point is that thanks to one citizen, who in the process of exercising of this right, discovered one of the biggest scams in the past 10 years in Serbia. We are talking about the public fund "Roads of Serbia". How frequent are cases in practice which detect irregularities of public administration in such a way?

Not rare. Here I'm just finishing a project with the support of the British Embassy, although it's not really my job, but they insisted that I be the promoter of the project, and I accepted. It is about the protection of whistle-blowers. You will find it on my blog, there is a story of an insider, etc.
People often give serious benefit to the authorities concerned and they would give even more benefit if the authorities handled the information as they should. I warned, if you noticed in the last report, that there are a relatively large number of outstanding decisions of the Commissioner for Public Information, which involve public companies.
Here's another illustration. I will brag with these 24 famous privatizations affairs identified by the European Union. 15 or 16 of them were in this office. Now imagine a situation in which the working body of the Government of Serbia turns to the Commissioner in order to access information about the work of entities that the same government controls. Not to mention that I have a significant number of complaints received by the public bodies against public bodies. This is extremely worrying and it is clear that party interests have fully penetrated all spheres. I should actually reject such requests. There should be a principle of coordination, common purpose, collaboration, everything that is fundamental for normal administration.

5 Mr. Šabić, I noted that one of the main obstacles in exercising the right to free access to information of public importance is the so-called "silence of the administration". Thus, according to the information in your annual report from 2011, 94.4% of the requests that were made to you were actually cases of "administrative silence". In your opinion, how can

such a high number of cases of ignoring the public by the public administration be overcome?

This is a situation in which the subject approaches another authority to complain because a public authority did not act in time to their request. This establishes another procedural situation. Therefore, these may not be illegitimate situations. According to the Law on Free Access to Information administrative silence is not allowed. If a public authority does not comply with the request within 15 days or possibly within 40 days provided that the period is extended in time due to the complexity of the procedure does then there is no administrative silence. Not complying with these requirements is a punishable offense. Unfortunately there is a huge number of complaints about "administrative silence" which tells you again about that my argument "if you do not complain to Šabić we will not give him any."

6 In your report, I noticed that in cases of refusal of access to public information the reason which is usually stated is for the protection of privacy and confidentiality of documents. Given that you have a dual role and are responsible for freedom of information and protection of privacy I am interested in your opinion on this phenomenon? What is actually the ratio of the Law on Free Access to Information of Public Importance and the Law on Protection of Personal Data? Are they aligned with each other?

I really advocate for the rights of the general public, but secrecy and privacy are legitimate reasons for restricting access to information. It is a question of measures and circumstances. When we talk about privacy I think it's the most legitimate goal for restricting the rights of the public. The Republic of Serbia has a solution that has become fashionable, Slovenia has already implemented it and a growing number of countries are working on it. The solution is based on an organ that protects both rights, something like a two headed eagle. Initially there were discussions whether this solution was a conflict of interest.
Accepting the dual function body is forced to create a standard, to find the right balance and that standard is respected. I think that we succeeded. I have to repeat that the policy for privacy is my priority. I can say that privacy is not even close to being protected in this country. We have this relic of the past, of collective consciousness. We have a very bad tradition. Today half of the population of this country says "Šabić, why are you complaining about eavesdropping, I'm an honest man, I have nothing to hide."
When we speak of the Law on free access to information, it is the law that provides access to information in the hands of government. Most conflicts in relation to the protection of privacy on the occasion of the opening of a state official attempts or position, to protect privacy. Here we must be aware of the fact that the international standard and standard I represent is different. Your right to privacy is much bigger than mine.
As for government secrets that situation is dramatic. We do not know in this country, what encompasses a government secret. We inherited from Tito and Milosevic some kind of a conglomerate and then few years ago we passed the law on confidentiality. When you read the law, it looks like the laws of the countries in the European integration process. Deleted

