PARTICIPATIVE AUTHORITY IN ADMINISTRATIVE PROCEEDINGS – EUROPEAN IMPACTS AND CONSTITUTIONAL COURT PRACTICE IN SLOVENIA

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Summary
The notion of the right to be heard (*audi alteram partem)*, deriving from human dignity and equal protection of rights, is becoming increasingly important in administrative relations within the European societal framework, both in theory and case law. The right to be heard directly enables and simultaneously serves as an indicator of participative power which is replacing the prior rather strictly authoritative relations among the rulers and the ruled. Despite some limitations of such principle in administrative relations, taking into account the primacy of substantive truth and due protection of public interest, or even because of these impediments, the *locus standi* of the parties is given significant attention by the Council of Europe and has been incorporated in the relevant EU acts (the European Code of Good Administrative Behaviour and the EU Charter of Fundamental Rights). The paper presents the theoretical and comparative views on participation and, more precisely, the right to be heard as a key Europeanization guideline. Furthermore, an analysis of Slovenian administrative and constitutional judicial practice is carried out to illustrate the European impacts on the conduct of Slovenian authorities. In conclusion, the author emphasizes the main principles developed over the past twenty years and the need to consider future European trends that leave further room for an even more proactive approach by the Slovenian public administration and courts.

Key words: participation, administrative proceedings, right to be heard, good administration, Council of Europe, EU, Slovenia, constitutional court.

1. Introduction

Factors contributing to the growing extent of the administrative domain in contemporary society include Europeanization with supranational public governance, decentralization of administrative structures and privatization of public tasks, delegation of the classic parliamentary powers to the Executive, etc. All these contribute to an ever greater significance of administrative law in continental Europe with a traditionally law-driven public administration.[1] The contemporary model of public governance is therefore contrary to the traditional one, grounding the execution of power rather on participative networking and partnerships. It clearly reflects the tendency to redefine top-down authoritative and unilateral decision-making by a higher level of bottom-up cooperation of the ruled. Inevitably, the importance of public administration as decision-maker is changing and growing as well. In this respect, a crucial element of modern governance is good administration, incorporating the classic procedural safeguards in relation toward (state or administrative) authority, as defined by the Council of Europe (CoE) and the European Union (EU). Administrative proceedings and the relations among participants in the regulation and implementation thereof thus enable the development of theories on the role of the state – from enabling through ensuring to collaborative state, with comprehensive participation of individuals in public governance.

Administrative law has a cross-sectional function: it provides for the development and implementation of public policies as well as for the protection of weaker parties in their relations with authorities. In such respect, particular importance is attributed to administrative procedure law which – in addition to its instrumental role of executing rights and obligations under substantive law – also provides specific constitutional safeguards of democratic power, e.g. *fair trial* or *due process.* Due process is the core of administrative constitutional and supranational law. Also administrative proceedings, in fact, aim at the protection of fundamental human rights, safeguarded at national constitutional and international

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[1] Cf. Breznik & Kerševan, 2008: 53, Hopkins, 2007: 713, Rose-Ackerman & Lindseth, 2011: 339.

levels.[2] A key standard of democracy and the rule of law may be found in the Germanic tradition that also influenced Slovenian law, namely the respect of human dignity. The same is provided by Article 22 of the Slovenian Constitution concerning equal protection of rights, which – together with the provisions on judicial protection and effective remedies – is of utmost importance for the rights known as the rights of defense. In administrative law, where specific features of civil or criminal law apply, the primary right of defense is the right (of the party) to be heard (*audi alteram partem*). This is also the main principle provided by Article 9 of the Slovenian General Administrative Procedure Act (GAPA),[3] the purpose of which is to balance – thanks to its adversarial nature – the otherwise unilateral authoritative decision-making in administrative matters. The paper addresses the right to be heard as a fundamental principle or key value among the rights of defense in a democratic state, as seen in theory, comparatively in European frameworks and in Slovenian administrative and court practice. The hypothesis that European convergence influenced the conduct of Slovenian authorities – particularly after Slovenia had acquired full EU membership in 2004 – raised the awareness that the right to be heard was not merely an administrative-procedural guarantee but also a constitutional guarantee. This means that in administrative matters, the Slovenian constitutional court practice interprets the right to be heard in accordance with the principles and case law of the CoE and the EU. The primary research method, besides historical, descriptive and comparative approaches, is a thorough analysis of case studies from the Slovenian Constitutional Court in administrative matters. The basic origins of the right to be heard are defined and the necessary minimum standards of participatory principle exposed (e.g. the procedural aspects of the right to be heard, access to file and information, notice, effective legal protection, etc.). Based thereon, the paper identifies the main trends and challenges faced by Slovenia and comparable post-socialist states in the region in democratizing their societies.

2. European trends and challenges of the development of administrative proceedings

2.1. Ratio of administrative proceedings in the national and European context

The evolution of administrative proceedings and, more generally, of administrative procedure law in most of Europe corresponds to the development of democracy as opposed to absolutist and arbitrary authority. Administrative proceedings and administrative dispute primarily represent an instrument of implementation of the rights and legal interests of the parties in their relations with a priori superior authoritative institutions, while the democratic rules of a state governed by the rule of law provide for predictability of actions of the holders of power, as well as for judicial review of the decisions of the executive and administrative authorities. The very purpose of procedural law in the context of legal certainty is to analyze as specifically as possible the course of actions aimed to achieve the objective of the proceedings regulated by law. Being a part of public law, administrative law does not strive only to protect the position of the parties but also to implement public interest in individual administrative areas. This implies an effective implementation of public policies. Roughly speaking, the worldwide development of administrative, particularly procedural law can be defined by two complementary objectives (cf. Nehl, 1999: 11, Rusch, 2009, Kovač & Virant, 2011: 206): the

[2] Although Slovenian textbooks do not often or systematically present administrative law as an autonomous (i.e. separated from constitutional or general public law) form of protection of constitutional rights, as e.g. in the case of constitutional criminal or civil procedure law, this aspect is even more important than in civil law due to the a priori subordination of the party in administrative proceedings (cf. Kovač, Rakar & Remic, 2012: 35). The German legal system, for instance, defines the nature of administrative procedure safeguards or administrative law in general as »*constitutional law in action*«, »*concretized constitutional law*« (Künnecke, 2007: 8) or the general administrative procedure act as an administrative constitution (*Grundgesetz für die Verwaltung,* Heckmann et al., 2007: 39). Cf. Ziller in Peters & Pierre, 2011: 168, or Rose-Ackerman & Lindseth, 2011: 117, stating that in general also in the Anglo-Saxon system administrative law (still) has a »*constitutional character*«.

