Opennes and Transparency in Public Administration: Challenges for Public Law (Draft)

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1. Introduction – the crisis of legitimacy in modern public administration

The traditional model of thought on public administration goes back over a century and to this day rests on the theoretical foundations laid by Max Weber.[2] Indeed, we can now call Weber's theoretical thinking on state administration a paradigm, given that it dominated and guided theoretical approaches and practice in public administration throughout the twentieth century. The core of the Weber paradigm is a hierarchical, professional and politically neutral public administration.[3] The operations of this kind of administration are based on laws adopted by a democratically elected representative body, while the executive branch of power implements them in a professional manner. The democratic legitimacy of the executive branch within this paradigm is indirect as it rests on the wishes of a directly elected parliament setting out the work and operational framework for the state administration. Lawyers call this the principle of legality, which means that the administration can only operate within the parameters set out by law.[4] The principle of legality is one of the most important achievements of the modern state governed by the rule of law. Checks on the principle of legality are performed by the representative body and the judiciary.

The principle of legality is a constitutional principle in all representative democracies and is no less important today than it was at the inception of modern democratic states. What has changed is the acknowledgement of a democratic deficit in the legitimacy of the public administration's functioning. The modern executive branch has, in parallel with the development of the interventionist, welfare, state continually expanded its sphere of function and influence. There are very few areas of society today not subject to some form

[1] Associate Professor at the Faculty of Law in Ljubljana, Slovenia.
[2] See M.Weber, *Economy and Society*, Volume Two (1978), pp. 956-1005.
[3] See R. Hague, M. Harrop, *Comparative Government and Politics* (2001: p. 255); J. Ziller, European Models of Government; Toward a Patchwork with Missing Pieces, *Parliamentary Affairs* (2001), p. 102.
[4] For more on the principle of legitimacy in European administration see J. Schwartze, *European Administrative Law* (1992), pp. 212-232.

of state regulation. The proliferation of regulation is a prime impetus for changes in views on the executive branch's democratic legitimacy. Today the prevailing understanding is that it is not enough for the executive branch to be subordinate to the supervision of the legislature and judiciary. At the same time the growing scope of regulation has increased the possibility of executive power being abused, especially given the modern phenomenon of delegated legislation and the increasing amounts of executive, or implementing, regulations.[5] According to the principle of legality the executive branch should only implement what the legislature has prescribed in laws.[6] Unfortunately the complexity of modern regulations too often demands rapid, large-scale intervention into a specific area in the form of executive regulations that do not always match clearly defined statutory objectives. The problem becomes even more urgent when we take into account the wide field of legal discretion the executive has in its decision-making.[7] The practical functioning of the public administration too often steps outside the principle of legality and, without express authorisation from the legislature, autonomously encroaches on legislative matters for which it has no legitimacy.

Legal theory and practice have for some time sought solutions, with varying degrees of success, with which to at least reduce if not eliminate the democratic deficit that threatens the public administration's legitimacy.[8] This has led to the formation of various theories of administrative law that offer a range of solutions to limit the discretion of the executive branch of power. The question of how to limit the discretion of the executive is traditionally one of the basic issues of administrative law. The solutions sometimes stress the need for more detailed and more extensive legislation that anticipates every possible "life situation" and eliminates the need for executive discretion. This formal theory of administrative law is unrealistic and impossible to apply in practice. Laws will never be so well defined that they can completely eliminate executive discretion. Furthermore the fact that the legislature has limited ability to anticipate and manage every possible life situation is not the only problem. An further limitation on the legislature's capacity to produce "perfect" legislation of that type is the pace of change in society and

[5] See C. Hunold, Corporatism, Pluralism, and Democracy: Toward a Deliberative Theory of Bureaucratic Accountability, *Governance* (2001), p. 151.
[6] Stewart characterised this theory of administration as functioning like a transmission belt, where the administration only applies the law in concrete cases. See R. Stewart, The Reformation of American Administrative Law, *Harvard Law Review* (1975), p. 1676.
[7] See K.C. Davis, *Discretionary Justice in Europe and America* (1976), p. 195-203; D.J. Galligan, *Discretionary Powers, A Legal Study of Official Discretion* (1986), p. 1-4; K. Hawkins, ed, *The Uses of Discretion* (1992). pp. 11-89.
[8] See C. Harlow, European Administrative Law and the Global Change, in P. Craig, G. deBurca, ed., *The Evolution of EU Law* (1998), p.264.

technology, which often necessitates a rapid response to numerous and widely-varying technological advances. This has also informed the understanding that modern regulations demand a certain level of autonomy and independence for the public administration, as only in that way can it keep up with changes in society.

