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Potentials of Administrative Procedures as a Participatory Tool within Governance Models in Central and Eastern Europe

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Abstract

Good public governance requires participative networking to tackle the worst societal problems. Redefined administrative procedure as an instrument that should ensure efficient public policies is one of the key approaches in this respect. The objective of this article is to show, based on qualitative research methods, that in modern public administration, procedure is attributed a much different role than under the traditional *Rechtsstaat* doctrine. It has been evolving towards becoming a dialogue tool for the state and the citizens, increasingly recognised in Neo-Weberian and good governance models, also in Central and Eastern Europe (CEE). Administrative procedure's modernised codification in CEE countries, grounded in public administration theory, EU and case law, is in this article seen as of the utmost importance to apply in the region to develop its governance capacity. The article addresses said issues and provides a specific outline as to how to systematically and proportionally codify administrative procedural law in this sense on a national scale. The author proposes a concrete, holistic outline to redefine respective codification within contemporary public governance models. This outline incorporates minimum joint fundamental principles, e.g. the right to be heard. Following the principle of proportionality, in addition a more detailed codification is suggested by more formalised proceedings in the case of the collision of legally protected interests. The principles, such as participation, would apply for any administrative acts, resulting from legislative policy-making or single-case decision-making, and judicial reviews thereof alike. Such an approach should ensure a balanced recognition and effective protection of parties and public interest.

Keywords

Public Governance, Administrative Procedures, Codification, neo-Weberianism, Central and Eastern Europe

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I. Introduction

Given the emergence of some new aspects of administrative relationships and public governance – e.g. transfer of sovereign state powers to the European Union (EU), privatised delivery of public tasks outside direct administration, transfer of value-determined decision-making from (once exclusively) the parliament to lower state bodies, etc. – new methods of public governance have become a necessity (Rose-Ackerman and Lindseth, 2010; cf. Hofmann et al., 2014). Since administrative procedure is a typical tool or method for implementing public policies (political authoritative actions supported by common good), this, too, must change, as method and form should match the content regulated. The aim of this contribution is hence to provide a development and comparative analysis of, in particular, decision-making procedures involving the rights, legal interests and obligations of individual parties in their relations with public authorities by applying general law to the specific and factual situation, as mainly understood in a post-socialist Central and Eastern European (CEE) setting (Kovač and Bileišis, 2017; cf. Ongaro and van Thiel, 2018).

Public governance as conciliation of interests and regulation of the relations between people, organisations and other stakeholders in a society, aims to pursue (most) broadly recognised values and general interests. Thus, good (public) governance is becoming increasingly important, attributed to an ever more complex life, globalisation, and crises as a result of limited resources, both generally and in administrative, otherwise static legal relationships. The contemporary model of good governance involves power being exercised through participative strategic partnerships in both the economy and the civil society. A system of governance with soft law that is agreement-based since it is adopted in cooperation between public and private entities. Here, democratic reforms are conducted by means of networking and open structures, and not authoritatively with a top-down approach (Bevir, 2011; OECD, 2017). Stakeholders' participation in public policies, if the latter is understood as a governance system, is an inevitable part of administrative affairs (Dunlop and Radaelli, 2016). This is often even an international (see Galetta et al., 2015) or a constitutional right. The general participation-related rules include authorities' obligation to gather proposals of general and expert or interested public, publish draft decisions before their final adoption, and to reason any authoritative decisions, if necessary through judicial reviews. Public participation means that citizens and other parties are assigned a proactive co-regulatory role in the modernisation of legislation. One of the key functions of administrative procedure rules is, *inter alia*, collaboration between the administration and the stakeholders concerned. Moreover, one aspect of the essence of procedural law, in the context of legal certainty, is to break down the course of action as specifically as possible, in order to achieve the objective of the procedure governed by law, while necessarily enabling the participation of all legitimate participants. This allows, irrespective of the merits of the case, a catharsis of the legitimate participants' interests (Kovač, 2016). Hence, in addition to instrumentality and the protection of administrative principles under international law, the basic participatory rules are also an expression of other functions of the procedure, such as the acceptability of decisions, the substitution of judicial protection, and promoting economic and investment development, etc.

In such context, administrative procedure law is co-regulated together with the addressees and enables a consensual conciliation of potential opposing interests. In a system of good governance, the state (only) ensures authority and protection of the general societal interest, and is not the exclusive or primary holder thereof. In development terms, the concept of good governance means that state actions are less authoritative and centralised and rather more service-based and decentralised. In consequence, the changes in the society necessarily result in the changed role of the state in exercising power, which inevitably affects the role and modus operandi of public administration.

