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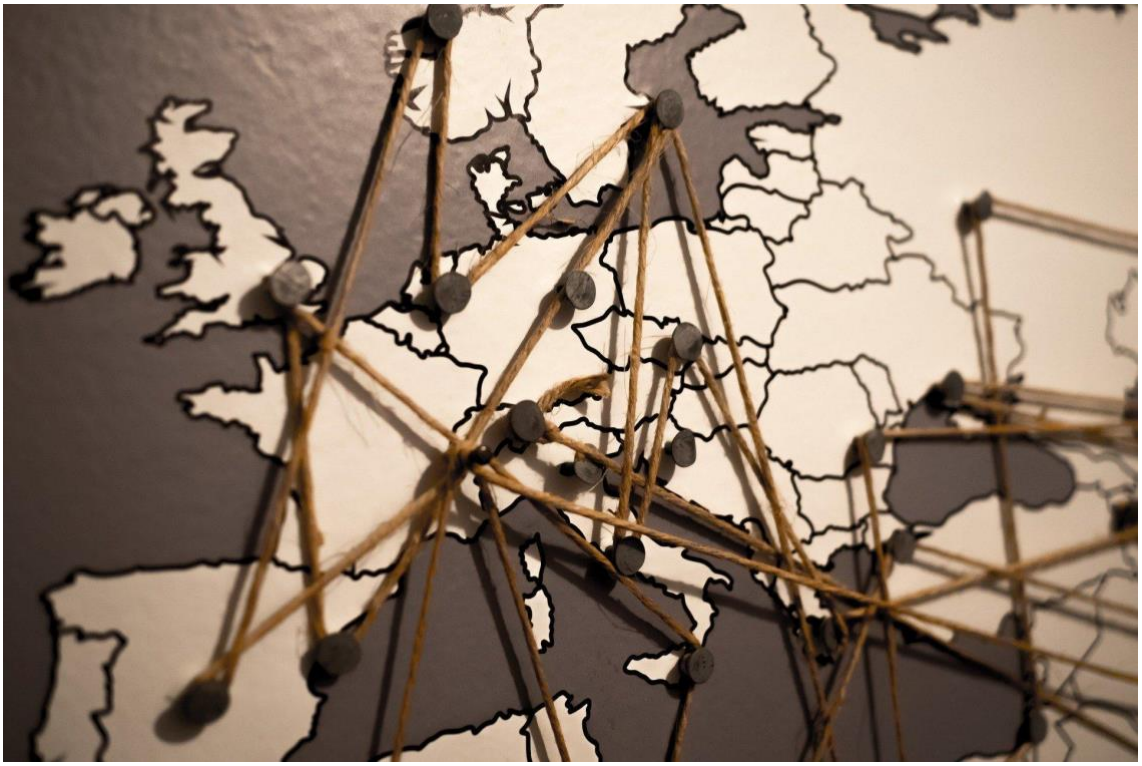
CoCEAL Working Papers
01/2022

July 2022



Due process clause in Administrative Procedure Acts of some Central-Eastern European Countries: An Overview

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The Common Core of Administrative Laws in Europe Working Papers Series – Issue n. 01/2022

The CoCEAL working paper series aims at spreading knowledge of the research outcomes of a new approach to comparative studies in administrative law, promoted by the The Common Core of Administrative Law in Europe, a project supported by the European Research Council (ERC) (Grant Agreement no. 694697)

CoCEAL Working Papers ISSN:

2724-2269

http://www.coceal.it

To cite this paper:

Muzi L., *Due process clause in Administrative Procedure Acts of some Central-Eastern European Countries: An Overview*, CoCEAL Working Paper Series, 01/2022.

Due process clause in Administrative Procedure Acts of some Central-Eastern European Countries: An Overview (*)

Laura Muzi (†)

Abstract

Growing concern has emerged within the EU regarding the respect of democracy, rule of law and fundamental rights in some Central-Eastern European countries, due to the alleged infringement of art. 7 TEU. However, it is often overlooked that, during the enlargement processes, the EU not only let some new states enter the supranational dimension, but also asked them to adhere to a normative conception of the rule of law, both from substantive and procedural point of view, which was shared by the founding Members and built on common values and principles. This paper wonders whether a key principle such as that of due process of administrative law can be used as a benchmark for democratic types of government. Therefore, the aim is to outline the main features of the administrative procedure acts of four Central-Eastern European States, considering both their similarities and differences. The first part provides a look into the past of each country, in order to emphasise the shared roots, common background and different developments that have taken place. Then the paper focuses on individual decision-making procedures, and specifically on due process of law as stated in general laws on administrative procedure. More specifically, three benchmarks are used, *i.e.* the right to access the file, the right to be heard and the duty to give reasons for the final decision, in order to compare the four pieces of legislation. The main conclusion is that despite there being many similarities, they should not be overestimated.

* I wish to thank a number of people for helping me to carry out this study. First of all, I would like to give special thanks to Prof. Giacinto della Cananea for entrusting me with this research within the CoCEAL project. My thanks also go to Dr. Lilla Berkes, who helped me to better understand a few key issues concerning Hungary, Prof. Marek Wierzbowski for his kindness in explaining some features of the Polish legal order, Prof. Marko Milenkovic for his priceless comments on the history and jurisdiction of former Yugoslavia, and Prof. Robert Siucinski for helping me to collect bibliographical references. All errors and mistakes are mine. Unfortunately, it was not possible to make reference to law in action due to the linguistic barriers faced by the author, therefore the paper is only based on researches made on statues and legal doctrine.

