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I. RECONSTRUCTING THE FUNCTIONS OF GOVERNMENT

**« CHALLENGES OF GOVERNMENT
RECONSTRUCTION: TURBULENCE IN
ADMINISTRATIVE TRANSITION (FROM
ADMINISTRATION AS INSTRUMENT OF
GOVERNMENT TO ADMINISTRATION AS PUBLIC
SERVICE) »**

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INTERNATIONAL INSTITUTE OF ADMINISTRATIVE SCIENCES

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NEW CHALLENGES FOR PUBLIC ADMINISTRATION IN THE TWENTY-FIRST CENTURY:
EFFICIENT CIVIL SERVICE AND DECENTRALIZED PUBLIC ADMINISTRATION
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TURBULENCE IN ADMINISTRATIVE TRANSITION
(FROM ADMINISTRATION AS INSTRUMENT OF GOVERNMENT TO
ADMINISTRATION AS PUBLIC SERVICE)

by

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WORKSHOP 1
RECONSTRUCTING THE FUNCTIONS OF GOVERNMENT
CHALLENGES OF GOVERNMENT RECONSTRUCTION
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CHALLENGES OF GOVERNMENT RECONSTRUCTION:
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I.

Modern administrative systems derive from a relatively non-differentiated organizational structure of the absolutistic states of the 17th century. Reactions against the administration as the monarch's "personal instrument of government" were inspired by Locke's and Montesquieu's doctrines of the separation of powers and realized by revolutions at the end of the 18th century in Europe and America (Locke, 1690; Montesquieu, 1748). However, as the administration steadily became an equal partner in the division of powers, the previous view of the administration as a "suspicious instrument of the monarch" started radically to change. Today, the experience of developed countries indicate that an administrative system cannot be conceived as an "instrument" or "apparatus" (e.g. of the ruling class), nor can a modern administrative system be projected as a normative model of legal structures and procedures.

In Europe, the past several years have shown two fundamental processes: on one hand, integration of developed Western European countries within the framework of the European Union, and on the other hand,

transition of Central and East European countries towards political pluralism, market economy, administrative efficiency, information technology application, democratization and human rights protection.

The European Union (previously the European Economic Communities) represents a voluntary association of member states, accompanied by a highly complex body of common "European Law", that the individual member-states recognize, and ultimately, to which they submit to (Leonard, 1994). Consequently, European Law is one of the principle and fundamental integrative instruments of the European Community (Wallace, 1990; Price, 1987). In this respect, the European Union also has immanent features of a "legislative community", i.e. a particular legal entity vested with the capacity of formulating legally binding general norms of conduct (King, Bosco, 1991). European Law is created within the framework of the legal institutions of the European Union in a variety of legal document forms (e.g. regulations, directives, decisions etc.), depending on the intent and character of the policy to be implemented. However, European Law is enforced by means of a more-or-less traditional mechanism of implementation, e.g. by formulating rights and obligations to be applied by the subject that is directly or indirectly concerned. The specific feature of European Law is that it may be applied not only to the member-states (and its legislative, executive, administrative and other legal bodies), but directly to the citizens of the European Union, as well (Siedentopf, Ziller, 1988).

After the fall of the Berlin Wall in 1989, many former European communist countries, as they struggle to overcome the existing one-party political systems and closed command economies (Kovacs, Tardos, 1992)

found themselves going through a period of - often rather turbulent - social and political transition (Kovacs, 1994). These changes effect, inter alia, the respective legal order and government organization of post-communist European countries, including the functional and organizational patterns of their administrative systems (Hesse, 1993). As consequence, the existing legal frameworks and administrative systems in these societies must give way to modern and democratic notions of government and administrative action that is supported by efficient functional and organizational structures and mechanisms of legal and political control.

II.

The existing system of control over the administration in Central and East European post-communist countries must restructure and orient itself towards politically accepting, legislatively formulating and procedurally implementing fundamental democratic standards that secure efficient safeguards of human rights, not only formally in constitutional and legal documents, but in the everyday communication of the citizen with governmental and administrative authorities, as well (Whalen, 1989). On the other hand, the existing concepts of government and administrative control, must be brought out of the pre-dominating system of authoritative control of the higher instance, into open and transparent forms of judicial review and ombudsman-type independent institutions (Lilić, 1995:2). No real democratic reform of government and administration is possible without accepting human rights safeguards and control standards of administrative action embedded in the principle of the rule of law and democratic concepts of legitimate

government and administrative action. No more can the government and its administration be viewed as an instrument of "class repression", but must be seen as a system of social regulation oriented towards rendering public services and protecting human rights.