These changes have been going in two complementary directions: the development of democracy and partnerships with decentralisation of power, and a commitment to efficiency to improve competitiveness, boost economic progress, and achieve the goals of the governing political options (more in Bevir, 2011). The modernisation of public administration into a cooperative good administration is thus both a tool and a target for a state to change its public governance from mere administration to integrative governance and social progress (e.g. see, for Slovenia and broader region, Kovač and Bileišis, 2017). Thus, the participants of administrative relationships – public authorities, providers of public service tasks, and public service users – are forced to change, to be adaptive, responsive, dynamic and fast. However, in public law relationships, the powers of authoritative structures are well determined owing to possible arbitrariness or abuse of social power. Public, and above all administrative law – committed to protect public interest – has been regulating such relationships for centuries at the infra-, supra- and national levels, in order to make them stable and predictable, to restrict authority and even the majority will when the latter would infringe upon fundamental human rights or the rights of protected minorities. Thereby, it achieves legal certainty and turns the concept of legitimate expectations into practice (Venice Commission, 2011; OECD, 2017). Yet law should not be rigid and hinder the necessary changes, but should instead provide the method and content, and consequently an adequate interpretation thereof. Hence we explore in this article several future trends of understanding and regulating administrative procedure as a tool of enhancing good governance.

The objective of this paper is therefore twofold. First, based on the development of governance models over time and given administrative traditions (in CEE in particular), we try to identify the redefined role of administrative procedures. Moreover, an analysis is made to define current systemic bases for the codification of administrative procedures in a more proportionate and participative way than understood traditionally. Second, we aim to elaborate concrete suggestions, which principles and rules should be incorporated in various parts of codification, addressing different types of proceedings. The main research questions to tackle are the following: (i) Are present laws on administrative procedures satisfactory to serve up-to-date societal needs? (ii) If this is not the case, in which direction and content should the respective codification be redefined? These questions are elaborated through literature overview, historic comparisons, comparative insights on the best role models and theoretical analysis.

The paper is structured into several sections. First, we explore the role of administrative procedures within the contemporary authority system and various governance models, in particular taking into account the neo-elements of classical Weberian theory (section II). Further, section III is dedicated to the necessity of a holistic approach in procedures' codification. Hereby, concrete suggestions are put forward, as to what are the favourable parts and the level of detail of Administrative Procedure Act in order to optimally address all relevant relations between administrative authorities and private parties. Section IV is discussion-oriented and aims to explore administrative procedures as a participatory tool that leads – if codified and implemented correctly – to sound new or good public governance, encompassing also neo-Weberian elements. The latter means simultaneously democratic and efficient administrative relations. This goal is worthy of effort, especially in circumstances of post-transitional processes in the CEE region.

II. Role of Administrative Procedures in Contemporary Public Administration

Governance in general and the delivery of public administration tasks in particular are divided between the need for rapid adjustment and legal soundness as a guarantee of the rule of law (*Rechtsstaat*). Administrative procedure in this respect is a key process of public governance at the instrumental or technical-operational level. Therefore, most countries codify administrative procedure at least partly by means of a general law, others by means of sectoral laws, and some by codes. In terms of development, the need to regulate administrative procedure(s) is based mainly on the primary provision of legality, impartiality, the rights of defense, etc. Therefore, convergence in the (meta)regulation of administrative procedure(s) or the convergence of its content are no surprise.[2] Throughout history and today still, Central and Eastern Europe has also been subject to reforms in such regard. A common characteristic of almost all the countries in the region is that at least at a declaratory level they also integrate elements of good governance and good administration in their horizontal legislation (Venice Commission (2011), OECD (2017) and Galetta et al. (2015), e.g. transparency, effectiveness and efficiency).

It needs to be noted, however, that the concept of the rule of law and the role of administrative law in the (post)communist sphere may well be formally established in the sense of the administration being a service for the people, while in practice it is merely a tool for partial political interests.[3] Also for such reason, based on the European Code of Good Administrative Behaviour (2005) and Council of Europe acts, the Charter of Fundamental Rights of the European Union from 2010 (OJ C 83/389) regulates in Article 41 the right to good administration as one of the fundamental citizens' rights. This principle or set of rights are a guarantee that one's affairs are handled impartially, fairly and within a reasonable time, and include: the right to be heard, the right to have access to file, the obligation to give reasons for decision, the right to use official EU languages, and the right for compensation of any damage caused by Community institutions or its servants while performing their duties.[4] On these bases, the draft EU APA has been prepared as the

[2] See Peters and Pierre (2005), Statskontoret (2005), Rusch (2014).

[3] More in Galligan et al. (1998), Koprić (2005), Kovač et al. (2012).

[4] In detail, Hofmann and Mihaescu (2013), see also Hofmann et al. (2014), Meuwese et al. (2009), Kovač (2016).

