Evaluating Procedural Aspects of Public Governance: Case of Slovenia

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ABSTRACT

This paper considers administrative procedures and acts of the executive branch of government in the framework of good governance. One important aspect of good governance is the importance of the participation of all societal groups in governance. A study of the regulation and implementation of procedures for issuing general and individual administrative acts was conducted for Slovenia, a post-socialist country that has been a full EU member since 2004. The aim of the study was to assess the degree of the development of good governance. Differences and points of agreement between the two types of procedures are identified, with emphasis on public participation. Using a normative and statistical analysis of the situation in Slovenia and by addressing theoretical guidelines regarding the purpose of procedures, the authors conclude that an implementation gap is still characteristic of this part of Europe. They view the harmonization of a uniform procedure, with an emphasis on the principles of good governance, as a solution in the right direction. Therefore in the future, findings on the importance of the fundamental principles of administrative procedural law in concrete individual administrative matters for harmonizing the collisions between the interests of different participants – participation being one such principle – would ideally create inroads into the regulation of other ways of shaping and implementing public policies and in particular into the regulation of administrative rulemaking procedure.

Key words: good governance, administrative procedures, general and individual administrative acts, participation, Slovenia.

1. INTRODUCTION

The importance of public governance in today's systems is on the rise due to growing complexity within society, globalization, the economic crisis, etc.; this is characteristic of both the general situation as well as administrative and otherwise rather static legal relations. Therefore, both levels of public governance within public administration, the institutional and the instrumental, are important and are subject to continuous evaluation and change. The modern model of good governance runs contrary to the traditional model, which grounds the execution of power in strategic participative networking and partnerships. The new model reflects a tendency to redefine the top-down delegation of tasks through higher levels of cooperation on ruled tasks, which includes bottom-up regimes, negotiations and the incorporation of overall societal and political problem-solving. Another factor behind the need for such an approach is the inability to resolve conflicts and complex issues using only legislation (the primary factor of societal relations according to classical theory). The redefinition of public governance is therefore following two major directions: firstly, the role of law is decreasing, since other "informal" (as denoted by legal science) instruments (agreements, recommendations, regulatory strategies, etc.) are replacing legal forms; secondly, recognition of fundamental procedural principles within concrete administrative relations in the form of administrative procedures (participation respectively) is leading to the extrapolation of these procedures to other administrative operations. These principles are so crucial to democratic governance and a state governed by rule of law that they are and should be applicable not only in individual acts of administrative decision-making, but also primarily, in the issuance of general administrative acts (policy-making or administrative contracts, etc.) Namely, administration performs two fundamental functions: it participates in policy-making and executes the decisions of the legislator and the government. In the framework of its first function, *inter alia* it prepares draft regulations and other acts, and in the framework of its second function it issues abstract general administrative acts (administrative rules; German *Rechtsverordnung*) and administrative decisions as concrete individual administrative acts (German *Verwaltungsakt*).

The importance of public administration is inevitably growing at the same time as its role is changing. A crucial part of good governance is "good government", which according to Article 6 of the European Convention on Human Rights (which pertains to due process) incorporates classical procedural safeguards or so-called rights of defence in relation to the authority. Good administration also needs to be implemented in the sense of Article 41 of the Charter of Fundamental Rights of the EU (2010, includes objectivity, legality and justice, reasonable timing, hearing, the use of language, reasoning, the right to compensation for damages, etc). Due dialogue is so

important that the so-called third generation of administrative procedures has been developed.[1] It is therefore of the utmost importance that any interested party be offered the possibility to state its views with the aim of creating a joined-up society and collaborative state. This should be kept in mind throughout the following analysis of regulation and its implementation within administrative policy-making and individual decision-making procedures in Slovenia.

In public law relations the procedure is the regulated path for the enforcement of certain legal interests or legitimate expectations. Regulation aims at predictability, legal protection, equal access and the effective achievement of the objective of the procedure. The nature of the matter is such that procedures also differ in the way regulation is implemented or in the degree of programming; in other words, differences are not limited to the content or type of rights of the governed in relation to the governing. It follows that the procedure for issuing administrative rules is less determined, while the procedure for issuing individual administrative acts is arranged in great detail. This is conditioned by the permissible input of political interests with the aim of coordinating societal interests in the case of administrative rules, compared to objectivized and thus strictly defined legal, politically neutral decision-making in cases of concrete rights, legal interests and party obligations to authorities. Rules that regulate these questions contain, among other things, an expression of an understanding of the relationship between the state and society, and with it an understanding of the values of the legal system – one of the functions of procedural rules is therefore to transmit values such as participation.