Administrative reform and reorganization of existing administrative systems in post-communist European countries must move in the direction of strengthening democratic control over state administration, increasing its accountability to democratic elected bodies, de-centralizing and de-concentrating the central government structures while maintaining the administrative system under the strict principles of the rule of law and protection of human rights (Pogany, 1995). The need to modernize the administrative systems of post-communist countries in Europe goes much beyond subjecting it to provisions of legal documents: "The challenge with which public administration is faced in Central and Eastern Europe is to redefine even its role in society, or, more concretely, its relations with politics, the economy and civil community. It is, therefore, worthwhile to recall that the dynamics of administrative transformation are intimately linked to changes in the political, legal, social and economic environment in which public institutions operate and on whose material and immaterial inputs they crucially depend. Legitimacy, authority, legality, acceptance and finance are amongst the most important resources required for effective administrative activity and ^ethey cannot be generated by the public administration itself. Accordingly, the outcome of politics aimed at public sector reform is decisively shaped albeit predetermined, by political, legal, social and economic developments." (Hesse, 1993)

The countries of Central and Eastern Europe are currently undergoing fundamental changes affecting the very foundations of their social, political and economic life and legal order. Although the extent of the transformation processes so far differ considerably from country to country, it is possible to identify a number of common features. These features, inter alia, include: a) the transition from one-party rule (in which the leading role of the communist party was dominant in all sections of society) to multi-party parliamentary systems with accountable governments; b) the abandoning of "democratic centralism" as the basic organizational principle, in favor of far-reaching decentralization and de-concentration of decision-making authority; c) the separation of the political from the economic system; and d) the implementation of economic reforms focused on privatization and denationalization, as a means of depriving the state of its enormous economic competence and legal possession of property (Hesse, 1993).

III.

The concept of Legal State and the principle of the Rule of Law are paramount moral and legal values that are incorporated in the very foundation of Western, and particularly European civilization (Lord Lloyd-Freedman, 1985). In respect to public administration their significance is essential for implementing the notion of legality of administrative decisions, and without the framework of the legal state and the rule of law, no modern administrative system can be imagined. Originating in the mid-19th century, the concept of the Rechtsstaat rests on a normativistic legal model of regulating social relations. According to this model, general legal norms

(materialized in statutes and other general legal acts, e.g. laws and regulations) prescribe the rules of social behavior. General legal norms are subsequently decomposed into concrete legal provisions contained in individual legal acts (e.g. administrative decisions, judicial ruling, etc) that directly effect the behavior of legal subjects (Kelsen, 1945). The main feature of the normativistic model is that the legitimacy of legal action, including the legitimacy of administrative action, derives from the legality of the legal acts. In other words, a legal (or administrative) decision is legitimate by virtue of its legality. This model in its initial form, however, cannot be implemented today without peril to the idea of fundamental human freedoms and rights and the concept of political pluralism and democracy (one needs only to have in mind racist or any other totalitarian regime that rests on "law and order"). As consequence, the values of the Rechtsstaat concept today can only be seen as a precondition of democratic legal and administrative systems.

As opposed to this formal concept of legality, modern concepts base their fundamental principles on the idea of the rule of law and human rights. The legality of government and administrative action, therefore, does not ipso facto include the legitimacy of these actions. In order to achieve legitimacy, government bodies and administrative agencies must also achieve in concreto legitimacy of each action they undertake or decision they render, through various instruments and mechanisms of government and administrative control (e.g. parliamentary debate, hearings, judicial review, ombudsman interventions, etc.). Consequently, modern concepts of administrative legitimacy, based on the idea of the rule of law and human rights derives from the premise that an administrative action is legitimate not by virtue of the

status of the subject or legality of the procedure, but by virtue of substantive values incorporated in these actions and decisions (Mescheriakoff, 1990).