are some concepts that are still in the subconscious: top secret, military secret. We encounter these terms daily.
The Criminal Code states that it is a crime to disclosure military secrets. How do you go after someone for something that does not exist? I have warned the Government and the Council that this is unacceptable from the standpoint of safety and legal security.
What is it? We made a law which has classification of documents but in the law we wrote that the government regulation will establish detailed criteria for the classification of documents, and these criteria are to decide whether something is confidential or a state secret. However, this has not been done. The fact that classification of documents did not happen is my problem.
There was a typical situation when a reporter asked the Ministry of Internal Affairs for data about the costs for the equipment to produce biometric documents (passports and identity cards). He asked the price and specification of these documents. However, his request was denied. When asked why he was told that was the secret according to their Regulations. When he asked to see the Regulations he was told that he could not because it was also secret. The reporter spoke to the Commissioner. It turns out that the Regulations in this case were written in mid XX century and was signed by the Secretary for Home Affairs of the Socialist Republic of Serbia. Such acts are now restricting the rights of citizens. After my intervention that Regulation was taken out of force, but who knows how many more documents such as this one exist.
I once said that Serbia has more secret documents than NATO. People commented that I was joking but I'm not joking at all. I'm sure of it. First, we do not know how many documents we have. We do not even have an inventory. The confidentiality law was written, and the state authorities had two years to review all documents in accordance with the new standards. At the time I criticized the fact that they didn't define what will happen after two years if the officials do not do the proper review. Of course, they did not do anything. Not a single document was declassified except those which were specifically requested.

The government needs to do its job. The law is bad and I am convinced that we should enact a new law on confidentiality and resolve the issue. To make it clear the Commissioner is authorized to declassify a state secret. In proceedings in which a citizen, a journalist or a similar appeal against the decision of the state authorities because they refused to give him a document that is classified, I have the power to remove the classification even if it is a state secret. And that's what I did. In about 700 cases the Commissioner ordered declassification of secret documents.

7 Mr. Šabić, the Law on Free Access to Public Information provides two modes of administrative litigation. First, in the case against the decisions of some state authorities appeal to the Commissioner is not permitted. Second, against resolution issued by the Commissioner an appeal filed by the applicant. Both modalities of administrative dispute sparked appropriate legal controversy, especially in the situation regarding the lack of authority of the public authority to initiate administrative proceedings against the Commissioner. Despite numerous warnings by the Commissioner, the Law on Administrative Disputes Serbia from 2009, has not defined this important issue?

From the standpoint of the interests of the Law on free access to information you have two mechanisms. One is reserved for the top 6 state agencies and the other for the rest of the state agencies. This is a long abandoned Soviet concept.
I place a big question mark to the fact that this law is virtually not used. There are thousands of complaints to the Commissioner each year and maybe a couple of dozen complaints regarding administrative proceedings against the 6 bodies. How does one explain this? The Commissioner does not have jurisdiction over the 6 bodies. Majority of complaints filed with the Commissioner against the 6 organs were inadmissible and therefore I had, for procedural reasons, to reject them. Only a small number of claims filed were allowed to get to the Supreme Administrative Court. So, there is definitely something wrong.
I have interesting information as for the claims against decision made by the Commissioner. It is interesting to note that half if not more than half of the complaints filed against the Commissioner's authorities were filed by government agencies. These are fraudulent charges. General judicial review of the Commissioner, from the statistical point of view, is extremely affirmative to the institution.

8. Based on your experience, which is the biggest success of the Commissioner in promoting transparency in Serbia?

You know it's hard to single out individual segments. It is a process that is irreversible and of high quality.

And it's definitely progressing?

True, it is in constant progress in both quantitative and qualitative terms. And it shows. And the number of claims submitted each year to the authorities and by the number of complaints submitted to the Commissioner and all the other things that are affirmative. The things on which I now insist on, out of principle, is the responsibility. The decisions of the Commissioner are final and binding.

Unlike the Ombudsman, whose recommendations are not legally binding?

Yes. Indeed, most cases are handled according to the decisions of the Commissioner but there are a number of cases where they do not comply. When authority does not acts upon the decision, even if it is written in the law as a legally binding decision. Then what? There were changes made to the law that authorized the Commissioner. The Commissioner may now impose a penalty of the total amount of 200,000 dinars to force execution. The problem is that state authorities in some cases do not act on the decision of the Commissioner and they just pay the fine from the state budget. The state authority pays a penalty with state funding. This is a serious problem.