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1. Introduction

In the last few years growing concern has emerged within the European Union regarding the respect of democracy, rule of law and fundamental rights in some of the countries which became Member States during the first decade of the 21st century[1]. It is worth recalling that in 2017 Poland became the first EU Member State to ever face a proceeding according to art. 7, par. 1, TUE on the initiative of the Commission and a similar step, concerning Hungary, has been taken in 2018 by the European Parliament.

Actually, during the enlargements the EU not only let some new states enter the supranational dimension, but also asked them to adhere to a normative conception of the rule of law, both on the substantive and procedural dimension, which was shared by the founding Members and built on common values and principles (Rivero, 1978; Usher, 1976). Put another way, an understanding of the rule of law that is mainly concerned with what a German-speaker would refer to as "*Menschenwürde*" or human dignity.

Due to the alleged infringement of art. 7 TEU, it is to be wondered whether a key principle such as that of administrative due process of law could be usefully applied to measure the level of compliance with democracy and rule of law. The main conjecture on which this essay is based is that due process, broadly understood, can exist in authoritarian countries too[2]. In other words, this paper will try to assess whether it is possible to have, at least, a regulatory framework that bring to some degree of acknowledgement of the rule of law principle within administrative procedures even in countries experiencing a non-democratic government. Indeed, due process is an instrument that has, at least, a two-fold purpose: besides helping people having an as fair as possible decision in a case affecting their interests, it is also an instrument for the government to supervise the behaviour of public bodies when implementing

[1] It is worth mentioning that Poland is the first EU Member State ever to face a proceeding according to art. 7, par. 1, TUE on the initiative taken by the Commission on 21th December 2017. *See* the "Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland and the rule of law", COM(2017) 835 final. A similar step has received the approval of the European Parliament concerning Hungary, as well, on September 12, 2018. *See* the "Draft Report on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded" (2017/2131 (INL)).

[2] *See* A. H. Campbell, *Fascism and Legality*, in 62 L. Q. Review (1946), 141-151. According this Author's analysis pre-WWII Italy and Germany adopted different approaches to the rule of law in their domestic affairs although they both were non-democratic regimes, often coupled together because of similar conducts in international affairs. The main difference being that in Germany the rule of law and the traditional canon of interpretation were "strained and twisted so as to give effect to Nazi ideas" while «[f]ascism [...] maintained in principle, though not always in practice, the idea of legality, of respect for law, at least in non-political cases». *Ibidem,* 149 and 141.

policies, keeping them under control[3].

This latter purpose of administrative procedures clarifies the reason why APAs often find a place even in countries which have little in common with the idea of democracy[4] but, nevertheless, formally comply with the principle of legality[5]. Those acts could be simply a mean of internal improvement of the administrative technique[6], according to the well-known utilitarian argument. Procedural requirements are, in such cases, tools at the disposal of the higher administrative authorities to improve the internal compliance to administrative tasks. Meanwhile, the judiciary is asked (or chooses) to limit its scrutiny only to a formal check on whether the procedural requirements are met, without also questioning how they are enforced.

Among all the Central-Eastern European countries[7], the choice has been made to focus on Hungary, Poland, Slovenia and Croatia, which were close to, or even part of, the Austro-Hungarian Empire, being largely influenced by its legal culture. The first two States were part of the Socialist countries and are now the leading members of the so-called Visegrad group which, in the last few years, have been through a process of rolling back to anti-democratic and illiberal regimes[8], while at the same time still respecting some of the elements of the rule of law or, better, of the *Rechsstaat*.

It is worth briefly recalling that, in his 2014 speech at the University of Băile Tuşnad, the Hungarian Prime Minister of the Republic Viktor Orbán used for the first time the concept of illiberal State[9], also adding that the «membership of the European Union does not rule this out». It goes without saying that the principles on which the European integration was built, and still works cannot go together with the idea of an illiberal State, therefore statements like this strike at the origins and the history of the European Union [10].

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[3] *See* S. Cassese, *Legislative Regulation of Adjudicative Procedures. An Introduction*, 5 Eur. Rev. Pubblic Law (1993) (special number), 15-26.

[4] *See* G Pastori, *La procedura amministrativa* (1964), 8-9; G. della Cananea, *Verwaltungsrecthliche Paradigmen im europäischen Rechtsraum*, in A. von Bogdandy & S. Cassese-P. Huber (eds.) *Handbuch Ius Publicum Europaeum*, III (2010), 476-7; *contra* M. Ruffert, Tor Vergata speech held on October 2016.

[5] *See* P. Craig, *Formal and substantive conceptions of the rule of law: An analytical Framework*, Public Law (1997), 467-480. On the differences between the principle of due process of law on the one hand, and the principles of legality and non-arbitrariness on the other, see G. della Cananea, *Due Process of Law Beyond the State* (2016), 139-149.

[6] M. Shapiro, *The Giving Reasons Requirement,* U. Chi. Legal F. (1992).

[7] According to an OECD terminology, Central and Eastern European Countries comprise Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and the three Baltic States: Estonia, Latvia and Lithuania.

[8] L. Pech & K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies (2017), 3-47.

[9] A full transcription of the speech can be found at https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/.

[10] A. von Bogdandy & M. Ioannidis, *Systemic deficiency in the rule of law: what it is, what has been done, what can be done*, CMLR (2014), 65; L. Pech & K.L. Scheppele, *Illiberalism Within*, cit. at 6, 11.