Modern concepts of the administrative system rest on models of the administration as a complex and dynamic system of human inter-action (Pusic 1985). In this model the administration is projected as a complex and dynamic "relatively closed" system of structures and procedures within itself, as well as an "open system" that communicates with other systems (e.g. the political and economic system) active in the social environment surrounding it. As a system of human inter-action that derives from the fact that individuals in society achieve their interests either through mutual cooperation, or through mutual conflict, the main social function of the administrative system, actively integrated into various patterns and forms of human behavior, is to regulate social processes. As realization of individual or group interests can either be achieved by domination or by compromise, the function of social regulation of an administrative system plays an essential role in neutralizing contingent effects of illegitimate social behavior or conflict (Luhmann, 1984).

IV.

The administration as instrument of government. Traditional legal theories define administrative action as administrative function, i.e. as one of the legal functions of the state - in other words as a modality of "state law" (Staatsrecht) (Jellinek, 1914). According to these concepts, the administrative function is a specific, legally regulated, function of state power that features the formulation of individual compulsory orders and commands and is authorized to perform acts of legally permitted physical repression. The

traditional concept of state law, modified by the marxist definition of the role of state and law "after the proletarian revolution" has been widely circulated in all Central and Eastern European countries under communism, particularly under the influence of the Soviet legal theory (Collins, 1982; Krygier, 1990).

The Administration as public service. On the other hand, the concept of the administration as a public service originated at the turn of the century in conditions of social, cultural and economic development of highly industrialized nations of Western Europe. Administrative activity is now perceived, not as a function of state power, but as an activity focused on the realization of the welfare of society. This lead to ^{the} concept that the essence of administrative activity is to render public service, i.e. activities that play a "vital" role in the everyday life and work of individuals (e.g. education, medical care, etc.) and society as a whole (e.g. transportation, communication, etc.) (Diguit, 1913). According to this model of the administration, in conditions of developed social structures and functions, the state administration undergoes a substantial transformation: no longer does administrative activity represent a specific legal instrument of government. Administrative activity is now a product of a complex administrative system charged with rendering public services with the goal of undertaking actions aimed at securing the welfare of its citizens, as well as the cultural development and economic progress of society (Rosenbloom, 1982).

V.

Western European integration and transition processes in Central and Eastern European post-communist cannot be interpreted only as compulsor responses to economic and technological competition and pressures (Baker Raadschelders, 1990). Integration in Europe is also the result of autonomous development patterns of both economic and administrative systems in the region. The developed countries in Europe have achieved the level of social human rights and technological development, that sets them within the general framework of post-industrial (Galbraith, 1979) and information societies (Bell, 1973).

On the other hand, post-communist countries in Europe still on levels of mid and late industrial development, as well as those in early stages of high technology developments, will doubtlessly need to consider present European integration tendencies, not only in respect to their general social and economic development strategies, but also in regard to their administrative systems as well. Within this dynamic social and economic environment, the recognition of the need of the administrative systems of European post-communist countries to adapt to integration processes is prerequisite for the active participation cooperation and integration of these systems into European integration processes. In this context, administrative legislation reforms and administrative system compatibility in Central and East European post-communist countries to West European integration processes should be the basis for the future transformation of the respected post-communist administrative systems and their organizational and functional development (Lilic, 1990:1). Comparatively speaking (Timsit, 1987), the transformation of administrative

systems should also be aimed at undertaking functional and organizational (Emery, 1969), as well as technological (Baquiast, 1986) and personnel (Reinemann, 1987) reforms that are in line with achieving higher standards of administrative efficiency and human rights protection, particularly in regard to the issues of privacy (Michael, 1994) and data protection (Bennet, 1992).

Another result of the transition process, is the consequent de-centralization and de-concentration of centralized administrative systems into organizational and functional forms of a higher order. This is due to the fact that increased complexity, and particularly the "informatization" of society, have practically rendered centralized directing, management and control of the administrative processes obsolete, as the traditional administrative structure is inflexible, inefficient and unadaptable to the dynamics of the changing environment (Baquiast, van de Donk, 1989). To achieve territorial integration of administrative systems that is compatible with tendencies in the developed European countries, hierarchical models must be substituted by new forms of organizational, functional, technological, human resource and financial integration patterns that enable multiple communication not only with internal subsystems, but with external and international systems as well (Simon, Smithburg, Thompson; Shafitz, Hyde; Heady).