[3] Official Gazette of RS, No. 24/06 – official consolidated text, 106/06, 26/07, 65/08, 8/10. The Act was adopted in 1999 based on the Yugoslav law of 1956 and the legacy of the Austrian law of 1925. Such right is not unilateral but requires an active approach by the body and the court. The author therefore uses the expression »to be heard« in addition to »make a statement«, »stating«, or »hearing« etc. Textbooks, as well, refer to such right with different terms. Some e.g. distinguish between *pro forma* participation or attendance (German *Beteiligung*), where the parties are merely present in the proceedings, and active participation (German *Partizipation*), where the legislature actually cooperates with the interested parties in decision making (cf. Hoffmann-Riem et al., 2012: 699-702). The paper discusses the above notions *in lato sensu*.

protection of the rights of the parties before the state or authorities on one hand, and the implementation of public interest through effective administrative proceedings on the other. Administrative proceedings are thus an interface ensuring that public and private interests are balanced and proportionate. Similarly to public governance, the regulation and implementation of administrative proceedings – being a key process of public governance at the instrumental or technical-operational level – are divided between the need for rapid adjustment and legal solidity as a guarantee of the rule of law (*Rechtsstaat*). In the past, e.g. in the previous century, more attention was devoted to the protection of rights and legal interests of the parties, while in other periods emphasis was placed on public interest, explicitly e.g. as regards the development of the goals, manners and structures of public governance in the EU.[4] Convergence measures or institutions comprise, in particular, the deregulation of administrative matters and simplified regulation of administrative proceedings aimed at reducing administrative burden, including computerization of the procedure and alternative dispute resolution, as well as the integration of proportionality into the regulation and implementation of proceedings. This means that despite nowadays surpassed and once merely instrumental nature of proceedings in relation to substantive law, and public administration in relation to the bearers of institutional public governance, it is necessary to pursue the importance of procedural guarantees by means of weighing the consequences of any infringement thereof for the addressee of the authoritative decision. The above results in a generalization of principles and rules of administrative proceedings rather than in a detailed regulation and relativization of certain safeguards of fair procedure not necessarily considered significant errors of decision-making, or in subsequent judicial review rather than legal remedies within administrative proceedings.[5]

Following the German and Austrian models, administrative proceedings in Slovenia are understood as concrete decision-making in individual matters, and not like in the USA or EU or individual Member States (e.g. the Netherlands) where such refer to any procedure carried out by a public administration body (including the bearers of public authority to which public tasks are delegated by the state).[6] Notwithstanding the understanding of administrative proceedings or administrative act as merely a decision pertaining to a specific party, and based on compliance of already existing facts with the abstract legal state in a regulation, most countries have codified their administrative proceedings precisely to allow the implementation of basic principles, such as the adversarial principle. Administrative law theory and international principles (cf. Nehl, 1999: 17, Peter & Pierre, 2011: 179, Harlow & Rawlings, 1997: 523) in fact consider impartiality of the decision-maker (*nemo iudex in causa sua*), hearing the viewpoint of the parties affected by the decision and judicial review of administrative decisions as unavoidable elements of the democratic legal order in carrying out administrative authority in any form, based on the rule of law and separation of powers. The above is particularly important for administrative law relations where the changed role of the state led to changes in the role of the administration. Thus, the latter is no longer the exclusive bearer of authority

[4] Cf. historically and comparatively Rusch, 2009: 3-5; for CEE Galligan et al., 1998, for Slovenia Kovač & Virant, 2011: 197-218.

[5] On instrumental and other functions of proceedings cf. Hoffmann-Riem et al., 2008:499. For the EU Nehl, 1999: 11, 80, presenting the horizontal convergence of changes in various administrative areas, such as delegation of measures from the EU to Member States in the sense of vertical convergence (cf. Statskontoret, 2005:34, 73, Rusch, 2009: 4, Galleta: 2010). As far as convergence is concerned, theory stresses the approximation of the EU and US systems as well as the differences within the EU, e.g. between the German and French model of public administration and understanding of administrative legality on one hand, and a third group of countries with individual systems, such as Sweden and Switzerland (cf. Peters & Pierre, 2011: 167, Kovač & Sever, 2012). Important for practical impact are the principles of EU law, primacy, direct applicability, and direct impact (with comments on cases Avbelj, 2010: 63-118).

[6] It needs to be mentioned that over the past decade theory and regulation have been developing a broader understanding of administrative proceedings even in countries where such is traditionally understood as mere decision-making, e.g. Spain and Germany (cf. Rusch, 2009: 5, Galligan et al., 1998: 17-26, Rose-Ackerman & Lindseth, 2011: 336-356). In such context, two types of proceedings are normally distinguished: a) individualized decision-making / adjudication (*Verwaltungsverfahren*) and b) policy-based decisions with general effect / regulatory acts / rule-making / procedural arrangements / public policy cycle (*Gestaltungsverfahren*). Cf. Breznik & Kerševan, 2008: 30–57, Šturm et al., 2011: 1390–1400. It is quite interesting in such regard that one of the rare CoE resolutions relating to individual administrative matters is the earliest, i.e. 1977 *Resolution No. 77 (31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities*. For more on CoE acts and the EU Charter of Fundamental Rights cf. Hoffmann-Riem et al., 2012: 510-520.

as it is up to, in particular, the government to conduct public governance by means of partnerships and networking of individual social subsystems, such as the economy and civil society i.e. authorized holders of public powers. The theory of public policies has developed the doctrine of good governance as participative strategic management of the society.

This directly reflects (also) in law and administrative relations, since an essential element of good governance is good administration, which encompasses the classic procedural entitlements or rights of defense in the relations with or even directly toward the authorities (cf. Schuppert in Bevir, 2011: 287-298). Good administration is not an intangible construct but rather a corpus of principles and rights which – thanks to the CoE and in particular the tradition of Article 6 of the European Convention on Human Rights (ECHR) – concentrated into the right to good administration pursuant to Article 41 of the EU Charter of Fundamental Rights.[7] The very essence of good administration (and good governance) is that every natural or legal person has the right to have their affairs handled impartially, fairly and within a reasonable time, whereby they should be given the opportunity to be heard or make statements in any language of the EU and to have access to any data in their file; the administration must give reasons for its decisions, and the affected party must be given the possibility of compensation. The right to be heard is a vital part of the right to good administration. This leads to what is known as the third generation of administrative proceedings which – compared to the other two traditional and defense-oriented groups, issuing general and individual administrative acts – focus on creative partnerships between social groups and thus on greater legitimacy of public policies and authoritative decisions. These proceedings are more than mere decision-making – they represent a system of communication and coordination with the ruled. It is therefore urgent to provide the possibility of participation to all legitimate participants in the (administrative) matter, which enables a catharsis of their interests and – regardless of the supremacy of one or the other – eventually a higher degree of acceptance of the decision by all the parties involved, hence leading to conduct that better observes the rule of law. Procedural guarantees, in particular the right to be heard, can thus be regarded as the main reason for understanding the proceeding in the sense of its integrative function. The regulation of administrative proceedings must encourage openness, accountability and effectiveness of public administration. A vital tool to achieve such is to develop participation and understanding of administrative proceedings in a broader context. This leads to the growing importance of the paradigm of a participative state, which is to regulate with greater emphasis on flexibility and the basic legal principles as value criteria (cf. Pavčnik, 2007: 599, Barnes in Rose-Ackerman & Lindseth, 2011: 337, Vintar et al., 2012: 128).