European Parliament Resolution of 9 June 2016 with a Regulation for an open, efficient and independent EU administration.[5]

In restructuring the vision of the state and its functions, an important objective in CEE countries in the 1990s – most often due to external, supranational incentives (EU, OECD and the World Bank) – was the need to introduce managerial practices into public administration. Given the specific socio-political and economic circumstances of that time, the primary goal of introducing New Public Management (NPM) in those countries was in fact quite different from the one pursued in older democracies. The latter primarily saw NPM as a tool for upgrading the democratic system-making, while the former initially saw it as a tool for stimulating effective and efficient ways of a democratic system in general and only later as a means for modernisation and adaptation (Vintar et al., 2013; Kovač and Bileišis, 2017). As time passed, however, the understanding of NPM as the ultimate stage of development in the sense of a "Neo-Weberian" administration was also overcome in CEE (Table 1).

Table 1: Major problems and development trends in CEE public administration

Core elements of the Neo-Weberian State	1991 levels	2018 levels
1. "Weberian" elements		
State as the main facilitator of societal problems	High	High(er)
(Reaffirmation of) The role of representative democracy	Medium	Medium
(Reaffirmation of) Basic principles of administrative law	High	High(er)
(Preservation of) A public service with a distinctive status, culture, terms and conditions	Medium	Medium
2. "Neo" elements		
(Shift from) Internal orientation towards external orientation, meeting citizens' needs	Very low	High(er)
Rationalisation on resources and performance management with from ex-ante to ex-post control	Low	High(er)
Professionalism of public service (joining up legal expertise and managerialism)	Low	High(er)

Source: own, based on Pollitt et al. (2008/09)

[5] There are many countries that adopted APA: Austria, Bulgaria, Croatia, the Czech Republic, Estonia, Germany, Italy, Japan, the Netherlands, Poland, USA, Slovenia, Spain, Sweden, Switzerland, etc. New laws are being drafted in the EU candidate countries and the EU itself (see Resolutions of the EU parliament of January 2013 and June 2016; the one from 2013 with Recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)) and the one from 2016 with Proposal for Regulation of the EP and of the Council for an Open, Efficient and Independent European Union Administration (2016/2610(RSP)); see especially the formal and societal grounds for their adoption. Cf. Galligan (1998), Peters and Pierre (2005), Meuwese et al. (2009), Rusch (2014), Sever et al. (2013), Auby (2014), Galetta et al. (2015).

Considering the Austro-Hungarian legacy, in most of CEE the administrative procedure continues to be conceptually understood (merely) as authoritative decision-making but pursuing fundamental principles of public affairs which seem to be a ground to further build on. Yet, as pointed out by, for example, Barnes (in Rose-Ackerman and Lindseth, 2010), such classic distinction on individual authoritative vs. general decision-making is nowadays becoming more and more blurred as a result of the interaction between law-making and implementation. This is also a reason why, outside the Central European context, theory and international organisations (e.g. the Council of Europe)[6] have been using the terms "administrative procedure", "administrative matter" or "administrative relationships", etc. for decades to designate various administrative actions towards the addressees. Moreover, this applies to both levels, i.e. (i) when deciding on individual matters as well as (ii) in relation to the regulatory and other functions of administration performed by the administration, i.e. the Executive (OECD, 2017). In theory, two groups of administrative procedures are distinguished (e.g. Galligan et al., 1998; Hofmann et al., 2014), in which either individualised or policy-based decisions (policy-based decisions with general effect, regulatory acts, rule-making) are made. The concept of the rule of law and today's classic principle of separation of power and the system of checks and balances require that in (public) decision-making, the axiological, factual and methodological premises are taken into account, whereby higher public governance gives greater emphasis to values while lower public governance attributes greater importance to facts and methods (Pavčnik, 2007). However – given the transfer of regulation from the parliament to the administration7 and the value-driven implementation and creation of fair law – this is a rather theoretical discourse.

The above dichotomy was further elaborated (by Barnes in Rose-Ackerman and Lindseth, 2010; Vigoda, 2002), considering the extent of impact of the issued administrative act as well as regulation and practice at the level of the EU. Here, three generations of administrative procedures are defined, depending on the characteristics of regulated relationships (singularity or plurality) as well as on their historic development. The first generation refers to administrative and judicial procedures for making individual decisions in administrative matters (i.e. individual decision-making), including adjudication, with an emphasis on the judicial method with relations of subordination and supremacy, both between the parties and the administration, between lower administrative bodies and higher bodies, and between administration and the judiciary. The second generation of

[6] A broader understanding of administrative procedures was introduced at the regulatory level by the US APA as early as 1946. Also in Germany recent theory assumed a broader understanding of administrative procedures (*Verwaltungsverfahren*), i.e. the issuing of individual administrative decisions as well as procedures to design executive acts (*Gestaltungsverfahren*) issued by the government. The classic understanding of administrative procedure is, however, much narrower and merely relates to decision-making in concrete individual administrative matters (cf. Künnecke (2007), Rose-Ackerman and Lindseth (2010), Auby (2014), Rusch (2014), Hofmann et al. (2014). One of the rare resolutions dealing only with individual administrative matters is the 1977 Resolution No. 77 (31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities. More recent acts relate to both the adoption of general rules and individual decision-making, for example the European Convention on Human Rights (Article 6 on fair trial) or CM/Rec (2007)[7] on good administration. Cf. Perrou (2014), also for sector-specific issues, such as tax matters.