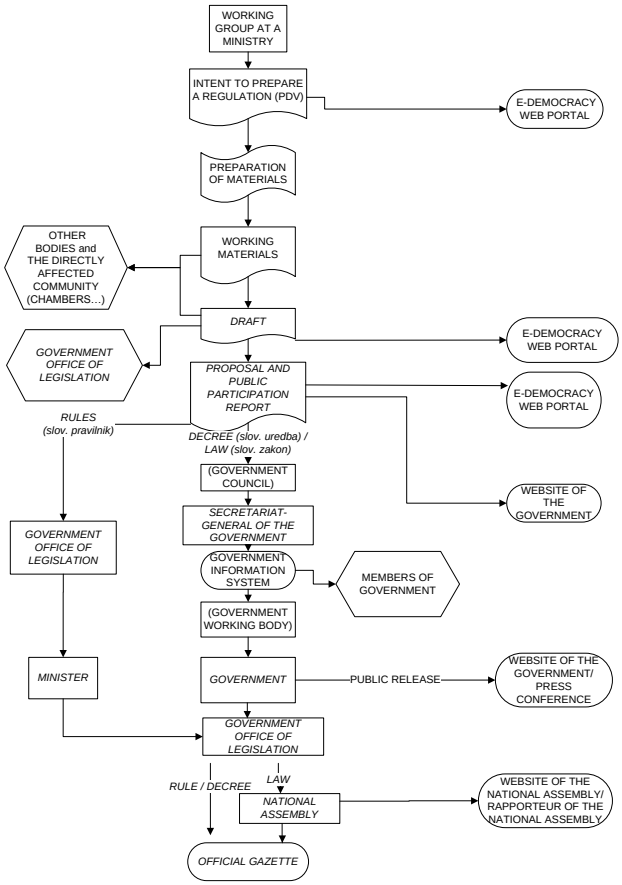
In this paper, we consider administrative rulemaking procedure (rulemaking procedure) and procedure for the issue of individual administrative acts (administrative procedure) in Slovenia. In the first part, we analyse the legal regulation of the two procedures and their implementation in practice. In the second part, we address the question of shaping common minimal procedural standards for both types of procedures, with an emphasis on the participation of subjects in the procedure. First, we present in brief the legal regulation of the rulemaking procedure in select countries; we then use descriptive and comparative methodsand statistical analyses of selected indicators of the implementation of procedures to analyse common characteristics of and differences between the two types of procedures and acts. Thus we evaluate the current situation, taking into account comparisons with internationally set principles and experiences in some countries. We create guidelines for the harmonised regulation of both types of procedures by highlighting minimal standards such as the participatory principle. This serves as a basis for a discussion of the harmonization of both types of procedure, with an emphasis on opportunities for public participation. It would be possible to extrapolate the findings for the Slovenian situation to other countries with post-socialist features.

2. REGULATION AND IMPLEMENTATION OF THE RULEMAKING PROCEDURE IN SLOVENIA

Policy-making and rulemaking are different yet closely connected activities, in line with the fact that the substance of policies is generally reflected in rules. In Slovenia policy-making is not clearly delineated from the preparation of proposals for rules;[2] the latter is, however, regulated and supported by information technology (the IPP application). On the systemic level, the rulemaking procedure is regulated by the Resolution on Legislative Regulation (introduced as a result of Slovenia's membership in the OECD) and the Rules of Procedure of the Government of the Republic of Slovenia; on the sector-specific level, it is regulated, for example, by the Aarhus Convention, the Environment Protection Act (ZVO-1)[3] and an internal act of the Ministry of Agriculture and the Environment.[4] In the rulemaking procedure, great emphasis is placed on public participation: on the e-democracy web portal, the public can submit its comments on published drafts/proposals for regulations. Linking the provisions of organic acts to the IPP application, the rulemaking procedure can be summarized, from its first to its last phase, as in Figure 1.

[1] In respect of the functions of the executive, Barnes, 2008, therefore delineates three types of administrative procedure: 1) the decision-making procedure in concrete administrative matters (adjudication; German *Verwaltungsverfahren*), 2) rulemaking (German *Normsetzungverfahren*) and 3) the public policy cycle.
[2] Zatler, 2009, pp. 1 and 3; for a detailed discussion see SIGMA, 2007.
[3] Official Gazette of the Republic of Slovenia, no. 41/2004 and amendments.
[4] Instructions for the Public Participation Procedure in the Adoption of Regulations that Could have an Important Impact on the Environment (2008).

Figure 1: Rulemaking procedure



Data from the Office of Legislation of the Government of the Republic of Slovenia reveals the volume of administrative rules and laws adopted between 1991 and 2012 (Table 1). These figures cover administrative rules that completely regulates a field anew, and therefore do not include amendments. The data shows that on average, over 700 pieces of administrative rules were issued, whereby it can be observed that after 2000, a notable increase occurred, which can be attributed to the rulemaking activities of the state in connection with EU accession – following EU accession, the number slowly begins to decline (see the shaded growth and then fall in the number of acts in Table 1).

Table 1: Administrative rules1991-2012 (Office of Legislation of the Republic of Slovenia)

Year	*Administrative rules*		*Law*
	Ministry	*Government*	
1991	27	3	41
1992	17	8	57
1993	20	15	109
1994	22	26	99
1995	36	23	84
1996	34	44	78
1997	40	27	67
1998	40	34	72
1999	151	129	112
2000	988	227	96
2001	1236	283	103
2002	1147	297	116

2003	1527	409	138
2004	1508	318	191
2005	1196	285	169
2006	878	353	249
2007	595	333	184
2008	625	326	107
2009	513	300	121
2010	393	274	181
2011	414	231	166
2012 (-Sep)	224	113	74
Total	11631	4058	2614
	15689		

In the period from 2000 to 2004, over 1,300 pieces of administrative rules were adopted per year on average. The data further shows that the ratio of the volume of administrative rules from the government on the one hand and from ministries on the other is almost exactly one to three. In this period, around 110 laws were issued each year, putting the ratio of issued administrative rules to laws at nearly six to one.[5]