Transition and integration processes in Europe also have a significant impact on the perception and quality of human rights, that should be taken into account in the present and future reforms of administrative systems (Rosas, Helgesen, Gomien, 1990). The principle of legality, expressed through the ideal "that all citizens are equal before the law", has historically played a crucial role in institutionalizing, particularly in regard to judicial and

administrative procedure, the relation between the citizen and the state (administration) (Lilić, 1990:2): the greatest moral value and practical effect of the "equality" principle being the (legal) protection of the citizen from the foul actions of the state. Today, however this traditional principle is considered one-sided and obsolete: it is argued that for the principle of legality to be legitimate in a modern administrative environment, apart from the law, the consent of the citizen is also needed. This is the result of the higher level of information and knowledge the citizen has access to, as well as ideological and interest independence of the citizen in communicating with the administrative system.

Due to the need of efficient regulation of social, economic and technological processes, modern administrative systems show a general tendency towards substituting traditional authoritative instruments of administrative power, with higher forms of achieving micro and macro level social regulation (Pusić, 1989). Grosso modo, it may be concluded that the use of administrative force is counter-proportional to the level of general social and economic development (Moharir, 1989; Sepe, 1989). It can be said that administrative repression today is a feature of underdeveloped social and economic systems, and leads to the phenomena of "vicious bureaucratic circles" - once applied, repression leads to more repression, which agitates the problem even more, then more repression is applied, and so on (Crozier 1969). Thus, the development of modern administrative systems is less and less oriented toward the use of power and force, as there is objectively less possibility of compulsory social regulation.

A specific question to be addressed in the context of administrative system reform is the issue of the efficiency of administrative systems. Generally speaking, the more there are technological factors present in administrative systems, the higher the level of the efficiency of the system. Nevertheless, particularly in countries that are experiencing political and social "turbulence", an opposite tendency in the development of administrative systems can be detected. Times of crisis generate a tendency of extensive "administrating", primarily due to the general inefficiency of the social and economic system. Inefficiency gives rise to the need of more authority, but authority itself does not resolve the problem. This model, logically, requires an authoritative administrative system, as authoritative administrative decisions can only be implemented by means of political force and repression. Consequently, authoritative administrative systems cannot substantiate and resolve economic, social turbulence by mere "authoritative administrative efficiency". Such situations, particularly receiving active political support, can easily become the main obstacle for general social, economic and administrative reform, e.g. as is the case with present Yugoslavia (Serbia and Montenegro).

VI.

With the fall of the Berlin wall, socialism gave way to nationalism all over Central and Eastern Europe. Also in Yugoslavia: "In Croatia, Slovenia and Bosnia and Herzegovina, and to some extent in Macedonia, nationalists used anti-communism to bolster their appeal and their international legitimacy, while the new Socialist Party of Serbia (ex League of Communists of Serbia) and the League of Communists in Montenegro managed

Ceausescu-like transformations, turning nominally socialist parties into openly nationalist ones." (Hayden, 1992). On the other hand, the collapse of the communist system in Eastern Europe brought new forms of nationalism (Paković, Koscharsky, Czarnota, 1995), most explosive. in cases of disintegration of former "socialist" federations (The USSR, Czechoslovakia, and particularly dramatic and tragic in Yugoslavia) (Wheeler, 1992). "It is possible to presume that these federations broke down because of two basic internal reasons. The first is that they were federations held together by force and authoritative policies (thus the federations began to dissolve with the disappearance of the communist regimes). The second, and crucial reason for their break-down is the fact that the nations composing them were set on becoming independent states. Thus, there was never a political will to reform the federations on a democratic basis." (Pešić, 1992). The events, the crisis and the tragedy that came upon the now former Yugoslavia in the course of the past four years are still very much focus of world attention and concern.

As an independent state, Yugoslavia was initially established on December 1, 1918 as the Kingdom of Serbs, Croats and Slovenes, changing the name to The Kingdom of Yugoslavia in 1929. On April 6, 1941, Yugoslavia was attacked by the Axis Powers, thus entering The Second World War, until victory was proclaimed on Victory Day, May 9, 1945. Immediately after the war, Democratic Federal Yugoslavia was proclaimed, becoming The Federal Peoples' Republic of Yugoslavia on November 29, 1945, after a referendum and elections. The Socialist Federal Republic of Yugoslavia was proclaimed by the Constitution of April 1963, and later reformed by the Constitution of 1974.