A second school of thought, the expert theory of administrative law, stresses the expert or professional nature of administrative operations and simply perceives public administration as the expert execution of a wider or narrower selection of legislative authorisations. The problem with the expert theory is that it overlooks the abuse of the profession for political purposes. In the expert theory, professional rules and standards are the main means of supervising the administration's functioning. Periods of placing greater trust in the professionalism in public administration are always followed by abuses of power, which usually lead to a loss of confidence in the expert theory of administration.

The third school of thought favours stronger judicial control over the public administration and gives the courts wider powers to adjudicate on the legality of administrative operations. This line has prevailed for over fifty years in Anglo-Saxon legal systems and in recent decades has also garnered support in continental Europe.[9] Hence the European Court of Justice (ECJ) has drawn up numerous principles of European administrative law that have significantly transformed operational concepts and methods in European public administration. There is also a clear move within the national legal systems of European countries towards giving judicial control a more important role and allowing the judiciary to draw up standards for public administration operations.[10]

The final school of thought can be termed the theory of open public administration and stresses the importance of individual (public) participation in the adoption of executive regulations and public access to all information on public administration operations.[11]

The last two theories, supplemented by certain new understandings from administrative law professionals, form the framework for a new approach to a more open, transparent and responsible public administration.[12] Any

[9] For more on all the administrative law theories cited see G. Frug, The Ideology of Bureaucracy in American Law, *Harvard Law Review* (1984), pp.1282-1284.
[10] For more see J. Schwarze, supra, op. 4, pp. 100-205.
[11] Ziller writes of the increasing influence of the Swedish model of public administration, the classic example of "open administration". See J. Ziller, supra, op. 3, p. 103.
[12] See C. Hunold, supra, op. 5, p. 161.

description of these theories or models must mention that in practice they usually occur in a variety of combinations within actual legal systems, and almost never as separate isolated systems, so rather than talking about the selection of one particular model over another, it is more accurate to speak of one model predominating.[13]

2. Open public administration as democratic legitimisation for the executive

Open public administration is based on giving the individual a greater role in the adoption of executive regulations and on greater transparency in public administration operations. Open public administration is based on the principle of openness in public administration operations, which has become an important legal principle in European administrative law.[14] The principle of openness means that the administration's decision-making process is also open to individuals, i.e. citizens, so that they obtain all public information on the work of the public administration and participate in adopting its decisions. There are two main components of the principle of openness: first, the public nature of public administration operations, providing information on the work of the public administration and the right to access to public administration documents (this part of the principle is often characterised as the principle of transparency of the public administration); second, the principle covers various forms of public participation in public administration decision-making. As Trpin points out, the principle of openness is broader than the principle of transparency, as the latter refers to the accessibility of information and other public administration services, while the principle of openness covers various forms of active cooperation and communication between the administration and the public.[15] We can therefore conclude that the principle of transparency is a narrower term and in fact a component of the principle of openness. In the literature the two principles are used interchangeably, but given the differences that exist between them it is important to carefully define their content.