administrative relations involves rule-making at the level of administrative bodies, either national or, e.g. European regulatory bodies developed after World War II in the US and European countries, particularly in the 1960s with an explicitly regulatory method and the parliament being hierarchically superior to the executive. Most important, however, is the shift in the case of the third generation, including procedural arrangements with the addressees of future general regulations, i.e. procedures to reconcile interests in drafting and enforcing public policies (procedural arrangements, public policy cycle). These third-generation procedures – a hybrid of the first two generations with added value – comprises both individual and regulatory procedures, as well as administrative participation in public policy making. It is based on good governance as strategic partnership public governance. Contrary to the first two defense-oriented generations, the third generation focuses on creative partnerships between social groups and thus provides greater legitimacy for public policies or authoritative decisions (cf. Bevir, 2011). These procedures involve more than just decision-making – they represent a system of communication and coordination with the regulated subjects. In the context of good governance and good administration, the task of the administrative bodies in implementing administrative procedures is not only to ensure fairness (particularly the participation of the parties and impartiality; *audi alteram partem, nemo iudex in causa sua*), but also to provide for the just distribution of public goods, transparency, accountability, rationalisation, and networking through collaborative public administration. Here, the administration must build on the principle of respect for human dignity.[8]

The essence of procedural law is thus to analyse in as much detail as possible – in the context of legal certainty – the course of action to achieve the goal of the procedure regulated by law. Here, it is necessary to provide the possibility of participation to all legitimate participants, which – irrespective of the subject matter of a case – ensures a catharsis of their interests, a possibly higher degree of acceptability of the decision regardless of one interest prevailing over the others, and broader action in the sense of the rule of law (Kovač et al., 2012). In the procedures that do not (yet) involve decision-making, the objective is to reach consensus among the affected parties. In authoritative procedures, consensus regarding the subject matter is replaced by the expectation that the competent body will make a well-argued decision. Then, the affected parties accept it as legitimate (Schuppert, 2000; OECD, 2017). Hence, it can well be said that the procedure is a tool of democracy, while participative administration or good governance between public, private and the third sector has an aggregate function.

[8] See Harlow and Rawlings (1997), more on principles in Sever et al. (2013), Hofmann and Mihaescu (2013), Galetta et al. (2015), Kovač (2016). Regarding collaboration, see more in Peters and Pierre (2005), and especially Vigoda (2002), who differentiates several levels of collaborative administration, i.e. (a) coerciveness, (b) delegation, (c) responsiveness, and (d) collaboration.

III. Role of Administrative Procedures as a Key Factor for their Holistic Codification

Administrative and political sciences study the bodies responsible for the implementation of public policies in relation to regulated subjects irrespective of whether they belong to the executive, including administration, or the legislative branch of power, whether they are state bodies or holders of public authorities outside state administration. Thus, particularly in US theory (see Peters and Pierre, 2005), administrative procedure is studied as an outcome or tool of implementation of state authority, both in terms of adopting general administrative rules and individual decisions or administrative procedures as a key aspect of administrative reforms, together with the organisation of power and the civil servants' system.[9] However, the modernisation of administrative behaviour is present only if it pursues the new concepts of the role of the administration in the society, whereby it is necessary to break the illusion that any change of a law is also an improvement thereof. Therefore, the role of administrative procedure is determined by the role of the state in the society, the tasks of the authorities, as well as by the understanding of the principle of separation of powers, particularly between the parliament and the executive, i.e. the constitutional system. The latter is conditioned by the selected governance model, which in turn influences – depending on the level of participation – the definition of administrative procedures or their fundamental principles either in individual or also in general matters (see Hofmann et al., 2004, Book I).

In such regard, administrative science (*Verwaltungswissenschaft* or public administration as a discipline) as a theoretical framework of administrative procedures' study is indeed a social empirical science studying governance rules, economic elements, political institutions as well as regulations concerning administration, and can thus also be considered a political science. On the other hand, in addition to private legal relationships, legal and administrative law science also concerns the authoritative definition of the relations between the subjects in order to coordinate their interests with other legally recognised interests. At the regulatory level, such is defined by the regulator and other issuers of general acts, while individual authoritative acts are issued by courts and administrative bodies. Administrative procedure is thus understood objectively, i.e. by the object of its consideration, namely the confrontation of individual legal interests and public interest given the applicable sectoral regulation and concrete facts of the case, and not subjectively, depending on the parties involved, where one party is a public body while the other is a private and subordinated person.[10] Administrative law science can thus be considered an intersection between law and administrative science since – by defining existing and ideal relationships between the administration and other parties to, in particular, legal procedures of the administration or issuance of (authoritative) administrative law acts – it aims at ensuring the rule of law.