Slovenia and Croatia which experienced a different kind of authoritarian regime under Tito's leadership are, on the other side, examples of countries that are closer to the standards of European liberal administrative states and of the EU's legal order[11]. Therefore, they will be scrutinised as sort of control group, trying to find out and highlight whether and how their different socio-political backgrounds reflect on the due process clause.

2. General issue on methodology

The following analysis will focus only on due process of law as stated in general laws on administrative procedure. This goal of the essay will be to outline the main features of the administrative procedure acts of the four States, considering both the commonalities and the differences among them. A look into their past will also be provided, in order to emphasise the shared roots, common background and different developments that have taken place. It will focus only on individual decision-making procedures and will not touch on procedures concerning rulemaking by administrative authorities.

It goes without saying that this is a very narrow field of inquiry but, nonetheless, one which deserves attention. Generally speaking, the codification of administrative procedure is a widely discussed topic[12], because of the massive diffusion of APAs during the last few decades all over the world. This widespread nature is often understood to be related to an increasing commitment towards a group of principles such as legality, equality, fairness and transparency which form the basis of a democratic system of government, although there still are liberal democracies, *e. g.* the United Kingdom (or France until 2015), which do not have a statute law ruling on administrative procedure.

It is common opinion that a legislative general framework for administrative decision-making is likely to enhance the protection of citizens' rights, giving clear and uncontroversial limits to the discretionary power of the authorities. Countries have turned to APAs to govern the growing extent of the intervention of the executive power in their citizens' lives[13]. Therefore, the introduction of statutory provisions on

See also J.W. Müller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, 21 European Law Journal (2015)*;* V. Reding, 'The EU and the rule of law – what next?', SPEECH/13/677, 4 September 2013.

[11] J. Schwarze, *Judicial review of European administrative procedure,* Law & Cont. Problems (2004) 85-105.

[12] *See* G. Pastori, *La procedura amministrativa,* cit. at 3; C. Wiener, *Vers une codification de la procedure administrative: étude de science administrative* (1975); J.B. Auby (ed.), *Codification of Administrative Procedure* (2014).

[13] P. Verkuil, *The Emerging Concept of Administrative Procedure*, Columbia Law Review (1978), 258-

procedure is a means to restrain the otherwise hard-to-check self-regulation of the administrative authorities, and to enhance predictability and legal certainty. The introduction of new or amended statues on administrative procedure was warmly welcomed during the accession process to the EU.

As long as the only control over administrative acts is in the hands of the judiciary, the system admittedly leaves space for some grey areas, partly due to the insurmountable boundaries of discretionary power, partly to the *ex-post* nature of such scrutiny. Indeed, a judgment may declare an act void and, nonetheless, be unable to wholly satisfy the interested parties because effects of that act have already completely unfolded.

Consequently, the great attention paid to the codification of administrative procedure can be easily understood and reconnected to the need for a more comprehensive and preventive system of control over administrative action, which would potentially be at the disposal of the general public rather than only of legal professionals. That said, it is worth recalling that such an instrument is a complement, not a substitute, for any judicial control.

3. Constitutional and administrative developments

3.1.Poland

Although Polish administrative law is largely modelled on the French system[14], the first APA, adopted in 1928, was implicitly shaped so as to resemble the 1925 Austrian APA[15]. During the Socialist era a new statute was enacted in 1960 and still is in force today, despite several changes[16]. The biggest amendment to the code was carried out in 1980, driven by the political and social changes of that period. In particular the reform took into account a reorganisation of the structure of the administration and the

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[14] Even though it lasted only seven years, from 1807 to 1815, the Duchy of Warsaw had a huge influence on the future Polish legal order, above all in the structure of the administrative judiciary. The Constitution of the Duchy introduced a Council of State (Rada Stanu) as the court of appeal, and – just as in France – prefectural councils acting as the courts of first instance. *See* J. Turłukowski, *Administrative Justice in Poland,* 3 Brics Law Journal (2016), 124-152, in part. 127.

[15] C. Reid, *The Approach to Administrative Law in Poland and the United Kingdom,* cit., 817. *See* also P. Craig et al., *Administrative Procedure Acts: History, Features, and Reception*, in *Id.*, *ReNEUAL Model Rules on EU Administrative Procedure* (2017), 7.

[16] The biggest amendment to the code was carried out in 1980, driven by the political and social changes of that period. In particular, the reform took into account a reorganisation of the structure of the administration and the introduction of elements of judicial review. In that same year a High Administrative Court was created in Poland. C. Reid, *The Approach to Administrative Law,* cit., 818-9.

introduction of elements of judicial review[17]. The APA was again amended on 7 April 2017.

Meanwhile Polish constitution had undergone several changes. A first amendment to the Socialist constitution was brought in in 1989, then in 1992 the so-called little constitution was adopted[18] and five years later a completely new constitution was enacted[19]. Poland also became a member State of the European Union in 2004[20].

Despite impressive efforts to join the EU, the country has recently experienced an upsetting process of dismantling some of the rule of law prerogatives to the point that Poland is now facing a sanctioning proceeding[21] according to art. 7, par. 1, TUE. In particular its judiciary is under attack following a number of pieces of legislation meant to undermine its independence from the executive power. Those acts are the law on the Supreme Court of 15 December 2017, the law amending the law on the Ordinary Courts Organisation of 28 July 2017, the law amending the law on the National Council for the Judiciary of 15 December 2017, the law amending the law on the National School of the Judicial and the Public Prosecutors of 13 June 2017.