Administrative law relations or administrative proceedings have specific characteristics compared to other legal relations and procedures where the said principles apply, as well.[8] One of the first

[7] OJ C 83/337, 30. 3. 2010: *»1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions...«* The Slovenian legal system does not provide for the right to good administration or good administration as such, although such right applies directly based on the EU Charter of Fundamental Rights or specific provisions of the Constitution and GAPA. Good administration is also a legal principle enshrined in the constitution and laws in e.g. Finland, the Netherlands and Latvia (Statskontoret, 2005: 15, Venice Commission, 2011: 15). An important reference is the Code of Good Administrative Behaviour (Hopkins, 2007: 723) adopted in 2001. On the content, legal nature, legal bases and the relation between good governance and good administration cf. the presentation of development and state of affairs until 2011 in the Venice Commission Study 470/2008. The Commission stated that the objective of administrative activity and legal regulation thereof in the sense of good administration was to resolve conflicts between public and one or more private interests, with emphasis on restricting absolute authority and encouraging the effectiveness of public policies, as only in such manner authority may be interpreted as legal and legitimate. On participative democracy as the foundation of good administration cf. Nehl, 1999: 19, 25.

[8] E.g. Čebulj, 2000: 303, on certain peculiarities of constitutional complaint in administrative law compared to complaints in other areas of law concerning the act of assessment, the applicants, the scope of assessment, etc. Particularly worth mentioning is the assessment of a decision within a reasonable time, taking into account not only the duration of court proceedings but also the course of prior administrative proceedings, also considering the executability of an administrative act which pursuant to the GAPA depends on finality or – given the non-suspensiveness under sector-specific law – on serving, which attributes particular significance to temporary decisions (Pirnat, 1994: 705).

distinguishing features is the relatively high frequency and unavoidability of administrative proceedings in the life of an average person, owing to the initially mentioned expansion of the administration and authoritative regulation of relations, including the imposition of obligations on individuals in order to achieve a regulated community society. Given the intertwining of various procedures, the different meaning of substantive truth is also quite often an issue since, for example, in punitive law the privilege against self-incrimination applies, while pursuant to the GAPA the party is obliged to tell the truth.[9] Moreover, a distinction needs to be drawn (Ude, 2000: 1379) between administrative and civil proceedings, differing above all as regards (1) the non-dispositiveness of the administrative claim, and (2) the role of the decision-maker. In administrative proceedings the decision-making body is at the same time the opposing party, while in a law suit the judge is separated and superior to the complainant and the defendant party. According to the GAPA, the right to be heard is pronouncedly expressed by the definition of absolute procedural errors and thus directly represents a part of (formal) legality. This principle and its implementing rules have – particularly in declaratory proceedings – a twofold purpose: (1) to protect legally defined rights and interests of the parties, and (2) to establish the objective and actual state of affairs, relevant for decision. Given the nature of the administrative matter, a precondition of legality of an administrative decision is above all substantive truth and – in the event of a collision – the supremacy of public interest over the rights of the parties (Articles 7 and 8 of the GAPA). Therefore, the adversarial principle and the right to be heard do not have the same weight as, for instance, in a law suit. In administrative proceedings, the party is inferior to an at least potentially opposing (public) interest. Yet precisely because of the party's subordination to public interest and bodies advocating such in a proceeding, the participation of the party is even more important.[10] The right to be heard is a corrective measure for the otherwise applying supremacy of the administrative body based on the protection of public interest, and introduces at least a minimum respect of the adversarial principle. Moreover, it allows for a consensual settlement of disputes even in administrative matters. The rights of defense are intended to ensure – particularly in the event of rejection of a claim or interference with a party's legal status – that such will occur only when and inasmuch as public interest cannot be protected otherwise. Last but not least, there is less need to invoke the inquisitorial principle since the burden of proof rests on both the body and the party.[11] Yet it is necessary to distinguish between the search for truth and the degree of (non)participation of the party since the right of the party to be heard can be implemented also otherwise. Therefore, the GAPA (should) provide the obligation for the body to guarantee the right to be heard to the party primarily pending the issuance of the administrative act, except in the event of urgent measures or a discrepancy between the statements of the party and the findings of the body that do not imply a collision of interest.

2.2. Right to be heard as part of the rights of defense and due (administrative) process

Due process implies several safeguards, yet the entire doctrine of due conduct by authoritative bodies has built on the principle of respect of human dignity – with emphasis on the right to be heard – ever since the 18th century (Harlow & Rawlings, 1997: 497, Nehl, 199: 166). From such viewpoint, the significance of the basic procedural rights is per se or *ipso iure* so considerable that one of the most frequent occurrences in judicial (administrative) law is the intertwining of substantive and procedural law. It is therefore important that due process, as an actively developing concept, evaluates not only the fairness but also the integrity and consistency of the regulation (i.e. the *fairness* and *reasonableness* of authoritative acts). Primarily, however, the rights of defense – with the right to be heard on the lead – provide through equality of arms for due and fair process, which is a basic

[9] This is only one of the special criminal law safeguards according to the ECHR and the Slovenian Constitution; other safeguards, which as a rule do not apply in administrative relations, include: presumption of innocence, immunity, exclusion of inadmissible evidence or prohibition of retroactive effect (Lampe, 2010: 290, cf. European Parliament, 2001: iii-viii, 105).

[10] Cf. Androjna & Kerševan, 2006: 103-109, who in addition to the relation between the body and the party also deal with the relation between parties with opposing interests. On the importance of procedural guarantees in administrative proceedings given the a priori subordination of the party cf. also Künnecke, 2007: 149, Peters & Pierre, 2011: 176-181.

[11] More in Hoffmann-Riem et al. 2012: 675. On the relation between inquisitorial and adversarial principles cf. Nehl, 1999: 109-115, Androjna & Kerševan, 2006: 302, Rusch, 2009: 6-7, Galleta, 2010: 33. It is necessary to distinguish between the right to be heard (i.e. principle of hearing) and the party's statement as evidence, since in the first case the party is the holder of the right while in the latter he/she is only a source of facts (Jerovšek & Kovač, 2010: 64, Šturm et al., 2011: 287).

component of a democratic state governed by the rule of law as well as of good administration. Participation should be understood as an element of proportionality and legality in the broadest sense.[12] As a general rule, in EU countries the right to be heard in administrative matters is exercised on the basis of constitutional guarantees even though it is rarely an explicit constitutional principle.[13] All EU countries have the principle of hearing enshrined in their legal orders (usually in the form of a general law on administrative proceedings), specifying the beneficiaries, the implementation e.g. even prior to issuing an administrative act or at least prior to execution, access to the file, the rights in the declaratory and evidence proceedings, statement of reasons, serving, legal remedies, etc. The importance of participation varies among the countries and is greater e.g. in Finland which has a special chapter relating to the right to make a statement enshrined in its GAPA. The same applies in the Anglo-Saxon law owing to the absence of separation into public and private law and the significance of participative democracy and human dignity (Harlow &Rawlings, 1997: 107, 199, 498, Peters & Pierre, 211: 177-181, Kovač & Sever, 2012). A reverse trend can be observed following the abrogation or relativization of the special principle of hearing under the economic pressures from the EU, e.g. Germany (Künnecke, 2007: 145–154).[14] The rights of defense thus comprise several elements which structure themselves rather diversely, but still share the same set of elements (see Table 1 with chronological indication of sources). In the Anglo-Saxon setting and Scandinavia, participation or right of defense is regulated more consistently but nevertheless in less detail than in continental Europe.