Being the most liberal of the European socialist countries, particularly in the late eighties, Yugoslavia initiated various economic, social and political reforms. However, with the fall of the Berlin Wall in 1989, the existing Yugoslav Federation of six republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia) was soon to dissolve in ethnic and nationalistic conflicts (Glenny, 1992; Djilas, 1990; Ramet, 1991; Bakić-Hayden, Hayden, 1992). In 1991, first Slovenia and then Croatia proclaimed independence, to be followed by Bosnia and Herzegovina and Macedonia in 1992. Serbia and Montenegro, as the remaining two republics enacted a new constitution in 1992, claimed continuity with the former Yugoslavia, and established the Federal Republic of Yugoslavia (FRY) (Lilić, 1995:1).

In 1993 Yugoslavia was hit by a record hyper-inflation (312 million percent monthly, for January 1994), that was stopped in early 1994 with the introduction of a new dinar (since then the annual inflation rate has been a steady 100%).

The Security Council of the United Nations implemented economic sanctions against the Federal Republic of Yugoslavia in May 1992, that were suspended after the Dayton Peace Accord and the signing of the Paris Peace Agreement between Bosnia and Herzegovina, Croatia and Yugoslavia in December 1995 (The Dayton Agreements).

In regard to transition and administrative reforms in Yugoslavia (Serbia and Montenegro), although new legislation has been passed in the 1991-1995 period, it could be said that no substantial effort in this direction was made since the last pre-brake-up Yugoslav Federal Government initiated extensive economic, political and administrative reforms in the 1987-90 period. Instead

of a conclusion on the state of affairs related to present administrative reforms in Yugoslavia (Serbia and Montenegro), it might be more effective to quote an excerpt from a paper titled "Opinions, Proposals and Initiatives" of the Federal Expert Board for Public Administration prepared as part of a special Report for the Federal Government on the subject of public administration reform policy. The Expert Board, *inter alia*, emphasized the following: "In the opinion of the Expert Board, there must be a clear option for such a model of the public administration that would correspond to the real needs of the present moment, as the further preservation of inflexible hierarchical relations, as well as the cultivation of the bureaucratic mentality of the functionaries and civil servants employed, would undermine the actions of the economic system reforms and the organization of scientific and technological developments, compared to the level of development in the world surrounding us. This "economic" orientation, as well as the rationalization of the activity of the administration, aimed at the support of the activity of the economic subjects, must receive convincing and unquestionable priority in the forthcoming administrative transformation. (...) The general re-orientation should be coordinated together with the constitutional changes, the changes of the Law on the System of Government Administration, as well as the changes of the other laws and by-laws that regulate the activities of the administration." (Federal Expert Board for Public Administration, 1987).

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TURBULENCE IN ADMINISTRATIVE TRANSITION
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S U M M A R Y

Modern administrative systems derive from a relatively non-differentiated state organizational structure of the absolutistic states of the Seventeenth century. Reactions against the administration as the monarch's "personal instrument of government" were inspired by the doctrines of the separation of powers and realized by revolutions at the end of the Eighteenth century in Europe and America. However, as the administration steadily became a equal partner in the division of powers, the previous view of the administration as a "suspicious instrument of the monarch" started radically to change.

Today, the experience of developed countries indicate that an administrative system cannot be conceived as an "instrument" or "apparatus" (c.g. of the ruling class), nor can a modern administrative system be projected only as a legalistic normative model of structures and procedures (i.e. administrative agencies and the administrative process). Administrative models that are common to the developed countries (particularly in Europe) derive from the concept of the administration's social function. In conditions of a developed material and cultural social environment, state and government "transform" from an instrument of power and repression, into an organization with a social function of rendering public services (c.g. education, medical care, scientific research and development, ecology protection, economic development, etc.) to citizens and other subjects in the social environment and protecting human rights. After the fall of the Berlin Wall in 1989, many former communist countries are going through a period of social and political turbulence that, inter alia, reflect on their administrative systems. The situation varies form country to country. A references to the state of affairs of the administration in Yugoslavia (Serbia and Montenegro) is also given.

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