[9] See Rusch (2014), Koprić and Đulabić (2009), Hofmann et al. (2014), Ongaro and van Thiel (2018).
[10] More in Schuppert (2000), Künnecke (2007), Kovač et al. (2012), Hofmann et al. (2014), etc.

Public administration, considered as authority and as institutional framework for the delivery of public services within public governance, acts at an executive-administrative and operative-technical level since – by means of general and individual administrative acts and material acts – it provides for the achievement of the political level or implementation of public policies adopted at the highest level, i.e. in a democratically established parliament (or municipal council). Administrative procedures and administrative matters (may) thus imply any activities between public administration and subordinated parties (Kovač et al., 2012). A uniform model should therefore be developed, with simultaneous differentiation (Table 2). If procedural law is to exceed its current role in which it more or less supports the goals of the governing political option by means of valid substantive law regulations or substantive law-driven rules (e.g. legitimisation of parties in the procedures) and become a driver of development of the public administration (also in CEE), it will be eventually necessary to radically alter the regulation of administrative law relationships. Administrative procedures should thus be regulated comprehensively, by means of an umbrella »code of administrative procedure« for all administrative activities, not only for individual authoritative decisions. It would also be logical to expect that, given the same subject matter of procedure and despite partly different functions, judicial review over administrative acts is consistent in terms of time and even more contents, yet this is unfortunately not the case.[11] As a consequence, a part of procedural rules within administrative procedure inevitably compensates for the limited role of judicial review and vice versa – a less rigid administrative procedure leads to stricter administrative justice.

Any radical shift, however, implies a certain degree of risks, which means that both the strengths and the weaknesses of the proposal need to be examined. Among the advantages are certainly transparency from the user's perspective and uniform principles and rules that apply to all administrative activities alike (see Galetta, 2015). Weaknesses, on the other hand, include the lack of transparency as a result of the large corpus of rules necessary to regulate the entirety of administrative procedures, questionable consistency of the system given the special provisions of sectoral regulations, and above all a low democratic administrative and political culture in CEE (see Kovač and Bileišis, 2017). Therefore, a good administration in the sense of "well-functioning bureaucracy" is one with the capacity to support the government and its partners to steer the society and the economy toward collective goals while being democratic and pursuing the rule of law, accountability, and zero corruption as elements of an effective political system.[12]

[11] Compare, for example, in Germany (Schuppert, 2000; Künnecke, 2007) and in other countries as well (Koprić and Đulabić, 2009; Kovač et al., 2012; more in Auby, 2014).

[12] Vintar et al. (2013), more in countries' profiles in Kovač and Bileišis (2017), and broadly in Ongaro and van Thiel (2018).

Table 2: The structure of a holistic "code of administrative procedure"

<table>
<tr><td colspan="5">A. General part: Common basic principles for the work of public administration/administrative law</td></tr>
<tr><td colspan="5">B. Special part: Principles and rule by type of activity of public administration (1–5)</td></tr>
<tr><td colspan="2">Regulation</td><td colspan="3">Implementation</td></tr>
<tr><td>1.
Participation in regulation by other regulators</td><td>2.
Adoption of general rules</td><td>3.
Decision-making in individual administrative matters, separately:
3a) common basic principles; then principle and rules for
3b) authoritative decision-making, separately:</td><td>4.
Administrative actions (real acts; keeping records, conducting inquiries, etc.)</td><td>5.
Administrative contracts and other activities of public administration</td></tr>
<tr><td></td><td></td><td>3ba) issuing permits, etc.
3bb) rights as a state burden
3bc) procedures ex officio
3bč) administrative execution</td><td></td><td></td></tr>
<tr><td></td><td></td><td>3c) (lege artis) decision-making within public services delivery</td><td></td><td></td></tr>
<tr><td colspan="5">C. Administrative justice</td></tr>
<tr><td>1.
Over administrative actions in public policy making (e.g. through damage liability of the state)</td><td>2.
Over the legality of general administrative acts (review of constitutionality and legality)</td><td>3.
Over the legality of individual administrative acts (today: administrative dispute and constitutional complaint)</td><td>4.
Over real acts of the administration (today: administrative dispute)</td><td>5.
Over private operations of administration (today: contentious proceedings, litigations)</td></tr>
<tr><td colspan="5">D. Ex post regulatory impact assessment (RIA) by evaluation of the objectives of regulation and its actual implementation</td></tr>
</table>

Source: own

Quite useful in such regard is the old rule: "comprehend, not copy" (in German: *kapieren, nicht kopieren*), advising against merely copying foreign practices and suggesting to actually understand them. Apparently radical new solutions should also be considered in the segment of individual administrative procedures, with due account of the context of the system. For example, a specific administrative area can be deregulated or an entitlement granted without prior procedure, yet this does not mean that some quasi authoritative acts of administration can be enacted in granting such entitlement. Furthermore, the possibility of a consensual solution of collisions between interests – even if one of them is a public interest – could be introduced generally when the rate of risk is low and third persons are not affected but also in more conflicting cases (see Perrou, 2014). Namely, regarding collision of public interest as a cardinal administrative value, and private interests, participation provides legitimacy through procedural rules (Bevir et al., 2011). Also, the application of the inquisitive principle could be less strict if such is not necessary to ensure public interest. The fiction of granting a claim (positive fiction) could be allowed if such is not just a disguise for administrative inaction. The acceleration of procedures could be facilitated, yet not by excluding the parties concerned but rather by means of more effective participation, e.g. online.