The last line of the table below offers the possibility to set up an aggregate model which best encompasses the various sources and serves for the analysis of Slovenian constitutional court practice. According to such model, the right to be heard is of primary importance among the rights of defense or basic procedural guarantees, although – in terms of a two-way communication between the body and the party – it is closely related with other rights, such as the right to be given the reasons for an authoritative decision, even if such in theory represent the basis for other constitutional principles (e.g. effective remedy): (1) the right to be heard, with (sub)rights: access to information, notice and serving, representation and assistance, use of language, the adversarial principle in establishing and proving relevant facts; and (2) legal protection, with (sub)rights: statement of reasons, effective remedy, access to court, decision within a reasonable time. The elements of the above rights inevitably intertwine. Categorization, however, attributes an individual right – such as the right to be heard – greater significance compared to implementing approaches.

The listed systemization has proven to be rather deficient in praxis. For example, the reasons for a decision or access to court (can) to a large extent express the sense of »active hearing«, as e.g. interpretation in proceedings. Nevertheless, it is theoretically useful for further debate, with due consideration of its limitations. The right to be heard is to be understood narrowly as a set of elements, and in a broader sense as the entire defense, including all elements of legal protection of the parties. In such context, it is necessary to understand the given principles and rights in court practice at constitutional or supranational levels. Some critics believe that in interpreting the rights of defense in administrative matters the courts are sometimes adequately (pro)active, while on other occasions they are much too conservative or formalistic (cf. Schwarze, 2004: 91-94, Peters & Pierre, 2011: 173, Harlow & Rawlings, 1997: 495, Pavčnik, 2009: 35).

Table 1: Elements of the rights of defense and their classification by different sources

[12] Cf. Lampe, 2010: 136-139. The trend toward natural fairness is observed both in Central Europe i.e. EU and the Anglo-Saxon world (Künnecke, 2007: 138, J. Schwarze, 2004, Harlow & Rawlings, 1997: 496). On the intertwining between procedural and substantive law cf. Nehl, 1999: 20, 107, Galligan et al., 1998: 29, Heckmann, 2007:. 41, Galleta, 2010: 2–32, Barnes in Rose-Ackerman & Lindseth, 2011: 342, for Slovenia Kovač, Rakar & Remic, 2012: 44, 177.

[13] For example in Spain (European Parliament, 2001: 90, Statskontoret, 2005: 38).

[14] Known as *Beschleunigungsgesetze*, BGB1.I, 1354, 12.9.1996, aimed at speeding up procedures related to foreign investments and providing that an infringement of the right to be heard does not create the possibility for challenging an act, unless the impact of a procedural error on the decision on the merits is proven, which is deemed exaggerated considering the principle of participation that applies in EU law (cf. Avbelj, 2010: 267). The German regulation also relativizes the consequences of the infringement of the right, even if the error is not always deemed significant or it can be corrected by legal remedies. Similarly the new GAPA (2010) in Croatia. Cf. Statskontoret, 2005: 35-37, Vintar et al., 2012: 123-126.

CE Resolution (1977)	Right to be heard	Access to information	Assistance and representation			Statement of reasons		Indication of remedies, judicial review	
Slovenian Constitution (1991)	Right to be heard as part of other principles (21, 22, 34)	Access to personal data (38)		Use of language (11, 61, 62)	Participation (only) as part of other principles (21, 22, 34)	Statement of reasons (only) as part of legal remedy (25)	Without undue delay as part of judicial protection (23)	Legal remedies and judicial review (23, 25, 153, 156-158)	Rule of law and legality (2, 3, 120), equality (14, 22), compensation (26), etc.
Nehl (1999)	Access to files and right to be heard (access mainly part of right to declare)				Principle of care: - reasoning - discretion	- adversarial principle			
ECtHR principles by Schwarze (2004)	Right to be heard as part of legality/defense	Access to information and protection of confidentiality	Right to representation with protection of confidentiality	Use of language		Stating reasons for decision (only) with relevant facts	Reasonable duration of proceedings	Judicial review of administration	Fairness, impartiality, good administration, compensation, etc.
EU Ombudsman Code (2001, 2005)	Right to be heard (16; also 10, 15, 19-20)	Access to information, notice, serving (20-24)		Use of language (13)		Stating reasons for decisions (18)	Reasonable time-limit (17)	Indication of legal remedies (19, 26)	Fairness, legality, equality, non-discrimination, impartiality, legitimate expectations, proportionality, good administration, being service minded, etc.
Statskontoret, survey by EU Member States (2005)	Right to be heard before any decision is taken	Access to file and information, notice and serving			Adversarial principle (only) as part of the right to be heard	Stating reasons for decisions	Decision within a reasonable time	Indication of remedies available to all persons concerned	
Künnecke (2007)	Right to be heard when affected					Stating reasons - (only) with relevant facts			
Art. 41 of the EU Charter of Fundamental Rights (2010)	Right to be heard (41/2/a)	Access to file, confidentiality (41/2/b)		Use of language (41/4)		Giving reasons for decision (41/2/c)	Decision within a reasonable time	(Independent) judicial review	Impartiality, fairness (41/1), compensation (41/3)
Craig in Peters & Pierre (2011)	Right to be heard	Access and notice	Representation		Adversarial principle as part of hearing	Stating reasons - (only) with relevant facts			
Galič in Šturm (2011)	Right to make statements (equality part 1/2)	As subpart of making statements	As subpart of making statements		As subpart of equality of arms	As subpart of making statements and legal remedy			Prohibition of departing from established practice, finality, abuse, etc.
Aggregate elements of the rights of defense	**Right to be heard**	Access to information, notice and serving	Representation and professional assistance	Use of language and interpreting	Participation in declaratory and evidence proceedings	**Stating reasons for decision (only) with relevant facts**	Decision within a reasonable time	**Legal (and above all judicial) protection**	**Other rights of defense**