3.2. Hungary

Hungary was widely influenced by Austrian administrative law since the territory of the two countries had been for centuries a single entity named, after the 1867 *Ausgleich,* the Austro-Hungarian empire. When the latter broke up at the end of the World War I, Hungary adopted its own general law on administrative procedure, modelled on the 1925 Austrian APA[22]. During the 1950s, the Socialist government felt the need to enact its own statute, and a law on administrative procedure was adopted in 1957, after the 1956 uprisings[23]. This act renewed the flavour of the *Rechtsstaat*

[17] N. Półtorak, *Enlargement and administrative law: the Polish experience*, in C. Harlow et al. (eds.), *Research Handbook on EU Administrative Law* (2017), 521-544.
[18] Thanks to the 1992 "Little Constitution" a system with a three-tier division of powers was formally reintroduced in Poland, signing a clear cut with the previous Socialist organization of powers.
[19] A. Wróbel, *Staat, Verwaltung und Verwaltungsrecht: Polen,* in A. von Bogdandy-S. Cassese-P. Huber (eds.) *Handbuch Ius Publicum Europaeum* (2010), vol. III, 229-272.
[20] It must be recalled that Poland signed an opt-out Protocol concerning the application of the Charter of Fundamental Rights of the European Union together with the United Kingdom. I. Pernice, *The Treaty of Lisbon and Fundamental Rights*, and C. Barnard, *The 'Opt-out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?*, in S. Griller-J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (2008). *See* also M. Zrno, *Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom: A Polish Perspective*, CYELP (2010), 300-318.
[21] "Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland and the rule of law", COM(2017) 835 final.
[22] Law No. XXX/1929. *See* S. von Csekey, *Die Entwicklung des öffentlichen Rects in Ungarn seit 1926,* 19 Jahrbuch des öffentlichen Rechts der Gegenwart (1931), 220-226.
[23] Law No. IV of 9 June 1957. *See* J. Martonyi, *La loi hongroise sur les règles générales des actes*

principle, in order to reduce the citizens' anger, and it closely recalled its 1929 predecessor[24].

That statute was in force until 2004, but it was largely amended in 1981 in order to broaden the rights recognised to parties[25]; a brand-new APA was adopted only with Act No. CXL of 2004. After the fall of Communism, the country's first written constitution was amended several times, but only in 2010 – when Viktor Orbán's government came to power – the process of adopting an entirely new Constitution began, ending in 2011[26]. The drafting process was closely scrutinised[27] by the Venice Commission and – as it was correctly foreseen in one of its opinions[28] – the adoption of the new Constitution in April 2011 was only the beginning of a longer process of establishing a comprehensive and coherent new constitutional order, involving the adoption of numerous pieces of legislation.

Since then, Hungary has come under the spotlight[29]. Three accelerated infringement procedures had been launched by the European Commission against Hungary, and more recently a resolution has been adopted by the European Parliament calling for the launching of Art. 7, par. 1, TUE, because of the alleged infringement of fundamental rights.

However, at least according to the wording of its new constitution, «Hungary shall be an independent, democratic rule-of-law State» (Art. B). Among the constitutional provisions ruling on the activity of administrative bodies Art. XXIV, par. 1, enshrines the due process clause stating that everyone shall have the right to have their affairs handled impartially, fairly and within a reasonable time by the authorities, who are obliged to state the reasons for their decisions (Art. XXVIII). The broad reform process which is taking place is now also affecting administrative activity. Law No. CXL/2004 has been repealed and a brand-new one adopted in 2016 (Law No. CL/2016), came into force from January 2018.

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administratifs de l'État, Rev. Intern. des Sciences adm. (1958), 3, 319-332.

[24] K.J. Kuss, *Judicial review of administrative acts in East European Countries*, in G. Ginsburgs (ed.) *Soviet Administrative Law: Theory and Policy* (1989), 467 *et seq*.

[25] M. Fazekas, *Changes of Administrative Procedure between 1990 and 2006*, in A. Jakab et al. (eds), *The Transformation of the Hungarian Legal Order 1985-2005. Transition to the Rule of Law and Accession to the European Union*, 2007, 127 *et seq*.

[26] However, it shall be underlined that since its entry into force, the Hungarian new constitution has been amended six times. To get an insight into this revision process *see* Z. Szente, *Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them*, in A. Jakab & D. Kochenov, *The Enforcement of EU law and values* (2017), 456-75.

[27] *See* K. Kelemen, *The New Hungarian Constitution: Legal Critiques from Europe,* 42 Rev. of Central and East Europ. Law (2017), 1-49.

[28] Venice Commission, *Opinion on the new Constitution of Hungary,* Opinion no. 621/2011 (Strasbourg, 20 June 2011), para. 21.

[29] *See* Z. Szente, *Challenging the Basic Values*, cit. 463-5; G. Halmai, *The Early Retirement Age of the Hungarian Judges*, in F. Nicola & B. Davies (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (2017), 471-88.

3.3. Slovenia

Slovenia had been a part of the Austro-Hungarian Empire until 1918, when it became part the Kingdom of Serbs, Croats and Slovenes, renamed in 1929 the Kingdom of Yugoslavia. Both Yugoslavia and Austria had a great impact on Slovenian legal order, even though the strongest influence was that of the Austrian administrative law. This influence has been clear since the Kingdom was formed after World War I, considering that the Yugoslav legislator took inspiration from the 1925 Austrian Administrative Procedure Act when drawing up the Yugoslav APA in 1930[30].

After the Second World War, under the Socialist regime, Slovenia was part of the Socialist Federal Republic of Yugoslavia and a new constitution was adopted in 1946. It took eleven more years before a new statute on administrative procedure became law. The latter was a very extensive law and, despite being federal, did not need to be transplanted to be directly binding in each national state[31].