The experience of social system reforms shows that development stages cannot be skipped but only accelerated. If CEE still perceives the state, the authority and the administrative procedure in the sense of Barnes' first generation, meaning that administrative relations are regulated mainly based on the principle of separation of powers and a mechanical distinction between administration and other holders of power; if privatised delivery of public tasks regularly implies abuses of power; and if the administration is often a tool of partial political interests, then the region is not yet sufficiently mature for good governance. A comprehensive modernisation of administrative procedure can only be successful if there is a shift in the society's mentality. The modernisation of the meta-regulation of administrative procedure should therefore be carried out gradually, starting with reflection on the selected governance model (see Venice Commission, 2011) and constitutional and administrative reforms. A modern regulation eventually means that the adoption of individual administrative decisions is less programmed by procedural law (e.g. with the possibility of consensual solution of administrative matters) than in the case of the existing APA, while the relevant code would cover those decisions that are currently (almost) non-programmed.[13]

IV. Administrative Procedures as a Participatory Tool to Good Public Governance

By means of administrative procedures, which represent a basic process of its work, administration strives not only to safeguard the legally provided interests of individuals against authorities but also to implement public policies. The latter serve to manage public matters and run the country. By designing and implementing public policies, mainly

[13] E.g. administrative planning or adoption of general acts for exercising public authorities; cf. Galligan et al. (1998), Bora in Schuppert (2000); also in Slovenia as the illustration of CEE region (Pavčnik, 2007; Kovač, 2016).

through regulation and feedback on facts in practice in relation to the desired goal, the "administrative process" creates a regulatory loop in which the law and actual relationships are coordinated and conditioned. Administrative systems act as a sum of guiding (political level) and guided (administrative structure) elements in constant interaction. The principle of separation of powers can also be explained based on the theory of management: the parliament designs public policies, the government and the administration implement them, and the courts assess the legality of parliamentary and executive/administrative acts, thus exercising control which creates a loop of constant improvement (PDCA: plan, do, check and act). Hence, the authorities through administrative procedure (partly) regulate what public policies (i.e. their goals and limitations) are, and try to enact them through implementation. It is therefore not surprising that, particularly at the level of regulation, there are frequent interventions in administrative procedures to improve the effectiveness of public policies, both at the level of the general APA and even more at the level of sectoral laws or through EU institutions' influence on Member States' legal orders (see more in Kovač, 2016 and Auby, 2014).

Efficiency should however be understood not only in technical or rational terms, but also in terms of values (according to Weber, in German: *Zweckrationalität* and *Wertrationalität*), which in the regulation and implementation of administrative procedure are seen as a trade-off between faster achievement of the pursued objectives and projects of the governing political option and fair procedure. The efficiency of public administration is only legitimate if it coincides with fairness and legality, meaning that the contrast between economy and (formal) legality (due process) might just be an artificial dilemma. It is necessary to pursue the balance and simultaneous duality of guarantees, both of public interest, i.e. enforcement of public policies of the regulators, and the rights and legal interests of the parties and persons concerned, i.e. the regulated subjects (Statskontoret, 2005). Efficiency thus means regularity of action (full implementation of applicable law), while theoretically speaking it is about rationality in the sense of compliance of the legal order with real life and – in case of deviations – in the sense of the necessary amendments of the law.

There had been some common trends towards a more efficient implementation of public policies also in CEE, typically, for example, the adoption of Directive 2006/123/EC (OJ L 376) aimed at encouraging entrepreneurship and services in the internal market. The latter (transposed in national law) also provides for the definition of specific deadlines for decision and for positive fiction in case of delay. This led several EU countries, the USA and also, e.g. the Former Yugoslav Republic of Macedonia and Croatia, to revise their APAs and even more their sectoral laws.[14] Convergence measures or institutions included, among others:

- deregulation of administrative matters and simplified regulation of administrative procedures as a way to reduce administrative burden;
- more participatory and inclusive administrative relations, including dispute resolution beyond administrative procedure, e.g. mediation;

[14] See Koprić (2005), Koprić and Đulabić (2009), Kovač (2011), Auby (2014), Kovač and Bileišis (2017).