In Slovenia, the problems surrounding the rulemaking procedure have in recent years become an integral part of the broad discussion on the quality of the regulation that, from a systemic perspective, is being developed and monitored by the ministry in charge of administration. The public, and non-governmental organizations in particular, is also active in this field, and it has received attention from supervisory bodies and the legislator. Within this framework, attention is focused primarily on the public's participation in rulemaking. This has been the subject of extensive studies, the results of which can be divided into two periods: before and after the adoption of the Resolution on Legislative Regulation in 2009. Before the adoption of the Resolution, it was found that 1) practices in this field were very diverse (Rakar, 2005), 2) those preparing administrative rules rarely included the public in the procedure (Umanotera, 2007), and 3) in Slovenia, consultation with the public was handled in an unplanned manner and only because of an obligation set forth in the Rules of Procedure of the Government of the Republic of Slovenia, that is, not because of a need to improve the quality of the proposed legislation (Zatler and Čarni-Pretnar, 2009). The adoption of the Resolution did not bring about essential changes in the findings, which can be summarized in two conclusions: 1) there are no signs that the Resolution has brought about any kind of progress in the adequate and effective participation of the public in the preparation of regulations (Divjak et al., 2012) and 2) participatory democracy has not (yet) taken off in Slovenia (Kovač, 2011, p. 118). Thus there is still a great deal of room for improvement in this area, so much so that it exceeds the implementation gap characteristic of Slovenia or the Central Eastern Europe region.