In 1991, Slovenia finally became an independent country, seceding from Yugoslavia. During the same year a new democratic constitution, modelled upon the Italian and German ones, was adopted and enacted. The principle of the rule of law is enshrined in Art. 2 and then repeated at Art. 120 and 121 in relation to State administration[32]. However, a new General Administrative Procedure Act was adopted only several years later, in 1999, and it is still in force today.

It is worth mentioning that the APA enacted in 1999 closely mirrors[33] the previous statute adopted in 1956 by the former Yugoslavia, and amended four times, the last one being in 1986. Such a statute was, with its 303 articles, among the most detailed general law on administrative procedure ever adopted in Europe[34]. Due to its good reputation, the prevailing attitude among all the newly independent countries was not to abolish it but, rather, to adopt into the new legal systems, amending or reframing it as little as possible[35]. And the Republic of Slovenia exactly this, embracing many of the leading

[30] The statute entered into force on February 26th, 1931. N. Stjepanovic, *La loi yougoslave sur la procédure administrative non contentieuse,* Rev. Intern. des Sciences adm. (1958), 181-198.
[31] *Ibidem,* 182.
[32] In particular, Art. 120, para. 3 lays down that «[j]udicial protection of the rights and legal interests of citizens and organizations is guaranteed against decisions and actions of administrative authorities and bearers of public authority».
[33] P. Kovač, The Requirements and Limits of the Codification of Administrative Procedures in Slovenia According to European Trends, 41 *Review of Central and East European Law* (2016), 427-461.
[34] I. Koprić, *Administrative Procedures on the Territory of the Former Yugoslavia* (2006), http://www.sigmaweb.org/publications/36366473.pdf.
[35] W. Rusch, *Citizens First: Modernisation of the System of Administrative Procedures in South-Eastern Europe*, 14 Croatian and Comparative Public Administration (2014), 189-228.

provisions of the past.

3.4. Croatia

Croatian history overlaps to a great extent with that of the current Republic of Slovenia, they were both parts of the Austro-Hungarian Empire since 1867, members of the 1918 Kingdom of Serbs, Croats and Slovenes and of the Socialist Federal Republic of Yugoslavia after World War II[36]. They therefore applied the same administrative procedure codes approved during the kingdom (1930) and under the Socialist regime (1956).

The Constitution of Croatia in force today was adopted on 22 December 1990. According to Art. 3 the rule of law is one of the highest values of the Croatian constitutional order, together with a democratic multiparty system. In particular Art. 19 states that individual decisions of State administration and bodies vested with public authority shall be grounded in law, and guarantees the judicial review of these decisions (Art. 18).

After becoming an independent republic, Croatia continued to apply the Socialist law on administrative procedure for almost two decades, although there were major changes in its legal order. The reform process of administrative law was largely fuelled by the Europeanisation process, in particular the signing of the Stabilisation and Association Agreement in 2001 and the beginning of the accession negotiations[37]. Croatia became a member of the European Union only in July 2013 after a very long accession process that lasted more than ten years[38] due to its initial failure to fully cooperate with the International Criminal Tribunal for the former Yugoslavia.

A new general law on administrative procedure came in force only on 1 January 2010. Nonetheless, it closely resembles, like the Slovenian APA, the 1986 version of the former Socialist Republic of Yugoslavia APA which continued to be applied until then.

4. Due process clauses

[36] D. Čepulo, *Building of the Modern Legal System in Croatia 1848-1918 in the Centre-Periphery Perspective,* in T. Giaro (ed.), *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert* (2006), 47-91.
[37] A. Musa, *Administrative Law and Public Administration,* in T. Josipović (ed), *Introduction to the Law of Croatia,* 58.
[38] M. V. Feketjia-A. Łazowski, *The Seventh EU Enlargement and Beyond: Pre-Accession Policy Vis-À-Vis the Western Balkans Revisited,* 10 CYELP (2014), 1-37; A. Petričušić, *Reforming the Civil Service as the Precondition for Public Administration Reform in Croatia,* 32 Rev. of Central and East Eur. Law (2007), 303-331.

4.1.The trial-type adjudication model

As has been underlined above, all the four countries have been influenced by the Austrian administrative legal order. Croatia, Slovenia and Hungary were part of the Habsburg Empire and shared a wide cultural heritage with Austria. On the other side, the Second Polish Republic – adopting its first administrative procedure act in 1928 – was certainly among the several Central-Eastern European countries[39] emulating the Viennese legislator of 1925[40].

The Austrian decision-making system concerning administrative adjudication has been traditionally labelled as *trial-type* compared to the United State's *interest representation model*. The reason is that while the former is focused on the formal legality of individual administrative decisions, the latter is much more concerned with democracy in decision-making and encompasses rules on administrative rulemaking. The main feature of the Austrian APA is that its structure closely recalls that of a judicial proceeding, a peculiarity deeply rooted in the path followed by the judiciary to achieve an ever-wider scrutiny of the exercise of administrative powers[41]. Both the administrative procedure and the judicial process are meant to ensure a proper application of the law and to enable checks on the exercise of power despite the timing of this control being different, the former occurring *ex-ante* and the latter *ex-post* the achievement of a decision. This is far truer in those administrative proceedings where the power exercised is not binding in its outcome.

It has been observed[42] that a trial-type of APA can be easily detected when looking at the rules on evidence. The flavour of a judicial kind of proceeding, whether inquisitorial or adversarial, could be glimpsed in those provisions where the authority is asked to establish the material truth, also beyond the evidence brought by the parties.