- technological revision of the regulation and digitalised implementation (e-administration);
- restriction of legal interest;
- transposition of certain safeguards of fair procedure among non-essential procedural errors, their reduction at least in some areas, or the guarantee thereof also in subsequent (optional) court procedure;
- shorter time limits and faster definition of enforceability, e.g. by excluding the appeal or the different levels of decision, by non-suspensory effects of legal remedies, by waiving the right to appeal, etc. (Statskontoret, 2005).

Moreover, at the political and administrative legislative level, there are acknowledged good practices to collaborate with citizens and other stakeholders through so-called engagement or at least consultation prior to adoption of authoritative decisions. Such practices, usually merged with regulatory impact analysis (RIA), contribute to more legitimate and also evidence-based public policies (more in Dunlop and Radaelli, 2016). Hence established role models of public participation might significantly enhance better regulation if engagement rights were to be systematically codified, in both legislative and single-case decision-making (Hofmann et al., 2014).

However, while striving for more efficient public policies, we should not forget that one of the two primary goals of administrative and, above all, procedural law is the enforcement of the rights of the parties when the regulator evaluates that in a particular situation their automatic recognition, without establishing the potential collisions with public interest, would be unfavourable for the broader community. Thus, administrative procedures should only be conducted when reasonable considering the practice (risk level, avoiding regulations, abuse of rights, etc.), while the rights should be recognised in any case, except in the event of interference with public interest. Modernisation should aim above all at a model of good governance, which implies a higher rate of partnership and consensual decision-making between the various social groups. Only in such a manner can all stakeholders be involved and society become fully collaborative and inclusive (Vigoda, 2002; Galetta et al., 2015; OECD, 2017). Moreover, the necessary level of legal regulation of the relationships and of the authoritativeness of cogent law would in fact be a consequence of the expected conflicting relations and level of interference in the legal position of individual participants. Nevertheless, even in this type of proceeding, like tax proceedings, participation is welcome but needs to be balanced with the protection of public interest and regulated accordingly (Perrou, 2014).

For such reason, the same degree of detail in regulation and the same corpus of parties' rights are not necessary in all relations with the administration (Harlow and Rawlings, 1997). Certain theoreticians and, by analogy, Anglo-Saxon case law, thus distinguish between several groups of (individual) administrative procedures or matters and thus provide for several levels of restriction of administrative powers.[15] In such context,

[15] Galligan et al. (1998) for instance indicates three or four basic groups of administrative procedures: (i) decisions on reallocation of resources (subsidies) and issuing of licenses and permits, (ii) obligations in public interest, and (iii) administrative inquiries where the findings are used by other bodies, e.g. the criminal court. In the first

it would be wise to regulate even the classic administrative procedure with due account of differentiation, not only as regards the authoritativeness of decisions but also as regards the subject matter of administrative procedure, since the degree of the necessary burden of proof will be different if the case involves *ex offo* obligations that are in the public interest or if it concerns the enforcement of positive rights. Here, too, there is a difference as to whether the recognition of a right on the request of a party implies the enforcement of such right, a consequence for public interest, or a direct burden for the state. Of key importance in the differentiation of procedures is the move from the inquisitive to the adversary principle, based on the respect of the dignity and the participation of the (subordinate) party. Hence, the regulation of administrative procedure following the judicial model is obsolete and probably does not even reflect the social reality.[16]

In such manner, it would be possible to go beyond the intertwining of substantive and procedural law that is typical of modern times, particularly in the conditions of an unrealistic full determination of substantive law, e.g. owing to the technical nature of standards or the praxis changing faster than regulation, when the basic procedural rules become even more significant.[17] The need for procedural rules is directly proportional to the lack of substantive rules or to the degree of indeterminateness or discretion. In modern administrative law, the regulator must thus evaluate whether the objectives, values and principles will be pursued more effectively by means of detailed substantive law or by procedural regulation, which is to guide and supervise the work of the administration. Experience shows that it is more reasonable to focus on ensuring the regularity of decision by means of procedure, since the complexity of social life and the indeterminateness of substantive law are inevitable and likely to grow further. Another evident trend is seen in procedural rules being taken over as substantive rules, and the boundaries between the substantive and procedural nature of regulations becoming blurred (Galligan et al., 1998). Some traditional values and rules of procedural nature are taken over by constitutional or sectoral administrative law as having the nature of substantive law, thus giving them dual and much greater certainty.[18] Additionally, any form of collaborative administration has certain limitations, particularly as regards the level of participation in relation to possible misuses, risks, and tensions (cf. Vigoda, 2002).

However, at all levels of regulation and consequent implementation, it is necessary to distinguish between general social and (already) public interest, as the latter determines the work of public administration as legitimate and just (Bevir, 2011; more Hofmann and Mihaescu, 2013). Yet not every benefit for the society or the majority can be considered "public interest". The latter has in fact both a substantive and a formal component. In substantive terms, the decision made needs to be in the public interest, to the benefit of the social majority and cumulatively in accordance with fundamental human rights or the rights of minorities, while formally speaking public interest may only be established when

two, the emphasis is on the decision, the outcome, while in the last case the procedure is – by the nature of the case – justified with an inquisitive maxim.