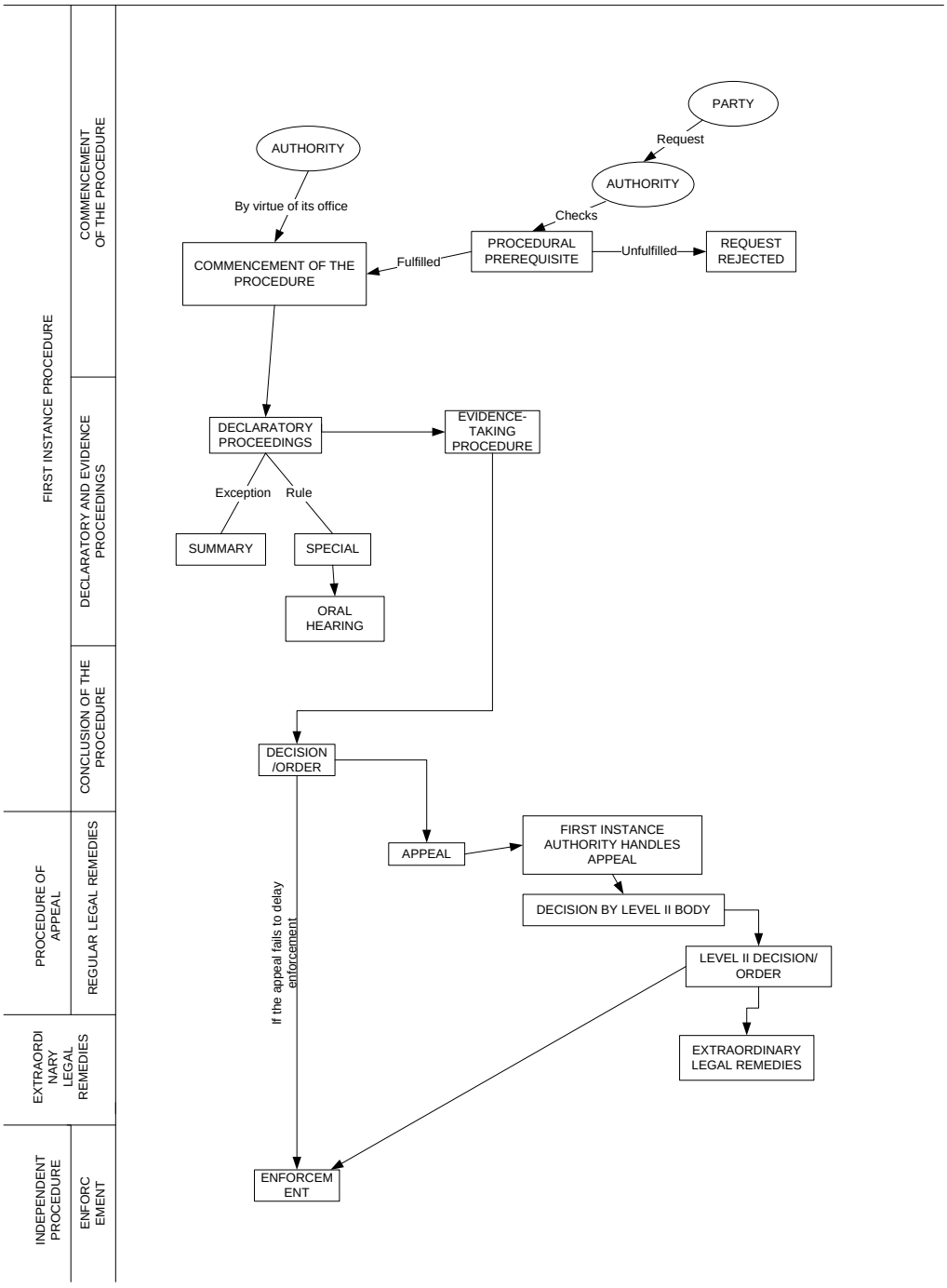
3. THE REGULATION AND IMPLEMENTATION OF ADMINISTRATIVE PROCEDURE

The procedure for issuing individual administrative acts is regulated in Slovenia by the General Administrative Procedure Act (GAPA; Slovene: *Zakon o splošnem upravnem postopku* or ZUP) and sector-specific legislation. GAPA is a general procedural regulation (*lex generalis*) that facilitates the management of the procedure and decision-making in all administrative matters except those which, due to their specific nature, require special procedural rules (*lex specialis*). Unlike its German counterpart, the Slovenian GAPA only regulates the procedure for issuing individual administrative acts, and not administrative contracts (regulated by the German VwVfG) or administrative rules (regulated, for example, by the Administrative Procedure Act in the US). GAPA was adopted in 1999 as the central regulation for administrative-procedural law in the Republic of Slovenia; it took effect in 2000, and has since been amended multiple times. The local basis for the arrangements contained in the current Slovenian GAPA was provided by Steska's Procedure Guide of 1923; by comparison, the first law in the territory of Slovenia dates to 1930. It is therefore possible to trace the GAPA's use in Slovenia back over 80 years, making it one of the oldest and, in light of the breadth of its use as an organic law, undoubtedly one of the most important regulations in the country (Jerovšek and Kovač, 2010, pp. 2 and 5-6; for a detailed discussion see Kovač and Virant, 2011, pp. 198-203) GAPA outlines nine fundamental principles: legality (Article 6), protection parties' rights and public interest (Article 7), substantive truth (Article 8), hearing of parties (Article

[5] This ratio is significantly lower than it was in the 1974-1989 period in Yugoslavia, when it was nearly 13 to 1 (see Rakar, 2011, pp. 94-96).

9), free evaluation of evidence (Article 10), duty to tell the truth and fair use of rights (Article 11), independence in decision-making (Article 12), the right to an appeal (Article 13), and the economy of proceedings (Article 14). These principles are valid for all phases of the procedure (see Figure 2).

Figure 2: Phases of the administrative procedure



The implementation of administrative procedures can be monitored in multiple ways, from volume to efficacy indicators. The treatment in this paper is limited to two substantive indicators (besides volume): 1) dilemmas that arise in concrete procedures and 2) violations of procedural rules detected by internal inspections.[6]

[6] Besides these two approaches, procedures and acts of administrative or court supervision could also be analyzed, cf. Kovač, 2012.

Collected statistics show that in Slovenia, approximately 5-10 million decisions are issued each year as merit individual administrative acts on the first level (of these, around 3 million are income tax assessments and around one million are decisions at administrative units), and that an average of 3% of these decisions are challenged each year. Only around 20% of appeals filed are granted, which is why each year, further court proceedings are commenced in around 4,000 cases (see Kovač, 2012). Despite a long tradition of the legal regulation of the general administrative procedure, the use of the latter is still surrounded by legal dilemmas. This becomes immediately clear once one takes a look at the Administrative Consultation Wiki (ACW), a project the Faculty of Administration and the Ministry of Interior and Public Administration (MIPA) have been conducting since 2009.[7] The essence of the project is as follows: a question submitted by an ACW user is generalized and a reply is prepared – in this way, both question and reply can be of use to other persons who find themselves in a similar situation, regardless of which field of substantive administrative law their problem pertains to. On 1 October 2009, a basic, publicly available base of 404 cases was created; based on legal questions received in previous years by the Ministry and Faculty. The number of cases (questions) published has since increased: October 2009 - December 2010: 267 cases published (total: 671); 2011: 268 cases published (total: 939); 2012: 92 cases published (total: 1031). Cases are arranged into categories that correspond to the substance of legislative acts regulating administrative procedures. Since the substance of a case can cover different legal aspects that may be important for more than one category, certain cases are published simultaneously in two different categories (and are also counted twice). Therefore the final total of cases published by the end of 2012 is 1,172.[8] Statistical analysis shows that the project is becoming increasingly interesting for users. The average number of visitors constantly increased from December 2009 to June 2011 (see Figure 3). Due to summer holidays, the numbers were a bit lower in July and August 2011, but after that noticeably higher interest is evident, with major peaks in November 2011 and April 2012.

Figure 3: No. of visitors addressing APA dilemmas on the ACW

The table below shows the number of reports issued by the Administrative Inspection,[9] which since 2009 has been operating in the framework of the Public Administration Inspectorate of the MIPA; its function is to provide oversight over the issue of individual administrative acts.

Table 2: Violations according to reports on the work of the Administrative Inspection for the years 2008, 2009, 2010, 2011

Violation	*No. by year*			
	2008	2009	2010	2011
Disposition of an individual administrative act	22	25	77	24
Instruction on legal remedies	40	18	61	43
Serving (decree and method)	42	31	/	21
Deadline for a decision	72	18	86	70

[7] See http://www.upravna-svetovalnica.si/ (28 February 2013).
[8] In summer 2011 a revision of all published cases was done to identify duplicate content and merge or delete certain cases found to have little value.
[9] The oversight competence and powers of the Administrative Inspection are regulated by the GAPA and the Public Administration Act. See http://www.mpju.gov.si/en/about_the_office/the_public_administration_inspectorate_bodies_of_the_ministry/ (Accessed 5 March 2013).