Each of the APAs analysed extensively states the relevance of the rule of law and the need for the public authorities to comply with it. In the Polish administrative code, a general provision concerning the rule of law can be found at Art. 7, where is written that «[p]ublic administration bodies shall uphold the rule of law during proceedings

[39] R. Siuciński, *Convergence of Law – Examples from European Administrative Procedure*, in *The Interaction of National Legal Systems – Convergence or Divergence*, (2013), 303-308, https://www.tf.vu.lt/wp-content/uploads/2013/04/THE-INTERACTION-OF-NATIONAL-LEGAL-SYSTEMS_-convergence-or-divergence_2013.pdf.
[40] R. Arnold, *Procedural law and the rights of the citizens in Central and Eastern Europe Countries*, in A. Massera (ed.), *Le tutele procedimentali*, (2007), 25.
[41] *See* R. Parser, *Administrative Procedure in Austria*, 14 *The American Journal of Comparative Law* (1965), 322-336; H. Schaffer, *Administrative Law/Droit administratif: Austria/Austriche*, 12 European Review of Public Law (2000), 1053-1055; A. Ferrari Zumbini, *Standard of Judicial Review of Administrative Action (1890-1910)*, IJPL (2018).
[42] L. Torchia (ed.), *Il procedimento amministrativo: profili comparati,* (1993).

and shall take all necessary steps to clarify the facts of a case and to resolve it, having regard to the public interest and the legitimate interests of members of the public». From this provision an APA strongly oriented towards an inquisitorial proceeding can be inferred, where the authorities' first aim is to ascertain the material truth of the case before them (Articles 77-78).

The new Hungarian general Law on Public Administration Procedures also begins by making reference to the due process clause and the right of the defence enshrined in the constitution (Art. 1) going on with the principle of legality and the principle of good faith (Art. 6).

The Slovenian General Administrative Procedure Act (law No. 80/1999) defining at Art. 6 the principle of legality, highlights that administrative authorities not only have a duty to decide according to laws, regulations and general acts but, in those matters in which a discretionary power is granted, the outcome of the proceeding must nevertheless be reached within the limits and in conformity with the purposes of the authority conferred and according to the APA provisions.

As a general principle, enshrined at Art. 7, the deciding authority must always enable the parties to protect and exercise their rights, insofar as this does not endanger the rights of others or the public interest. Moreover Art. 9 states that, before a decision is reached, each party must be given the possibility to inform themselves on all the facts and circumstances necessary for the decision. Nonetheless, Art. 8 lays down the principle of substantive truth, according to which in the proceeding the true state of facts must be established by the authority, the latter having the power to decide which facts could be considered proven (Art. 10).

The Croatian General Administrative Procedure Act of 2009[43] shares several similarities with the Slovenian APA. *E.g.* the principle of legality is defined at Art. 5, with more or less the same wording: administrative matters have to be decided on the basis of laws, regulations and general acts, and when public law authorities are authorised by law to decide by free assessment, a decision shall be rendered within the boundaries of their authority and in accordance with the purpose for which the authority was granted (para. 2).

For the economy of this paper, in the following sub-paragraphs we have limited our analysis of the due process clause in the selected countries by only taking into account the three main features of the right to good administration according to art. 41.2 of the Charter of fundamental rights of the European Union[44].

[43] D. Đerda, *Republic of Croatia*, in J.B. Auby (ed.), *Codification of Administrative Procedure* (2013), 107-122

[44] Assuming that this article gathers together principles belonging to the common core of the European administrative procedural law.

4.2. Access to documents

The provisions dealing with access to files show the most unquestionable closeness. Parties shall be allowed to view the files and to make notes or copies thereof, while limits usually concerns internal acts, disclosure of third parties' personal data or privileged information.

In Poland access to the file is provided by Art. 73 where it is laid down that at each stage of the proceeding parties shall be allowed to view the file and to make notes or copies thereof. However, access will not apply to case files subject to State secrecy and other files the viewing of which is excluded for reasons of public interest, according to rulings issued to that end (Art. 74).

In Hungary, the right of access to documents (Art. 33) shall be allowed to the parties at any time, also after the conclusion of the proceeding. Also, third persons able to prove that they have a legal interest in it, may be allowed access to documents containing any personal data or privileged information. Nonetheless, Art. 34 states that access shall be forbidden to draft decisions or in the case where statutory requirements for access to privileged information or personal data are not met. An appeal may be lodged on the refusal of a request for exercising the right of access to documents.

Art. 82 of the Slovenian APA lays down the right of the parties, and also of accessory participants to the proceeding, to inspect the files of the case and to make the necessary copies at their own expense. Those files that are considered confidential shall not be inspected or copied, nor can records of deliberation and voting, official reports and draft decisions.

As a general rule, Art. 11 of the Croatian APA establishes that public law authorities shall provide the parties with access to the necessary data. However, personal and confidential information must be protected within proceedings, in line with the regulations in force. More details on access are given further on, at Art. 84, according to which anyone able to prove their legal interest in the proceeding has the right to examine the case file and make copies, save for confidential acts and documents containing third persons' personal data. Any refusal to show the file shall be provided by a formal and motivated decision.

4.3. The right to be heard

The Polish APA specifies (Art. 10) that the public authorities are required to ensure

that parties are actively involved in each stage of proceedings and that they shall be allowed to express an opinion on the evidence and materials collected and the claims filed, before any decision is issued. A derogation should only be possible where a resolution of the case requires urgent attention because of threats to human life or health or of irretrievable material damage. However, reasons for that must be provided in writing with annotation recorded in the case file. Besides, Art. 11 provides for a general duty to give reasons according to which administrative bodies ought to explain which rules have been used to reach an outcome, so as to facilitate its implementation.