3. Analysis of Slovenian Constitutional Court practice in the European context

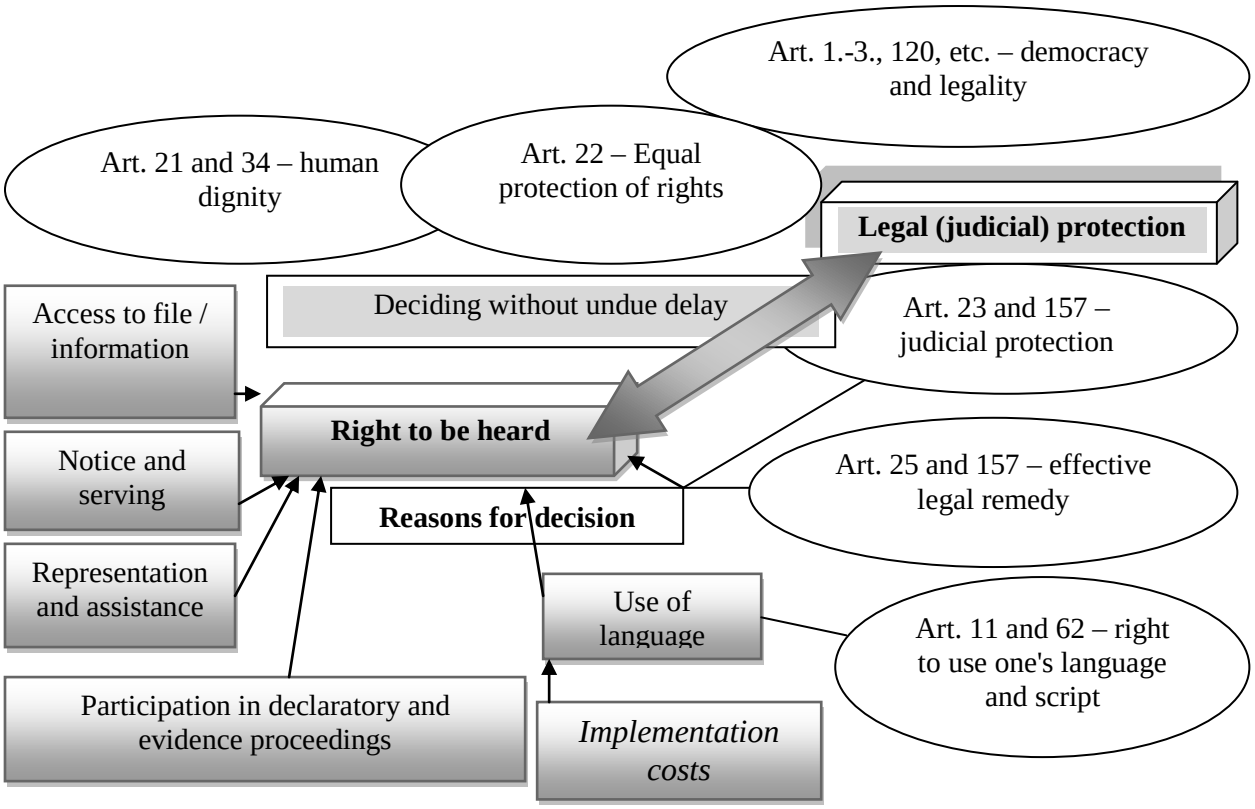
3.1. Elements of the Slovenian regulation of the right to be heard in administrative matters

In the Slovenian constitutional order, the right to be heard in administrative matters is generally enshrined in the principles of democracy, rule of law and protection of human dignity, and in particular in the principle of equal protection of rights pursuant to Article 22 of the Constitution. This is proved by both theory and Constitutional Court case law. Equal protection of rights is a more specific form of the principle of equality (Article 14 of the Constitution), which in administrative matters is expressed mainly in the (un)constitutionality of sector-specific laws which regulate special administrative proceedings, considering the principles, rules and standards laid down by the GAPA. The latter is indeed *lex generalis*, yet the merely formal supremacy of the sector-specific law over the GAPA is not sufficient for legal regulation that is to be consistent with the Constitution. Namely, special laws can regulate differently than the GAPA only individual procedural issues, with the cumulative existence of reasonable grounds for different regulation or the need for different regulation based on the nature of an individual administrative area. Moreover, it is inadmissible that a special regulation negates the fundamental principles of the GAPA (from legality to economy, Articles 6-14 of the GAPA, Jerovšek & Kovač, 2010: 17).

This applies also for the right to be heard as a basic principle of examination of the parties (Article 9 of the GAPA) and individual detailed or related GAPA rules (e.g. procedural legitimacy, access to file, representation, use of language, calling a hearing, stating the reasons for decision). The violation thereof is defined by the law itself as an absolute substantial procedural error (Article 237(2) and 260 of the GAPA), implying a (formally) illegal proceeding or decision; in such case, a new decision is issued or the case is remanded for a repeated proceeding (Articles 244 and 251 of the GAPA). The GAPA considers the right to be heard as being a part of the principle of examination of the parties in the context of protection of their rights (Articles 7 and 9 of the GAPA), which is specified in more detail with rules on making statements in the assessment of the subject matter of proceedings (e.g. Articles 138 and 146 of the GAPA, cf. the positive assessment by Statskontoret, 2005: 35).The party can declare themselves in writing or orally prior to the issuing of the decision, throughout the entire proceeding, with preclusions at oral hearing and appeal or renewal of proceedings pursuant to Articles 238 and 260 of the GAPA (otherwise, it implies a substantial procedural error according to Article 237). Furthermore, the GAPA defines a series of other rights of defense, such as the status and position of the party, representation (mandatory in the event of a lack of decision-making capacity or for the economy of proceedings), use of language, access to file, notice and serving, participation in declaratory proceeding e.g. with the party's statement as evidence, the possibility of extending deadlines, the obligation to state the reasons for decision, indication of legal remedies, etc. (Articles 43, 48, 62, 82, 103, 188, 214, etc.). Broadly speaking, nearly the entire GAPA is a list of the rights of defense, even if it does not contain some of the principles and rules presented in the table above (e.g. decision within a reasonable time). The principle of examination of the parties enshrined in the GAPA guarantees one of the most important procedural rights (Androjna & Kerševan, 2006: 99, Jerovšek & Kovač, 2010: 50). According to the analyzed case law[15], the right to be heard implies the elements below (Figure 1).

[15] The analysis of Constitutional Court decisions relating to administrative matters and more or less directly involving the right to be heard or make a statement, i.e. the rights of defense, over the past twenty years highlighted about 10 decisions concerning the review of constitutionality of a law and nearly 30 decisions concerning constitutional complaints. Among the decisions concerning constitutional complaints, practically 10 decisions issued in 2001 and 2002 are almost the same, all referring to the same type of legal issue i.e. citizenship as an element of legitimacy for denationalization of socialized property. These 10 decisions can thus be taken as one. The occurrence of issues concerning the right to be heard is thus analyzed based on about ten or a third of all decisions on (un)constitutionality of legal regulation with infringement of the equal protection of rights while restricting the principle of hearing, and 20 decisions in individual matters where the administrative body or court acted (or did not act) contrary to the right to be heard. The decisions are equally distributed in terms of time if separated by the first and second decades of operation of the Constitutional Court, although their number is higher in individual years (e.g. 1996, 2002, 2011).

Figure 1: Sources and elements of the right to be heard in the Slovenian Constitution



3.2. Scope of the right to be heard according to Constitutional Court case law 1991-2012

In legal theory and (constitutional) court practice in various legal environments, the right to be heard is based on the same constitutional or fundamental human rights, mainly authoritative democracy and respect of human dignity. There is, however, a considerable discrepancy as to what the right to be heard includes and which safeguards are equal, superior or inferior to such right. A simple categorization is made impossible by the intertwining of protected values, principles and rules, particularly the importance of stating the reasons for decision as a cross-section between the right to be heard and legal protection. The various elements are thus grouped rather loosely. A brief comparison between Slovenian and European regulations and practice is also provided.

- **Legitimacy of the right to be heard and differences between types of proceedings**

The scope or legitimacy of the right to be heard is important and thus frequent in Slovenian constitutional court practice (together with representation in nearly 20% of all cases). The prevailing opinion – e.g. in case Up-984/06-27, 4.4.2009 – is that procedural guarantees under Article 22 of the Constitution do not refer to proceedings in the personal sphere.[16] The court often stressed the limitations of the right to be heard in various types of proceedings, for instance in case U-I-273/98, 1.7.1999. Yet it needs to be added – and the court somehow supplemented its opinion a few years later in case U-I-312/00-40, 23.4.2003 – that in the family relations under consideration, the courts acted in accordance with the law regulating civil proceedings. The latter in fact implies much better safeguards for the protection of children than the GAPA, which is otherwise the main procedural regulation for the work of administrative bodies.[17] On the contrary, the implementation of the right to be heard in one

[16] Šturm et al. 2011: 271. In the US doctrine, the right to be heard was initially (18th and 19th century) applied in staffing decisions, such as discharge from public office and disciplinary and other measures in private law organizations (Craig in Peters & Pierre, 2011: 179).