Problems reported to the Administrative Inspection mainly pertain to long periods of time needed for a decision and lack of response or action (approximately 15% of reports out of 600-1000 per year), particularly in environmental and spatial planning issues (Kovač, 2012). Furthermore, violations of the fundamental principles of legality (disposition of a decision) and the protection of the rights of parties (instructions on legal remedies, serving) could also be noted. Unfortunately, the Inspection is not systemically fullfilling its role, as more often than not it does little more than make a record of a violation, whereby a regulatory feedback loop is not established. Taking the violation as a basis, such a feedback loop would lead to improvements in the regulation of institutions found to be problematic from a procedural standpoint or at the very least to the optimization of the method of work in public administration.

4. HARMONISING THE REGULATION OF RULEMAKING AND ADMINISTRATIVE PROCEDURE

4.1. Comparative insights

Administrative proceduralization is increasing throughout the world due to two different factors – the increasing complexity of administrative structures and the weakness of representative democracy (Cassese, 2011, p. 9). An increasing number of states legally regulate administrative procedure; some states also legally regulate the rulemaking procedure. Below, a brief analysis of the key features of the legal regulation of the rulemaking procedure is presented for select countries/states: the US (the Administrative Procedure Act – APA), the German state of Schleswig-Holstein (*Allgemeines Verwaltungsgesetz für das Land Schleswig-Holstein* – LVwG) and the Netherlands (*Algemene wet bestuursrecht* – AWB).

The APA entered into force in the US in 1946; when it appeared, it represented a collection of the generally valid principles of the rulemaking procedure that had been developed up to that point by various agencies. With the adoption of this law, Congress recognised that rulemaking is a legislative-like activity which requires special procedures different from those used in adjudication (Ziamou, 2001, p. 69-71). In terms of substance, the APA ensures broad procedural standards for the functioning of agencies; at the same time, it does not regulate a number of matters and provides more of a general orientation than detailed rules for work. This is said to be one of the reasons for its decades-long lifespan and the few amendments made to it. It facilitates innovation in both administration and adjudication and with it the possibility of adaptation to the changing circumstances of the functioning of the state (Edles, 2000, pp. 545, 555). Agencies may issue rules through formal (trial-like, on-the-record proceedings), informal ("notice-and-comment rulemaking" and "553 rulemaking") or other procedures, whereby the APA only regulates the first two. The informal procedure that serves as the rule aims at democratizing rulemaking without destroying its flexibility. The essence of the procedure is in the opportunity for public participation in rulemaking.

The LVwG, which entered into force in 1992, expressly determines principles pertaining to administrative procedure and divides these into two groups: 1) general (the principle of legality, Articles 72 and 73) and 2) special (Articles 74-88). An analysis of the latter reveals the principles of procedural simplicity, expediency and speed, protection of the rights and legal interests of stakeholders, legality, the inquisitory principle and the principle of substantive truth. The chapter of the LVwG that pertains to rules (German *Verordnung*) does not expressly determine principles; it does, however, regulate the definition of term, type and form; prohibition of disconformity; substance; publication; and the start and end of the validity of rules (Articles 53-59). An analysis of these provisions shows that the act derives from the principle of rule of law and with it from the principle of legality (for example conformity with the law, the degree of detail of substance, publication – Article 60).

"AWB regulates the process of administrative decisionmaking in a general sense and provides a general framework for legal protection against the orders issued." The AWB is a so-called modular act, which means that it is enacted in tranches – the first two tranches entered into force on 1 January 1994, and the fourth tranche was enacted in 2009. The AWB pertains mainly to orders, specifically individual decisions, and is a so-called "layered" act, structured from general to increasingly specific provisions (Barkhuysen et al., 2012, p. 1, 4, 7 and 10). The fundamental characteristic of the AWB is its modern approach to relations between administrative authorities and citizens – they are seen as equal partners (Blomeyer and Sanz, 2012, p. III-44).[10] Although principles are not expressly defined, it is possible to discern in the introductory chapters that the act enforces the principles of legality, impartiality, weighing of interests and openness (disseminating information, consultation). The AWB contains several "open standards", as a result of which administrative authorities have considerable scope of discretion to decide on the details of general procedural rules (Barkhuysen et al., 2012, p. 10).

[10] Theory has nonetheless found that the concept of a mutual relationship did not take root (see Barkhuysen et al., 2012, p. 8).

The key question is, can common principles be defined which would harmonize the two forms of administrative functioning? A part of German theory is sceptical, as it feels that the circumstances surrounding the two kinds of procedures are not the same (see Kopp and Ramsauer, 2011, p. 228). At the same time, it should be noted that the question has received a great deal of attention within European theory in recent times (e.g. Rusch, 2009; Cassese et al., 2011) and that it is also being addressed in the framework of the EU (see Blomeyer and Sanz, 2012). The authors of this paper feel that an answer to the question of harmonization is to be sought in analyses of the functions of procedure and in an understanding of procedure-as-institution. Namely, the principles guiding implementation of procedure are the result of the latter's functions, whereas procedure-as-institution embodies the status quo of public law at any given time and is an expression of an understanding of the relation between the individual and the state (see Barnes, 2008, p. 15).