The principle of openness was introduced to European law by the Amsterdam Treaty, which incorporated it into Article 1 of the Treaty on European Union (TEU), which states that decisions by EU institutions are to be "taken as

[13] C. Harlow, supra, op. 8, p. 265.
[14] For more on the principle of openness in European law see D. Curtin, H. Meijers, The Principle of Open Government in Schengen And The European Union: Democratic Retrogression?, *Common Market Law Review* (1995), pp. 391-442. For more on openness in Slovenia's public administration see G. Trpin, Načelo odprtosti javne uprave, *Javna uprava* (2000), pp. 409-416.
[15] See G. Trpin, ibid., p. 411.

openly as possible and as closely as possible to the citizen".[16] Although the European Court of Justice has still not accorded the principle of openness the character of a general principle of European law, its judiciary clearly recognises the importance of the principle, especially the right of access to the documents of the Community's institutions.[17]

Even before the Amsterdam Treaty several countries had introduced the principle of openness as a basic principle of their national law. The first to do so was Sweden, which adopted the Freedom of the Press Act in 1766, which included the principle of transparency. Transparency is a constitutional principle in Sweden. After the Second World War Denmark followed Sweden's example, and was later followed by other Nordic countries.[18] As Ziller points out the principle of openness in the Swedish legal tradition does not only mean access to information but also the right of public administration employees to communicate with journalists during the preparation of regulations or during decision-making. Having openness as a constitutional principle, more than two hundred years of tradition, and other political ethical support for the principle of openness in Swedish society has shaped a deeply grounded culture of openness that to this day remains the *differentia specifica* of Sweden and the other Nordic countries.[19] Although considerable changes have also taken place in this field over the last decade in other countries, the majority of professional opinion agrees that European countries can be divided into those with a culture of openness in public administration and those with public administration operations based on the principle of secrecy. Most continental European countries belong to the second group although significant differences exist among them.

The principle or theory of open public administration is a significant departure from the traditional Weberian theory of public administration.[20] The main change lies in the fact that this new theory not only attempts to find solutions to the democratic deficit through indirect legitimisation of the public administration but also introduces mechanisms to ensure its direct democratic legitimacy.[21] This far-reaching change in the concept of public administration is recognition of the need to involve the public in the public administration's functioning as much as possible. The understanding that openness in the public administration is essential if it is to function more responsibly and

[16] Article 1 (TEU) as amended by the Amsterdam Treaty (97/C 340/01).
[17] See P. Craig, G. deBurca, *EU Law, Texts, Cases, and Materials*, Third Edition (2003), pp. 392-393.
[18] See C. Gronbech-Jensen, The Scandinavian tradition of open government and the European Union: problems of compatibility?, *Journal of European Public Policy* (1998), p. 188.
[19] See J. Ziller, supra, op. 3, p. 109.
[20] David Held points out that in Weber's theory there was not much room for democratic participation. Weber's model is therefore ranked as a "competitive elitism" model. See D. Held, *Models of Democracy* (1995), p. 143.
[21] See C. Hunold, supra, op. 5, p. 164.

effectively is gaining increasing importance in the theory of administrative law. The most effective means of limiting the scope of discretion in public administration lies not in more detailed legislation but in having administrative professionals with greater expertise, and bringing public administration operations into the public domain.[22] Just as the participation of the democratic public legitimises the legislature, their participation should remove the democratic deficit from public administration functioning. The democratic legitimacy of its operations would therefore be changed from indirect to direct.

An review of modern trends in public administration reform[23] reveals a wide range methods for opening up the public administration, including the right to access public information, to consultation in the adoption of executive regulations, the right to cooperation in the adoption of fundamental political decisions within society, a stronger role for the judiciary in supervising the legality and constitutionality of the public administration's functioning, a stronger role for informal means of protecting citizens against administrative bodies (ombudsmen for various areas) and changing the public administration's internal organisation itself, putting the emphasis on decentralisation, the principle of subsidiarity and the democratisation of functions within the public administration, to mention just some of the most visible examples of public administration reform.[24]

An overview of public administration reform in the largest 123 countries in the world reveals four basic driving forces behind public administration reforms around the world: they are globalisation, democratisation and the related decentralisation, the information revolution and public dissatisfaction with public administration.[25] Although these factors function in concert, the effect of the fourth – public dissatisfaction with the public administration – cannot be overlooked. It should be emphasised that it involves not only a measure of dissatisfaction that can be measured by economic or other material criteria, but also an expectation that public administration should function honestly, competently and effectively.[26] This has been the impetus for a