[16] See Künnecke (2007), Koprić and Đulabić (2009), Rose-Ackerman and Lindseth (2010).

[17] Cf. Peters and Pierre (2005), Rose-Ackerman and Lindseth (2010), Kovač et al. (2012).

[18] More in Sever et al. (2013). Cf. Künnecke (2007), Rusch (2014), Hofmann et al. (2014), etc.

and inasmuch the relevant values are incorporated in the applicable law by the competent regulator. What and to what extent the majority and democratic values and needs of practice will be integrated in a regulation is, eventually, codified by public administration through participation in the design of public policies.

Administrative procedure and administrative relationships between public authorities and individual subjects hence generally evolve towards a balanced democracy and simultaneous efficiency. If the regulation of administrative procedures – even if deciding only in individual administrative matters – was to be shaped according to the communicative "third generation" of procedures, which is taken into account within the neo-Weberian and the good governance model. Thus, a shift in administrative culture would be achieved. In today's understanding of administrative procedures, in fact, the administrative relation relies on the *a priori* supremacy of public interest as defined in positive law and thus of the administrative body over a subordinated party. The regulation and, consequently, implementation of administrative procedures build exclusively upon authoritative decision-making and not on an exchange of positions, on negotiations, coordination, mediation, dispute resolution and co-decision-making between regulators and the regulated subjects. A slightly different trend, although rather slow, is observed as regards the regulatory function of the administration. Administrative procedures deriving from the limitation of power are procedure-oriented, whereas an outcome-orientation would be more appropriate for the efficiency of public policies as well as for the protection of the democratic rights of the parties. Sectoral regulation should define, by substantive law provisions, the relevant targets of public policies, while procedural regulation should ensure that such targets are pursued and the desired substantive results achieved. This, however, does not mean that aspects such as procedural fairness, regularity and formal legality would be subordinated or undone. With the basic safeguards (e.g. participation of the parties), procedural rules *de facto* evolve towards becoming a component of the outcome while the boundary between substantive and procedural law becomes blurred in the light of achieving the common goal.

V. Conclusion

The regulation of administrative procedures and the issuance of authoritative individual administrative acts, as one of the basic work processes of public administration, should be systemically modernised in order to follow key changes that have occurred in the society over the past few decades. By stating the above finding, we answer our initial research question, whether the present codification corresponds to modern society and its need. We conclude that contemporary public affairs require a more holistic approach than traditionally in order to run administrative affairs more efficiently yet still democratically. Therefore, harmonised codification should be developed to encompass different proceeding under the same fundamental principles. Among these, participation is found as the most salient one. Participation in this context is not an end in itself, but significantly increases the level of acceptability of even unfavourable authoritative decisions among citizens and businesses through public engagement and creates better decision-making in general. Namely, the purpose of participatory administrative

procedures is to protect the defined legal interests of different stakeholders, and to embrace collective wisdom. Since administrative relations are by definition subordinate to the public interest, parties' participation in administrative procedures thus becomes a counterweight to the supremacy of public authority. Yet, this does not mean that in administrative procedures the authorities should act bureaucratically, since neo-Weberian and good public governance requires a participatory and efficient public administration, which assists the parties in the exercise of their rights and obligations, as long as such does not affect the public benefit or third parties.

In particular in CEE, modernisation should focus not merely on amending the regulations, as is often the case, but even primarily, due to the long-known implementation gap, on their principal understanding in practice. Gradually, so as to prevent that the shifts are misunderstood and regulatory changes made contrary to their purpose, it is necessary to come to the belief that the state exercises authority only when consensual conciliation of interests fails. Given the long-standing regional culture, transition and other specifics of CEE, it is not surprising that new patterns regarding participatory governance take time. On the other hand, considering the trends and good practices in the EU and globally, this seems to be only a matter of time.

This applies in particular to regulation, yet also to the implementation of administrative procedures, since the rate of risk to public interest and the resulting interference with the legal status of the parties are not equally significant in all the procedures. Thus, it would be wise to first analyse whether the realisation of an administrative matter actually requires an administrative procedure or not. If not, the issue should be deregulated. Since comprehensive and radical processes are involved here, we should proceed on a step-by-step basis and first carry out a possible deregulation. Procedures should be regulated and conducted with due account of the basic APA principles and hence differentiated depending on whether or not the matter can be resolved consensually. Although such approach initially prolongs the procedure, the outcome is a society in which – through participation of once subordinated parties – the values of participative democracy and technical efficiency evolve hand-in-hand. Administrative procedure could and should therefore present a networking base for partnerships of different social groups coordinating general and individual interests in public affairs.

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