4.2. From the theoretical functions of (administrative) procedures to their normative principles

A procedure is a sequence of actions that leads to a goal. The fundamental function of the procedure is therefore the achievement of the desired goal – in the matter at hand, the goal is a decision. This function may be called the instrumental function of procedure. Further investigation of the functions of procedure makes it possible to focus on the participants of the procedure. For the needs of this paper, it is important that participants input information in the procedure, and in doing so exercise their actual and legally protected interests. In this respect, the procedure could also be defined as the structured process of choosing between different alternatives by acquiring and processing information (Schneider and Barnes, 2008, p. 320; similarly Schmidt-Aßmann in Barnes, 2008, p. 43) – this definition is in its essence true of both the rulemaking procedure and the administrative procedure. According to Schmidt-Aßmann (in Barnes, 2008, p. 48) administrative procedures in the broader sense fulfil several functions. They: 1) ensure the protection of human rights, 2) allow for participation, 3) provide for balancing of interests, 4) serve administrative transparency and clarity, 5) make cooperation among various actors possible and 6) enhance administrative efficacy. In his opinion, most administrative procedures fulfil several of these functions, while the general concept of procedure is meant to ensure the rationality of state action (ibid.). The authors of this paper feel that the rulemaking procedure and the administrative procedure fulfil all the above mentioned functions, even though they place emphasis on different aspects (Table 3).

Table 3: Key differences between the rulemaking and administrative procedures

	Points of difference	*Administrative procedure*	*Rulemaking procedure*
1.	Progression	Linearity, determined by law	Tendency towards non-linearity[11], legal regulation differs from country to country
2.	Substance of decision	Generally a high degree of advance substantive determination[12]	Generally a lower degree of advance substantive determination
3.	Time needed for decision	Directly determined (by law)	Generally not directly determined
4.	Legal effects	Direct legal effects	Generally no direct legal effects
5.	Acquainted with the decision	Those directly legally affected	The general public
6.	Reasoning of decision	A constituent part of the legal act, required by law	Not a constituent part of the legal act, not required by law

This view on harmonization is based for the most part on an analysis of not only differences, but also similarities between the two types of procedures (Table 4), which appear in both the Slovenian system and in the systems of most other countries (Kovač and Sever, 2012, pp. 113-132).

Table 4: Points of agreement between the rulemaking and administrative procedures

1.	The end result is a decision
2.	The substance of the decision is framed by a hierarchically superior legal act
3.	The decision has the form of a legal act
4.	The decision is adopted by an authoritative body
5.	The decision is adopted in a unilateral manner
6.	The decision is of an authoritative nature
7.	The decision must be adopted in the framework of the competence of the body
8.	The affected parties must be familiarized with the decision

[11] This is due to tensions in the policy-making procedure.

[12] Discretionary decision-making is an exception; here the choice between multiple possible decisions is framed by the purpose and dimensions of the discretionary right.

In conclusion, the following requirements can be set as minimal common procedural standards: competence, substantive conformity with higher legal acts, procedural legality, participation of those directly legally affected and familiarization of those directly legaly affected with the decision. These requirements are an expression of the principles of rule of law, the democratic state, the separation of powers and human rights protection, as Table 5 shows in the example of Slovenia.

Table 5: Principles as found in Slovenian organic regulations for public administration and officials

General legal principles and special principles of good administration	*Constitution of the Republic of Slovenia*	*State Administration Act*	*GAPA*
Legal security and predictability	X	X	
Legality	X	X	X
Respect for human dignity[13]	X	With an orientation towards parties	Part of human rights protection
Protecting human and minority rights	X	Using rules (language, for example)	Using rules (language, for example)
Equality	X	Through legality	Through legality
Effective legal remedies and court oversight	X	X	X
Responsibility	X	As a part of effectiveness	
Independence	X – Separation of powers	X	X
Political neutrality		X	
Professionalism		X	
Impartiality		X	As a part of legality
Openness, public nature, transparency	X	X	
Confidentiality, data protection	X	Partially	As a rule
Use of (official) language	X	X	As a rule
Protecting the public interest	Through legality	X	X
Party-oriented		X	X – Participation
Effectiveness and economy		X	X

The table shows that in Slovenia, different regulations on the highest or most general level establish similar principles, even though classification by subject matter reveals an aggregation of democratic principles and professional standards. Legal-political principles can be defined as 1) principles that are general for any subsystem of society or uniform for all holders of power (equality before the law, for example) and 2) those principles that are (more) characteristic of public administration compared to other authorities and/or the private sector (being bound by law and consequently having limited independence or effectiveness, impartiality). In fields where differences generally stemming from the nature of the two types of legal acts exist, uniformity would for the most part bring about enhanced standards for rulemaking procedures. From a legal perspective, support for this could be found in a modern understanding of the substance of fundamental constitutional principles and human rights as addressed by administrative science in the framework of the concepts of good governance and good administration, with classical procedural safeguards on due process or the so-called rights of defence. The remainder of this contribution will therefore be limited to the question of participation in the two types of procedure.