Moreover, Chapter 5, Part II of the Polish APA is wholly dedicated to the hearing, which must be held whenever it is required by the law, or in those cases when it would speed up or simplify the proceeding or produce «some educational benefit» (Art. 89). Its purpose could range from the need to agree the interests of the parties, to the necessity to clarify the case with the involvement of witnesses or experts or by means of inspections. Detailed provisions are laid down concerning the summons prior the hearing, which shall contain the date, venue and purpose of the hearing, shall be in writing and be sent at least a week before it takes place. The parties can present clarifications, demands, proposals, accusations, comments on the results of the evidentiary process, and submit supporting evidence (Art. 95). However, the person in charge of conducting the hearing has the power to withdraw those questions if they are irrelevant to the case and, in such a case, the only possibility for the interested party is to request that the essence of the withdrawn question shall be recorded in the minutes.

The Hungarian approach to the hearing is totally different. It seems that a hearing is an optional procedural step, taking place only when it is necessary to ascertain the relevant facts of the case or if the party asks for it. Art. 5 states that «clients shall have the right to make statements and comments at any time during the proceedings», nonetheless Art. 74 provides for a list of conditions for a hearing to be held. *E.g.,* whenever it is necessary to interview a party against their opponent in order to ascertain the relevant facts of the case in a proceeding opened upon request (Art. 75); where the nature of the case so permits; in proceedings held with the counterparties in attendance; whether it is necessary to hear all parties to the proceeding collectively.

According to Art. 74 of the Slovenian APA a proceeding's record shall be composed of an oral hearing, other important procedural acts and any relevant oral statements by the parties and other participants. Further details on hearings are provided by Art. 102, according to which the authority, at least seven days before the hearing is called, must summon parties and other persons whose presence is deemed necessary. The summon shall provide the reasons why a hearing shall be held, and information concerning the place, room and its timing. An oral hearing may always be called upon the discretion of the official conducting the proceeding or at a party's request (Art. 154), shall be held

in public (see however Art. 155), and the notice ought to be delivered in sufficiently far in advance to allow the persons summoned to prepare.

In the Croatian APA, Art. 30 states that, in the course of a proceeding, parties must be given the opportunity to make a statement on all circumstances, facts and legal issues which are important for resolving the administrative matter. More interestingly, the Croatian APA specifies a number of circumstances under which a hearing can be avoided. This happens when the party's application needs only to be accepted, when the final decision does not negatively affect any parties' legal interest or when the law prescribes it. Moreover, whenever there are no opponents, Art. 48 lays down that the authority may undertake a direct decision, *i.e.,* a simplified procedure where the case is decided without producing evidence at a hearing.

Otherwise, an inquiry procedure (Art. 52) shall take place, allowing the parties to participate, making statements both in writing and orally until the reaching of a decision. The latter case may happen (Art. 54) when two or more parties are involved with opposing interests, when it is necessary to undertake an on-site inspection, hear witnesses and experts or in all those cases when it is deemed useful for deciding the matter. Hearings are usually public, except when issues of privacy, public moral or public security arise.

4.4. The requirement to give reasons

In Poland, administrative decisions normally must be issued in writing (Art. 109), but some derogations are allowed in the interest of the party concerned and when it is not precluded by law (Art. 14). Art. 107 specifies that the final act has to provide justifications for the decision containing the facts that the deciding body regards as proven, the evidence relied upon and the reasons for which other evidence has been treated as non-authentic and without probative force. The reasoning should also include references to the relevant laws providing for the legal bases of the decision. It is then added that, whenever the decision fully reflects the demands of the party there is no need to provide a justification for the decision. However this does not apply to decisions in contentious cases and decisions given on appeal. Finally, the justification of a decision shall not be given in such cases when the law lays down a derogation, with a view to protecting State security or public order.

The final decision in the Hungarian APA shall contain an operative part composed of the ascertained facts of the case, the evidence available, the assessment of any specialist authority and its explanation, the reasons for the deliberation, the decision, the specific statutory provisions on the basis of which the decision was adopted and the

information for seeking legal remedy (Art. 81). Much more interestingly, it is laid down that a simplified decision may be adopted in certain given circumstances, *e.g.* in relation to rulings which cannot be appealed. In those cases, the statement of reasons ought only to make reference to the statutory provisions on which the final decision is based.

Nothing similar is stated by the APAs of the two Balkan countries included in this analysis, which on the contrary provided for very accurate and detailed provisions on the requirement to give reasons.

The Slovenian APA rules that final decision shall be issued in writing, even when pronounced orally, and shall incorporate certain items listed by the law: an introduction, the outcome, a reasoning, and the instructions on available legal remedies (Art. 210). More specifically (Art. 214), the Slovenian APA provides for a very detailed description of the reasoning content, which shall include an explanation of the claims, the established state of facts and evidence, the decisive reasons on which any single piece of evidence has been judged, references to the provisions on which the decision is based, the reasons which dictate such a decision and the reasons why certain claims by the parties have not been granted.

Like the Slovenian APA, Art. 98 of the Croatian law provides some very precise provisions on the content of the decision, consisting of the letterhead, an introduction, the disposition, the explanation, the instruction on legal remedies, the signature of the competent authority and the official seal. Specifically, on the explanation, it is stated that it shall contain a brief statement of the party's requests, the facts of the case established, the decisive reasons in the assessment of single pieces of evidence, the reasons why any of the party's requests were not accepted, the reasons for concluding the proceeding and the regulations grounding the final outcome of the administrative matter.