[17] Cf. Galič in Šturm, 2011: 283, arguing that the provisions of civil proceedings aimed at protecting the child »*might go too far*« to the detriment of constitutional procedural guarantees of the parents. Cf. Harlow & Rawlings, 1997: 181, who stress the importance of equality in various types of proceedings in a situation of limited (financial) resources. Or Ude, 2000: 1377,

proceeding, where the purpose thereof and the scope of legitimate beneficiaries is different, does not satisfy the right of equal protection in another proceeding. This is true even if both are bound by the same circumstances (e.g. participation in spatial planning does not equal the right to declare oneself, which is granted to an accessory participant in the issuing of the building permit, U-I-165/09-34, 3.3.2011). Following the decision in case Up-1293/08, 6.7.2011, the court could – also considering the intertwining of elements of criminal and administrative law in inspection – define the admissibility of evidence more doctrinally.[18] Generally speaking, precluding the parties by binding their statements to a certain deadline is constitutionally admissible even according to the GAPA in order to ensure efficiency of proceedings (cf. same in U-I-50/08-16 and Up-2177/08-16, 26.3.2009, for accelerated asylum procedures). However, it is not allowed to limit the parties to a specific period of time in the course of proceedings (U-I-219/03-25, 1.12.2005), unless the limitation is necessary due to the specific nature of the area subject to regulation and proportionality between the norm and the objective thereof (cf. e.g. decision on "the Erased", U-I-246/02-28, 3.4. 2003, and U-I-14/00, 7.12.2000, stating that the (preclusive!) deadline to submit the applications (three months) was too short to prepare a list of the addressees). Such statements by the Constitutional Court point to a thorough weighing among several constitutional guarantees and goals of the acts under consideration, whereby in its decisions the Court consistently and regularly upgrades the arguments in multiple considerations of the same areas and institutions. Exceptions to the right to be heard are a rule also in other EU countries.[19] The Slovenian regulation and constitutional court practice can thus be evaluated as consistent with the European standard or balance between public and private interests in the proceedings.

In addition to giving the parties the possibility to declare themselves, very important for the right to be heard is two-way communication or dialogue, in which the competent body actually hears and considers what the party has told and explains its opinion in the decision. Such understanding of the right to be heard complies with its (natural law) value basis and represents an element of effective legal protection.[20] The body is obliged to take note of the statements made by the party and take them into consideration, deliver an opinion thereon and actually explain them in its decision, not only apparently (Up-1525/06-23, 21.6.2007) or in general (Up-17/95, 4.7.1996, Up-147/96, 13.3.1997) or with a »void« reply to an action (Up-416/09-15, 20.5.2010). Cf. decision U-I-273/98, 1.7.1999: equal protection of rights includes a statement by all (legally) affected parties about facts relevant for decision, the possibility to deliver one's opinions, and cumulatively that their opinion is taken into account in decision-making (same in U-I-219/03-25, 1.12.2005, Up-1525/06-23, 21.6.2007, Up-758/06-25, 6.12.2007). Or decisions Up-498/08, 15.4.2008, and Up-1525/06-23, 21.6.2007: in (adversarial) proceedings, every party must be given the possibility to state facts, evidence and (supporting) legal views or perceptions about facts and evidence (despite the principle *iura novit curia*), to state its opinion about the statements of any opposing party, to collaborate in the declaratory and evidence proceedings (incl. asking questions to witnesses and experts), to declare itself on the results of facts proofing and generally on the pleadings which might affect the decision. The right to be heard applies in all stages of proceedings, even with different legal remedies and in execution (particularly forcible execution, Up-359/01, 15.11.2001). Should the regulation be amended in terms of legitimacy or scope of the rights of defense in general for the purpose of legality, it is still consistent with the Constitution although it implies inequality between the parties in relation to the time of

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who for a decade has been pointing to the trend of public law elements invading private law relations, even when it comes to judicial competences, both in Slovenia and abroad. Cf. details on the distinction between administrative and other relations, proceedings and bodies in Slovenia and the EU: Androjna & Kerševan, 2006: 57, Kovač, Rakar & Remic, 2012: 80, Avbelj, 2011: 166.

[18] The dilemmas concerning such guarantees in relation to the restrictions of the sector-specific law are integrated e.g. by cases U-I-213/03-26, 12.1.2006, and U-I-220/03-20, 13.10.2004. The sector-specific law (Securities Market Act) is in fact restrictive as regards the party's right to object, the deadline for such, the calling of hearing, the payment of actions, etc. Yet all such elements are consistent with the Constitution given the need for autonomy of the regulatory agency and economy of proceedings, which represent reasonable grounds for distinction.

[19] Statskontoret, 2005: 36, presenting the following exceptions: (1) rapid decision needed, (2) large number of participants, (3) decision in favour of the applicant.

[20] More in Šturm et al., 2011: 274-325, 392-411. Lower standards apply for explanation by appeal and higher instance bodies/courts since after agreeing with the inferior body and exhausting the possibility of first reasoning, repeating the arguments does not contribute to the right of defense.

proceedings, unless it is retroactive (Up-395/06-24, U-I-64/07-13, 21.6.2007).[21] As highlighted in several decisions, e.g. Up-84/94, 11.7.1996, or Up-50/94, 22.1.1998, stating the reasons is particularly important when deciding at discretion and in the event of indefinite legal notions, as it allows arbitrariness. However, it is not deemed unconstitutional if no account is taken of procedural acts which imply abuse of procedural rights (Up-3427/07, U-I-287/07, 6.11.2008).

As regards the right to be heard and related rights, the legitimate holder of the right or obligation is, in addition to the party, any person who – at the time of proceedings – proves to have existing and individual legal interest in the entire proceeding or single parts/questions thereof. Substantive legitimacy is determined by substantive administrative law that should be interpreted according to the intention of the legislature to safeguard an individual party who thus protects or improves their legal status. Persons who are not parties but are guaranteed the same procedural status by the GAPA, e.g. accessory participants, »*cannot be denied – in proceedings aimed at the protection of their legal interests – the need for being given the possibility to effectively implement their rights and be thereby guaranteed fair administrative proceedings*« (U-I-165/09-34, 3.3.2011, Up-112/97, 16.10.1997). Thus, anyone whose legally protected interest has been recognized should have the possibility to protect such interest also in administrative proceedings where such interest could be infringed upon. Such regulation nowadays prevails also in the EU, and Slovenia – despite a more democratic expansion of legitimacy from the main parties also to other persons showing legal interest – does not dominate in this area (e.g. some countries also recognize legitimate expectations).[22] Also according to Constitutional Court case law, the rights of defense in Slovenian administrative practice are often not guaranteed neither to persons who have already been recognized the status of party. Nevertheless, the right to be heard must be guaranteed also to children when their status is at stake (and is significant for their existence, as e.g. when children are moved away from the parents) and inasmuch as they are capable of formulating their own opinion considering their age, maturity and circumstances, not only to those (with full decision-making capacity) who required the proceedings be initiated (U-I-273/98, 1.7.1999). Several questions arise also as regards representation, e.g. representation of a party without decision-making capacity (Up-1782/08-16, U-I-166/08-8, 18.6.2009). Particularly interesting is the restriction of the capacity of legal representation to a person who has passed the state bar exam since »*mandatory legal representation contributes to greater quality of the trial«* (U-I-69/07, 4.12.2008, Up-736/04, 9.11.2006). The latter is indeed questionable in administrative matters given the significant amount, the unavoidability and the relative simplicity of most administrative proceedings. From a constitutional point of view, the decision of the court to reject the request because the applicant failed to produce evidence concerning the state bar exam – although is it undisputable that the applicant had passed such – can thus be critically evaluated. On the other hand, any deviations of sector specific laws from the GAPA – e.g. on (non)reimbursement of representation expenses – are not consistent with the Constitution if no legally-based and reasonable grounds for such have been presented (e.g. in tax matters, U-I-252/00, 8.10.2003). As regards legitimacy, the Constitutional Court is nearly always consistent. It might, however, have reservations as to the understanding of the scope of legal interest, thus giving room for intense activism in the event of interests that are legally grounded yet not yet existing.