4.3. Participation in rulemaking and administrative procedure

The key questions for this paper are: 1) who participates in a procedure; 2) what do they input in the procedure and 3) what do they protect. Rules that regulate these questions contain, among other things, an expression of an understanding of the relationship between the state and society and with it of the values of the legal system – one of the functions of procedural rules is therefore to transmit values such as participation. Linking this function to the question of who participates in a procedure makes it possible to claim that a person who is important participates and *vice versa* – a person who participates is important. In line with a modern understanding, the

[13] On this "protoprinciple" see Articles 21 and 34 of the Constitution of the Republic of Slovenia. Article 21 of the Constitution of the Republic of Slovenia establishes the protection of human privacy and dignity in legal proceedings, while Article 34 establishes the right to personal dignity and protection as an entitlement for everyone (even outside of legal proceedings). By comparison, the German *Grundgesetz* lays out this fundamental value, which provides the basis for "western" democracy, in its first article; as a person's inviolable dignity, it is an obligation of all authorities of the state (*Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt …*). Similarly, it may be concluded that for (the right to) good administration(s), this value is not laid out at all in the Slovenian legal order, even though it is valid on the basis of the direct effects of the Charter of Fundamental Rights of the EU.

person who participates is not the object, but the subject of decision-making (human dignity, fundamental human rights). This function is not linked to the concrete procedure, but has a general significance.[14]

In the Slovenian legal system, the requisite participants in the administrative procedure are the authority and the party as the person whose rights, legal entitlements or obligations the procedure addresses. A person protecting his or her personal rights or entitlements may also participate in the procedure, in which case they have the same procedural rights and obligations as the party (the Slovene term for these participants is "*stranski udeleženec"*, or "interested party", Article 43 of the GAPA). Keeping in mind the questions posited above, a possible answer is that one of the fundamental purposes of party and interested party participation is the protection of the rights and legal entitlements of these actors, which is also one of the main functions of the administrative procedure and can as such be linked to the principle of the legality of the functioning of administration as a key component of the principle of rule of law (similarly Rusch, 2009, pp. 4, 5). To achieve this objective, both participants have the right to make statements regarding all facts and circumstances that are important for the issuance of an individual administrative act (the right to be heard, the hearing principle; Article 9 of GAPA). In this way, they input information required for the decision (the principle of substantive truth, Article 8 of GAPA) and advocate their own, private interests. The regulation of the capacity and position of the party is also important from the perspective of the efficiency of the procedure, and here the Slovenian system, like several others (e.g. the Austrian, German and Croatian systems), links interested party's participation to demonstrated legal interest. Although it contains detailed arrangements regarding the position of interested party, the Slovenian GAPA does not elaborate upon these arrangements to an adequate degree, which leads to a lack of clarity in the implementation of provisions; similarly, in a number of fields sector-specific legislation is not sufficiently clear about whose legal interests it is protecting, which leads to the broadening of participation to include persons who in fact do not have an interest, which in turn could prolong the procedure (for more information, see Remic, 2010). That is why it would be prudent to consider the approach taken by other countries, in line with which they regulate the capacity and position of the party more generally and with a greater degree of discretion (for more information, see Kovač and Sever, 2012, pp. 126-127).

Besides the rights of parties, in the administrative procedure the body must also protect and (co-) create the public interest – it must see to it that parties do not exercise their rights to the detriment of the rights of others or in opposition to the public interest. To prevent the unlawful functioning of an authority, a complex system of oversight over its functioning exists, primarily in the form of legal remedies. Besides these remedies, the protection of the public interest is also served by the possibility that the public be informed of the progress of the procedure and the substance of the acts issued through it – the GAPA thus states that oral hearings are public,[15] and in accordance with the Act on Access to Information of Public Character, individual administrative acts are of a public nature, which means that anyone may be informed as to their substance without previously demonstrating legal interest.[16] In this way, the transparency and openness of the procedure are provided for, albeit in a somewhat limited form. Linking these observations to the question of the functions of procedure, it may be concluded that the abovementioned duty of an authority implies the protection of the legality of the procedure as an integral part of the principle of rule of law. Besides the abovementioned participants, so-called other participants such as witnesses and experts also participate in the procedure. These persons do not participate in the procedure to protect their rights or legal entitlements, but due to other reasons, such as providing information (witnesses) and expert assistance (experts). In this way, they contribute to the accuracy of findings regarding the current state (the principle of substantive truth), which in turn provides a basis for the substantive legality of the decision in the procedure (the principle of rule of law). This part therefore still applies to elements of the inquisitory principle.

A question that arises is, should the rulemaking procedure ensure the functions of protecting the rights of individuals and protecting the public interest and, if so, in what way should it do this? In respect of ensuring the protection of the rights of individuals, it is first necessary to reiterate that administrative rules rarely has direct legal effects, as these rules consist by their nature of abstract and general legal norms. As such, it may not directly incur upon the legal position of the concrete individual. Regardless, one must take into account the fact that it could incur upon legally determined rights, obligations or legal entitlements *if* it oversteps its legal authorisations. In this sense Horvat (1994) speaks of a primary violation of the rights of individuals and,

[14] Morlok (in Gösswein, 2001, p. 76) calls these procedural rules self-serving (German *Selbstzweckhaft*), as they do not directly serve the quality of the result of the procedure, but rather embody an independent procedural-legal value which can only be expressed in the procedure itself.

[15] An authorized person who manages a procedure may exclude the public from the entire oral hearing or from a part of the hearing if legally grounded reasons are given (see Article 155 of the General Administrative Procedure Act).

[16] The Act on Access to Information of Public Character lists exceptions to the availability of information; these pertain to personal information, classified information, etc. See Article 6 of the Act on Access to Information of Public Character.

consequently, of only a secondary violation of the rights of individuals in the administrative procedure. And while he does stress that persons who demonstrate a legal interest have the right to challenge administrative rules before the Constitutional Court, he warns that this form of protection only comes into play *ex post facto* and is not the most effective (in the same sense see Wahl in Schuppert, 2000, p. 805-806). The question is whether the potential violation of a right for which the protection of the Constitutional Court has been established presents a basis for attributing the legal protection function to the rulemaking procedure. The authors of this paper feel that it does not, except in cases where the administrative rules could have a direct legal effect.