5. Inferences

The most striking difference between the selected statutes is the approach adopted regarding the right to be heard. The Polish APA, according to an inquisitorial model of proceeding, conceives the hearing as a means which could speed up the verification of facts and the achievement of an outcome. Instead in the Slovenian and Croatian laws, hearings are considered procedural steps which should be avoided whenever no one else, apart from the person affected by the final decision, have shown interest to the proceeding, reflecting an adversarial attitude. Most interestingly, the Hungarian legislator greatly shrinks in its APA the chances to be heard, since there is a normatively

pre-determined list of conditions for a hearing to be held.

Either way, only in Slovenia and Croatia are hearings conceived as a procedural stage which necessarily involves two or more adversarial parties, facing each other, according to the adversarial approach, which is further confirmed by the detailed provisions concerning the summoning of parties provided in the Slovenian and Croatian acts. In the Polish law, instead, the hearing is a mandatory step, at the disposal of both parties and higher authorities (Article 78) to supervise the discretionary assessment of any case.

As far as access to files is concerned, the provisions of the four APAs show an indisputable closeness. Differences obviously reflect the various notions of who is the "party", thus being endowed with the right to exercise such a procedural right. The latter is generally acknowledged at each stage of the proceeding, and also after its completion in the Hungarian APA. Parties shall be allowed to view the file and to make notes or copies thereof, while limits usually concern internal acts, disclosure of third parties' personal data or privileged information.

Finally, as regards giving reasons it is worth noting that the APAs analysed provide a very detailed explanation of what the final decision should consist of. Reasons shall be given on every piece of evidence evaluated and on the final outcome of the proceeding as a whole, making reference to the legal acts supporting each single decision and on the legal remedies available. However, while for the Slovenian and Croatian laws the elements which the decision should consist of are mandatory, a different approach is adopted by Poland and Hungary.

The former country's APA consider it unnecessary to give a reasoning when the outcome of the proceeding matched the party's request, unless opponents are involved or a decision on appeal is concerned. Such an approach is very common to an adversarial model of decision-making, because it implies that the successful party in the administrative procedure would have not any interest in a review of the decision. On the other hand, Hungary allow the authority to adopt a simplified decision, consisting of a statement of reasons which only refers to the legal grounding without also providing an explanation of the elements of fact. Such a solution can be adopted when the decision cannot be appealed, which makes the lack of an extensive reasoning even more disappointing, revealing a low concern with the legal interests and the dignity of the final addressee of the proceeding.

6. Concluding remarks

As observed in the previous pages, each of the countries under consideration seemingly reached – at some point more or less coinciding with their accession to the European Union – both a "constitutional due process dimension" and a statutory one[45]. Despite that, administrative law and constitutional law proves once again that they do not follow a synchronic pattern in their own evolution. Moreover, it is apparent that due process of law, broadly understood, is a kind of principle which had proven to fit not only democracies but also authoritarian forms of the State, as these countries have shown during their post-WWII socialist experiences.

Indeed, due process can only formally be applied – granting just a *minimum* standard of protection – and still being substantially infringed, leading to major concerns for fundamental rights and the implementation of EU law, which rely strongly on a non-instrumental rationale for administrative procedures. It is worth recalling that even if it recognises the principle of national procedural autonomy, the EU has shown increasing concern[46] about the need to create a level playing field when single-case decision-making is at stake, relying on art. 197 TFUE and the principles of effectiveness and non-discrimination in shared and indirect administration as well. Therefore, it would be conclusive to evaluate the cases decided before the ECtHR[47] and the ECJ in order to assess the compliance with the non-instrumental due process approach embraced in the supranational European administrative space.

Further research should take into account the administrative and judicial praxis developed over the decades, helping to understand whether the attention paid to procedural requirements during the exercise of administrative powers is a well-established practice or one yet to be fully internalised[48]. If this should prove to be the case, one would consequently infer that, when those requirements are the result of an opportunistic transplant rather than of domestic achievement, there could be a high likelihood that they would grant a mere formalistic due process[49], unable to meet the standards of procedural fairness requested by the European legal order[50].

However, other equally suitable reasons justifying a formalistic and utilitarian approach to due process of law need not to be overlooked. One is, for example, connected to the global political scenario and the long economic crisis. From this

[45] J. Mashaw, *The American Model of Federal Administrative Law: Remembering the First 100 Years,* Faculty Scolarship Series (2010), Paper 3866.
[46] P. Craig et al., *ReNEUAL Model Rules on EU Administrative Procedure* (2017)
[47] *See* ECtHR, Tysiac case, 7 February 2006
[48] R. Arnold, *Procedural law and the rights of the citizens in Central and Eastern Europe Countries, cit.,* 23.
[49] W. Rusch, *Citizens First: Modernisation of the System of Administrative Procedures in South-Eastern Europe*, 14 Croatian and Comparative Public Administration (2014), 189-228.
[50] A. Kovacs & M. Varju, *Hungary: The Europeanization of Judicial Review*, 20 European Public Law (2014), 195-226.

viewpoint, it is worth noting that every European country has experienced in the recent past an upsetting increase of anti-democratic or populist political forces, which are, generally speaking, more liable to employ a personal use of power. This happens because their legitimacy relies on a charismatic leadership, rather than a rational-legal model, and therefore they are more prone to a utilitarian approach to procedures.