[22] See M. Dorf, C. Sabel, A Constitution of Democratic Experimentalism, *Columbia Law Review* (1998), p. 283; J. Freeman, Collaborative Governance in the Administrative State, *UCLA Law Review* (1997), p. 21-27; T. Ziamou, New Process Rights for Citizens? The American Tradition and the German Legal Perspective in Procedural Review of Rulemaking, *Public Law* (1999), p. 10.
[23] See OECD, *Citizens as Partners: Information, Consultation and Public Participation in Policy-Making* (2001), pp. 27-63.
[24] See V. Wright, Reshaping the State: The Implications for Public Administration, *West European Politics* (1994), pp. 109-116.
[25] See E.C. Kamarck, Globalization and Public Administration Reform, in J.S. Nye, J.D. Donahue, ed., *Governance in a Globalizing World* (2000), p. 232.
[26] Ibid, p. 235.

growing number of countries deciding on deep-seated reforms of the public administration aimed at increasing its openness.

The first reforms intended to bring greater openness to the public administration were taken by Anglo-Saxon and Nordic countries. In 1946 the United States adopted its Administration Procedures Act (APA), which gives the public the right to consultation in the adoption of executive regulations (known as "notice and comment"). Twenty years later the United States adopted the Freedom of Information Act, which regulates the right of access to public information and in 1976 it adopted the Government in the Sunshine Act which stipulated that the meetings of public agencies were public.[27] Similar regulations are found in most of the Nordic countries.[28] The Swedish tradition of open administration, the oldest in the world, has already been mentioned. Anglo-Saxon and Nordic countries were the first to adopt laws on the right to access public information. For a long time, continental European countries held to an instrumental theory of administrative law, which prioritises the efficient functioning of public administration over its democratic control. Today the picture is somewhat different: a supervisory theory of administrative law which deals with various control mechanisms for administrative operations is now more or less predominant in continental Europe.[29] One significant stimulus for the changing concept of administrative law has been the development of the European Union's regulatory bodies.[30] EU law, its institutions – especially the court practice of the European Court of Justice, and the creation of a "European administrative area" have encouraged a different way of thinking about administrative law in Europe.[31] The protection of an individual's rights and the participation of individuals in adopting the basic acts of the European Union is now at the forefront of efforts to reform the European Union.[32] Some of these rights are already encompassed within the *acquis communautaire*, the body of European law, while others will be introduced in some manner or another.[33]

A recent OECD study on administrative reforms points out that involving the public in the administration's decision-making not only leads to

[27] See P. Strauss, *An Introduction to Administrative Justice in the United States* (1989), pp. 195-200.
[28] See C. Gronbech-Jensen, supra, op. 18, p. 188.
[29] See C. Harlow, supra, op. 8, p. 264.
[30] For more on this topic see G. Majone, *Regulating Europe* (1996), pp. 47-61.
[31] For more on this topic see J. Schwarze, ed., *Administrative Law under European Influence* (1996), pp. 13-26.
[32] See the basic strategic document by the European Union on the reform of its institutions, White Paper on European Governance COM 428 final (2001), p. 12.
[33] The right to access is regulated by the Amsterdam Treaty Article 255, TEC), while other rights are addressed by Mendelkern's report, which is the EU's main document on the development of public administration. See Mandelkern Group on Better Regulation, Final Report (2001), pp. 33-35.