The next question is does the rulemaking procedure have the function of protecting the public interest? The public interest is generally defined or can be identified in a law. In simple situations, an individual administrative act could be issued solely on the basis of a law, provided that the authority is careful that the party does not exercise his or her rights in opposition to the public interest. Very few, if any, situations of this kind can be found. Due to the complexity of matters which must be regulated by law, a deviation from the so-called classical ideal of separation of powers occurred some time ago, as a result of which the executive may issue rules. This created a constitutionally-legally regulated and delimited division of work between the legislator and the executive.[17] This means that the process of shaping or determining the public interest does not end with the issue of a law, but continues in the rulemaking procedure.[18] The rulemaking procedure can therefore be defined as a procedure for (co-)creating the public interest or policies. Factoring in the potential for the abovementioned violation of the rights of individuals in the event that administrative rules overstep their legal authorisations, it may be said that the rulemaking procedure must be shaped in such a way that it will facilitate the adoption of decisions which are most suitable for regulating a given societal relation (quality of substance) and which at the same time do not overstep their legally determined framework (legal quality). One way to ensure this is through a procedure that is open and transparent – the body provides information to the public or facilitates access to information and receives information from the public. Public participation in rulemaking therefore has the following functions: providing the information required for a decision, expressing and balancing interests, indirect or advance protection of rights, oversight over the functioning of authorities, democratic legitimation of the adopted decision and, potentially, greater acceptability of the adopted decision (see, for example, Barnes, 2009; Coglianese et al., 2008; Ziamou, 2000). From a legal perspective, public participation in rulemaking strengthens the democratic character of the state (the principle of democracy) and contributes to the legal regularity of the functioning of authorities (the principle of rule of law); from the standpoint of administrative science, it contributes to the quality of the adopted decision.

Regardless of the above, theory has also put forth reasons against public participation in rulemaking. If participation is formalized and enables the inclusion of a wide circle of participants, it could lead to excessive rigidity, slow down the procedure and generate considerable costs.[19] In the opinion of certain authors (Rusch, 2009, p. 10), the party's right to a hearing as an expression of participation, if regulated by an administrative procedure act, must be clearly separated and organized in its own way if it is a matter of the right to be heard in the case of individual administrative acts of an adjudicating nature and acts of a regulatory nature. For theorists whose point of departure for democratic legitimation is the people as a whole, public participation in rulemaking represents an illegitimate attempt to bypass the political will of the legislator. Namely, the executive must respect the law, which is why the only way for the public to be included is through elections based on party pluralism. General views on direct public participation in shaping decisions can also be found in the literature. These claim that 1) the public cannot be trusted because individuals do not understand democracy and are not in favour of democratic debate, 2) public participation further complicates the already complicated rulemaking procedure, 3) public participation is naive from a political point of view because it cannot prevent the domination of powerful interest groups, while at the same time it sets off political conflicts and may therefore be considered dysfunctional and 4) people do not have the time or adequate knowledge and information to participate (see Roberts, 2004, pp. 325-326).

What does all of the above mean for Slovenia, keeping in mind the findings of the studies on public participation in rulemaking? Considering that Slovenia is a so-called emerging democracy and that authorities violate the Resolution on Legislative Regulation, and regardless of the fact that the public does not appear to be particularly interested in participating in rulemaking procedures, we feel that public participation in rulemaking needs to be

[17] This ideal of the principle of the separation of powers suits the current situation regarding the regulation of societal matters.

[18] This fact is also acknowledged by the Resolution on Legislative Regulation, which states that draft administrative rules must be prepared alongside the proposal for a law, as the two together represent the regulation of a given societal relation in its entirety (see chapter VII of the Resolution on Legislative Regulation).

[19] In American theory, this problem is known by the expression "ossification". Empirical analyses do not confirm this hypothesis (see Johnson, 2008; Webb Yackee and Webb Yackee, 2012).

regulated by law due its role in transmitting constitutional values. Nomotehnically speaking, this could take the form of an independent law or a chapter of the General Administrative Procedure Act.[20]

5. CONCLUSION

Good governance compels authorities to redefine and improve the legal regulation of relations with the governed in the direction of participation. In this context, administrative-procedural law should develop through the co-regulation of procedures together with those whom said procedures address, while in terms of substance it should enable the harmonization of any conflicting interests through mutual agreement. In a system of good governance, the state (only) provides authority and the protection of the general societal interest, but is not their exclusive or even primary bearer. From a developmental perspective, the functioning of a state in accordance with the concept of good governance gradually progresses from being more authoritative and centralized to being service-based, decentralized and participatory.

The analyses of the state of the regulation and implementation of rulemaking and administrative procedures (as the two classical types of procedure which differ based on whether the end result is a general or individual (administrative) act) presented in this paper show that for Slovenia there is still a great deal of room for improvement in the area of good governance. The legal regulation of procedures could contribute to this end through educational norms, insomuch as the two types of procedure were to be harmonized following the example of certain countries (the US and the Netherlands, for example). For the principle of public participation in Slovenia, this also means raising standards derived from the traditional Austro-German administrative procedure on the level of administrative rules. The modernization of public administration in the direction of participatory good administration is therefore both a means and an end with which and towards which the state can guide changes in its approach to public administration and thereby progress from bare administration to integral governance and societal advancement.

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