[21] Such does not apply in the event of a new regulation becoming applicable in already initiated proceedings of unreasonably long duration (Up-10/03, 10.7.2003, Up-304/01, 20.5.2004). Most probably, the Constitutional Court would likewise provide an exception following ECtHR case law (cf. Šturm, 2011: 313, e.g. Scoppola v. Italy, 10249/03, 17.9.2009), if the state (or municipality) as legislature amended the regulation in order to influence the outcome of the proceedings in which it is involved as a party.

[22] On the regulation of the status and position of the parties in administrative matters in EU Member States cf. Vintar et al., 2012: 126, Kovač & Sever, 2012. E.g. the Finnish GAPA (Art. 41) provides that in the procedures of issuing administrative acts, participation is allowed also to persons who have not demonstrated legal interest but whose living, working and other conditions could be significantly affected by the administrative decision. The US APA provides a rather broad definition of participants: a party (Art. 551) is any person properly seeking and entitled as of right to be admitted as a party; if a person has been declared to be incompetent, they may be represented by a legal guardian (Art. 552). More in Craig in Peters & Pierre, 2011: 180, Rusch, 2009: 6.

- **Language, access to information, serving**

Communication institutions represent a tool for the dialogue that in a democratic state should be taking place among the participants in proceedings. The use of one's own language is emphasized already at the level of the EU, namely in Article 6 of the ECHR, and in the light of protection of national minorities also in the Slovenian Constitution (special provisions of Articles 11, 61 and 62). Thus, according to decision Up-147/96, 13.3.1997, the body must give the possibility to declare themselves on facts and circumstances relevant for the decision to any party with recognized legal interest, regardless of the status of citizenship. Yet in the framework of equal protection of rights and the right to be heard, such right can be restricted. According to the court (Up-2177/08-16, 26.3.2009): »*The mere fact that the applicants … are not entitled to the translation of the entire administrative act does not mean that the right referred to in Article 62 of the Constitution is being infringed upon*«. As a matter of fact, the Constitution does not provide that public administration bodies must allow the party to use the language they understand. Special protection is granted only to persons with communication disabilities (U-I-146/07-34, 13.11.2008). In relation to communication with the blind, for example, the court provided a comprehensive and proactive explanation with due consideration of ECtHR practice. The result of the above decision was that in 2010 all procedural acts in Slovenia were supplemented in terms of the rights of people with disabilities.

Another essential right in the framework of good administration in the EU concerns access to information. The same derives from the decision of the Constitutional Court U-I-16/10 and Up-103/10, 20.10.2011, where the court affirmatively replied to both questions, namely (1) understanding the right to inspect documents according to Article 82 of the GAPA separately from the parallel (substantive law) right of access to public information pursuant to the Act on Access to Public Information[23], and (2) that such right is held also by an accessory participant or person with legal interest. Thereby, the court raised the procedural right up to the level of constitutional protection under substantive law and confirmed the theory that even a procedural decision issued in the course of administrative proceedings can infringe upon a human right or fundamental freedom. In EU countries, access to information is even more often than the right to be heard merely a legal category, although most laws define such right very broadly, e.g. together with notice and serving. For such reason, the significance of the proper interpretation of such right, with due consideration of the restrictions thereof, is even more important in (constitutional) court practice. The right to know or the right of access indeed has some limitations, yet also according to the ECtHR they are restrictive, limiting the manner of access rather than the actual fact of becoming familiar with the relevant process documentation (Up-220/05-10, 29.3.2007).

Furthermore, the (at least fictitious) serving of the act is a prerequisite for legal consequences arising therefrom, whereby the manner of serving can be restricted consistently with the Constitution (e.g. serving by public announcement or to the authorized representative, Up-16/06-26m, 7.12.2006, U-I-50/08-16, Up-2177/08-16, 26.3.2009). The connection between serving and representation is evident also in case Up-41/93, 4.7.1996, on cancellation of domicile, where the decision was served to the »forcibly designated« spouse of the party, which resulted in a delay in filing the party's complaint. However, the Constitutional Court indisputably established that such representation would have no legal basis and all further consequences would be illegal. This example indicates the importance of correct serving as a prerequisite for the use of legal remedies and for executability and finality. The reasoning provided by the Constitutional Court sometimes (see Up-422/03-10, 10.7.2003), possibly due to language style, implies that errors by bodies can be corrected. Therefore, it needs to be underlined that subsequent serving or permission to accede the file cannot be considered a remedy for a previous unconstitutional conduct, unless it is deemed that legal effects or (preclusive) deadlines for the party start from then on.

[23] Official Gazette of RS, No. 24/03 and amendments.