democratisation and greater openness in the public administration, but also to an improvement in the quality and implementation of public administration decision-making.[34] This further demonstrates the urgency of opening up the public administration, demonstrating as it does to potential critics of such reforms that a more democratic public administration does not mean a less efficient one; on the contrary that it will function more effectively. This is the clearest difference between the traditional Weberian paradigm of public administration and new models of open public administration. Advocates of the Weberian paradigm paid most attention to the efficient functioning of the public administration, based primarily on the expressly hierarchical nature of public authorities and saw public participation more as an obstacle than as an aid to greater efficiency. Advocates of the hierarchical model have seen problems rather than solutions in legal recognition for the public right to participate in the decision-making of the public administration. The fear remained that this right would paralyse the functioning of the administration. Supporters of the Weberian paradigm held similar views on the scale of judicial supervision over the legality of administrative operations and, by extension, how far an individual's rights extended within administration procedures. The origins of the continental model for administrative procedures can be traced back in part to French post-revolutionary experiences of mistrust in the regular judiciary, which at the time opposed the bourgeois revolution. As a consequence in France judicial supervision of the administration was entrusted to special administrative courts rather than the normal judiciary.[35] The special administrative judiciary was supposed to be founded on certain basic elements of traditional civil and criminal procedures, but also to be more specialised, i.e. more favourable to the administration. For this reason a great deal of the procedural provisions on administrative procedures are clearly less favourable to the administration's users and much more inclined towards the state. The situation was quite different in countries where judicial supervision of the administration was performed by the regular court system. The English constitutional theorist Dicey even advocated the position that in a state based on the rule of law it was unacceptable for the administration not to be subject to regular courts and hence heavily criticised the idea of special administrative courts.[36] Irrespective of its historical heritage, administrative court practice has changed considerably and they are increasingly taking a much more aggressive stance against the public administration. Perhaps the most illustrative examples is France's Conseil d'Etat itself, which has radically

[34] See OECD, *Citizens as Partners*, supra, op. 23, p. 20
[35] See J. Rivero, J. Waline, *Droit Administratif* (2000), p. 17.
[36] See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1982), pp. 266-267.

changed its court practice with some fundamental decisions and has become extremely activist in judgments on the functioning of public administration.[37]

Examples of open public administration can today be found in practically all developed countries. A range of factors has contributed to the spread of open public administration. Recognition of the democratic deficit in the executive branch can found all over the world. Public dissatisfaction with the public administration, especially the lack of greater transparency, openness and efficiency is one motivation for calls for open public administration. Other important reasons have been democratisation, the information revolution and globalisation.[38] Taken together these factors increase the need to bring the public administration's functioning further into the public domain. Reforms to establish open public administration do form one element of the more general New Public Management movement.[39]Although the main emphasis of new public management is improving the efficiency of public sector management by bringing in ideas from the private sector, it is interesting that the new public management and open public administration theories overlap on demands for greater openness in the public administration. There nevertheless remain considerable differences between the two concepts, but it is not the remit of this paper to address them. Below I will set out some important areas in which open public administration has been put into practice. The purpose of this paper is to demonstrate the qualitative changes that open public administration has brought to public administration operations.

3. Examples of open public administration in practice

3.1. The right of access to public information

3.1.1. Legal definition and function of the right of access to information

The right of access to public information is the first step to a more open public administration. The right of access is the legally protected right of access to all documents and other public information that the legislation on access designates as public. The right of access is extremely important, as access to information is a pre-condition for public participation in the public administration's work. Access to public information allows citizens to discover the content of regulations and other public administration acts and in this manner participate on a much more equal footing in public administration

[37] See P. Devolve, *Le Droit Administratif* (1994), p. 3.
[38] See E.C. Kamarck, supra, op. 25, p. 235
[39] See C. Hood, A Public Management for All Seasons, *Public Administration* (1991), pp. 3-19.

decision-making than they could without access. This demonstrates the democratising function of the right of access.[40] Another important function of the right of access to information is that it allows citizens to supervise the public administration's work. The legally protected right of access means that citizens can obtain any public information, thus placing the work of the public administration under the microscope of its citizens. The public administration can no longer hide or hold back information for its own exclusive use, but must make it all available to interested parties. This makes access to information an important way for citizens to supervise the authorities, which may well work towards prevent poor management, abuse of power and corruption.[41] The third important aspect of the right of access is economic, as public access provides extremely important information for business decisions. This means we can speak of the economic function of this right, as it opens up an important new market, the market in public information. Public administrations around the world gather and produce a large amount of public information. The development of the information society has not only increased the spread of new information technologies but also led to the creation of a new market, a market in public information. The collection and production of public information is already a significant economic activity and some countries are already moving onto the next level – supervising the market in public information.[42] The fourth aspect concerns the part of public administration reform known as e-government: using the internet as a communications media between the administration, citizens and business.[43] E-government is important in of itself, as part of the information revolution that has made information technology a key factor in economic development.