- **Establishing and proving facts relevant for decision**

A quantitative analysis of the total sum of administrative decisions concerning the right to be heard reveals that a particularly pressing issue in Slovenia (arising in about a quarter of all issued decisions) is the exercise of such right in facts proofing. In practice, it is disputable that inquisitiveness is favoured over the adversarial principle, which is a special characteristic of the administrative law relation.[24] In such context, mention needs to be made of the positions (although in civil matters) stated in Up-2380/07, 19.3.2009, whereby the right to be heard applies exclusively for evidence produced *ex officio*. Or in the case Up-216/99, 19.12.2000, whereby in legally defined positions the party has the right to take full advantage of the deadlines for procedural acts. Therefore, the rejection of the request to reinstate the previous state of affairs – claiming that the party could have carried out the relevant act prior to the occurrence of the unforeseeable and unavoidable reason for delay – does not comply with the constitution. Particularly in the event of active parties, the right to be heard does not only mean being invited and attending the proceedings, but also the right to question the witnesses, otherwise it is possible that the decision is annulled and the procedure renewed years after it has become final (Up-17/95, 4.7.1996). In this particular case, the court proactively upgraded the hitherto interpretation of the reasons for renewal of (non)participation in proceedings, as participation would *de facto* imply active collaboration not merely *pro forma* presence. The point of the fundamental principle of the right to be heard is not merely to allow the party to attend individual parts of the declaratory proceedings, although this, too, is important for a correct application of such principle, but to implement the contents thereof (cf. Androjna & Kerševan, 2006: 106). The restriction most often invoked is that the rights of defense (making a statement, considering and examining statements, stating the reasons, legal protection) are bound only to the facts and evidence that are or should be relevant for the decision (Up-171/00-16, 12.7.2001, Up-2177/08-16, 26.3.2009, Up-422/03-10, 10.7.2003). The body is not obliged to produce every proposed piece of evidence (Up-758/06-25, 6.12.2007); it must, however, take a stand thereon and explain – in case of rejection – why it will not produce it (Up-1525/06-23, 21.6.2007).The Constitutional Court clearly stated (e.g. Up-368/01-9, 11.12.2001) that the party should be allowed to challenge legal assumptions, such as official documents or data from official registers, otherwise the party's right to be heard and the entirety of their defense guarantees are infringed upon. As regards the hearing of evidence, the court often sets limitations or decides that such comply with the Constitution. For example, if a decision is taken without a hearing, even if according to the GAPA a hearing should have been called, such does not per se affect the party's right to declare themselves if they can do so in writing or orally in ex parte hearings or if a concentration of decision-making is necessary (U-I-213/03-26, 12.1.2006, Up-758/06-25, 6.12.2007, U-I-50/08-16, 26.3.2009). In such case, the actual state of affairs must be properly established with the prescribed degree of substantive truth, despite summary or accelerated declaratory proceedings (Up-1525/06-23, 21.6.2007). An interesting issue is also the probative value of evidence to which comments have been made by the parties, although such comments are precluded by constitutionally consistent provisions of a sector-specific law. The opinions thereon vary: some advocate greater restriction if such is supported by law and consistent with the Constitution, while others favour more flexibility and the principle of *in dubio pro reo* (U-I-252/00, 8.10.2003).

3.3. Slovenian Constitutional Court practice in the light of Europeanization

According to case law, most administrative acts relate to constitutional institutions, such as simultaneous infringement of the right to be heard and effective legal remedies or judicial protection, for instance in the case of incomplete reasoning or preclusions and restrictions of rights under a special law compared to the general law. On the other hand, other elements – such as access to file – are not so accentuated or problematic and are to be found (more) in other aspects (e.g. right to judicial protection before the right to be heard). Rather interesting is the outcome of the analysis of administrative (sub)areas to which Constitutional Court decisions refer. As regards constitutional

[24] According to Jerovšek & Trpin, 2004: 86, the right to be heard has its grounds already in the Slovenian Constitution, more precisely Art. 1 on the democratic state. It gives the party three basic rights, namely (1) to participate in declaratory proceedings, (2) to declare themselves on all facts and circumstances, and (3) to challenge the findings and statements of the body and opposing parties and other participants. Cf. European Parliament, 2001: 50, Lampe, 2010: 44-48. On cross examination of witnesses and experts Peters &Pierre, 2011: 180.

complaints (despite combining ten matters into a single one) and constitutional reviews, most unconstitutional elements seem to be found in the area that falls under the responsibility of the Ministry of the Interior (citizenship, residence, asylum or international protection, etc.).[25] Quite often disputes are observed in matters concerning denationalization, construction, securities market and status of children,[26] while most other administrative areas were dealt with in a single administrative act (e.g. taxes, health inspection, privatization). The same type of issues seem to repeat over time, which leads to the conclusion that the so-called moral precedential effect of the positions of the Constitutional Court does not (yet) reach the (sufficient number of) holders of regulatory and administrative functions. More so, the Slovenian Constitution and, consequently, the Constitutional Court occasionally consider the right to be heard somewhat formalistically or subordinate rather than equal to other principles that are comparable with international standards. The manner and subject matter of procedure are generally limited to equal protection of rights, which is underestimated compared to the theory and case law of European courts. The European understanding in fact highlights equality and participation (or at least attendance) of the parties, which is also the core issue of the judicial review of legality (and suitability) of administrative acts. The Slovenian Constitution specifies equality and judicial review directly in several provisions whereas attendance with the right to be heard is less elaborated. To our estimates, however, the latter is equally important and necessary for the development of constitutional democracy, legality and authoritative legitimacy, as well as good administration. The initial hypothesis that the Slovenian Constitutional Court interprets the above elements consistently with the principles pursued by the CoE and the EU can thus mostly be confirmed, yet not entirely. As for the future, the Constitutional Court should – given the key role of constitutionality as defense of the weaker party in a (particularly administrative law) relation – proactively upgrade the right to be heard as an independent fundamental guarantee.[27] A precedent for such is provided by the concept of proportionality, which is not explicitly stated in the Constitution but has evolved through constitutional court practice into an autonomous principle, together with the appropriate methodology of constitutional review. Only a comprehensive understanding of the right to be heard or of the concept of defense will lead to the further development of fundamental democratic and civilization values.

4. Conclusions

The right to be heard is indeed one of the key accomplishments of modern democracy within the European context. Therefore, it must continue to be protected at both declaratory and operational levels despite significant societal changes, which directly reflects also on the area of administrative relations. A comparative analysis shows that the rule of law, together with the concepts of equality and participation of the ruled in the decisions of the rulers, is a considerable factor for the effectiveness of public policies as well as for economic development and competitiveness in the global market. Therefore, at the international level and particularly in the EU, significant attention is devoted to the protection of fundamental human rights in the relations between (administrative) authorities and holders of administrative rights, obligations, legal interests and even legitimate expectations, including the right to be heard. In such respect, authority is to be effective so that the prescribed standard is balanced with the weight of the subject matter of proceedings and the importance of the right as such for the purpose of decision-making. As deriving from the Slovenian constitutional court practice, the level of legal regulation is relatively correct. Concerns are however raised by the conduct of

[25] This finding is not completely undisputable since the frequency of constitutional review varies also depending on the agility of representatives of the parties. In case of constitutional complaints, the applicants are always the affected parties or their representatives, although the active legitimacy of the administrative body can theoretically be questioned (cf. Čebulj, 2000: 305, Pirnat, 1994: 702).

[26] E.g. U-I64/07-13, Up-395/06-24, 21.6.2007, Up-416/09-15, 20.5.2010, Up-171/00-16, 12.7.2001, U-I-165/09-34, 3.3.2011, U-I-16/10, Up-103/10, 20.10.2011, U-I-213/03-26, 12.1.2006, Up-758/06-25, 6.12.2007, U-I-273/98, 1.7.1999, U-I-312/00-40, 23.4.2003 etc.

[27] In such context, following the model by Harlow & Rawlings, 1997: 516, the Slovenian Constitutional Court can on average be considered an active formalist, providing for judicialized administration, as opposed to Anglo-Saxon courts and judges which, with a high level of activism and low level of formalism, are deemed to be the holders of fairness redefined (cf. Ziller in Peters & Pierre, 2011: 173). Cf. the emphasis on the scope of the commitment to the basic EU principles for national courts and administrative bodies (Avbelj, 2011: 119.).

administrative bodies and even courts deciding in specific areas, such as internal affairs, where authoritative decisions quite often even contradict fundamental rights. Thus, the constitutional protection of the right to be heard by means of constitutional complaint represents the final safeguard which also in the future – and even more explicitly considering the analogous significance of participation and proportionality – is to support the declaratory and practical value of the right to be heard. Particularly in Eastern Europe, thus, the (post)socialist tradition of a priori authoritative supremacy over individuals is evolving into a participative European entity.

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