3.1.2. Comparative review of the right of access to public information

Over forty countries have already adopted laws regulating the right to access public information[44] and roughly thirty countries have legislation in preparation. Most developed countries already have legislation in this area:[45] Sweden since 1766, Finland since 1951 and the United States since 1966 to name just a few. The Swedish law of 1766 had four main elements: first, public access to official documents; second, public access to court hearings;

[40] See A. Verhoeven, The Right to Information: A Fundamental Right?, in EIPA, *An Efficient, Transparent Government and the Rights of Citizens to Information* (2000), pp. 2-3.
[41] See T. Blanton, The World's Right to Know, *Foreign Policy* (2002), pp. 52-53.
[42] See J. Gyorkos, Trgovanje z informacijami javnega značaja, in Inštitut za javno upravo, Kaj prinaša novi zakon o dostopu do informacij javnega značaja (2003), pp. 47-62.
[43] See S. Pličanič, Pravno sistemski vidiki E-uprave, *Javna uprava* (2002), pp. 50-53.
[44] See D. Banisar, Freedom of Information and Access to Government Records Around the World (2002), pp. 2-3.
[45] Twenty four of the 30 OECD member states have already passed legislation in this field. See OECD, *Citizens as Partners*, supra, op. 23, pp. 29.

third, the right of access to sessions of parliament and local bodies; fourth, the right of civil servants to free speech. As can be seen the Swedish regulated the right of access very liberally, as well as a range of other rights that may be considered part of the principle of openness in the public administration.[46] Danish legislation on access contains very similar provisions.[47] In 1970 Norway adopted its Freedom of Information Act containing a general principle of access, qualified only in certain specific cases. Compared to the Swedish law there are fewer exceptions but they are less clearly defined, leaving the public administration with considerable discretion in deciding when there is an exception to public access.[48] Germany and Switzerland are the only Western European countries that do not have this kind of legislation.[49] The number of countries to have adopted public access or freedom of information laws has risen significantly in the past decade. The fall of communism and other totalitarianism regimes was in part also a moral condemnation of the culture of "closedness", secrecy and lack of access to public documents. This increased pressure from citizens and various international organisations, which called on the new democracies to pass legislation giving citizens access to information. The right of access is also regulated in EU law. The Amsterdam Treaty introduced a new Article 255 to the Treaty establishing the European Community (TEC), which sets out the right of access to documents. In 2001 a regulation was adopted setting out in detail the right of access to documents in paragraph 2 of Article 255/TEC. The right of access only covers access to European Parliament, Council and Commission documents and directly covers the rules on access by member states. Irrespective of this, the right of access at the EU level will significantly influence legislation and court practice in the member states. It will be possible, for example, to demand specific information from an EU institution, when the source of that information will be a member state. This will lead to interaction between EU and national law, and the solutions and explanations surrounding this contact between legal orders will definitely influence the use and interpretation of national law.[50] Mention should be made that the court practice of the ECJ to date demonstrates that the court interprets the right of access very broadly, with very few exceptions. Although the court has yet to

[46] See C. Gronbech-Jensen, supra, op. 18, pp. 188.
[47] Ibidem.
[48] See F. Sejersted, The Act on Public Access to Documents: Current Frustrations and Proposals for Reform, *European Public Law* (1999), pp. 12-13.
[49] The German government already has a draft law prepared and awaiting deliberation. See Informationsfreiheitsgezetzes (IFG) (2002). Switzerland also has a draft freedom of information act prepared. See www.freedominfo.org (2003).
[50] See A. Verhoeven, supra, op. 40. pp. 13-16; U. Bernitz, Sweden and the European Union: On Sweden's Implementation and Application of European Law, *Common Market Law Review* (2001), pp. 919-920. Of greatest interest is the case Journalisten, Case T-174/95 (1998), ECR II-2289.

recognise transparency as a basic principle of EU law, the right of access – one form of transparency – is increasingly gaining in importance.[51]

By adopting the Access to Public Information Act (ZDIJZ – Official Gazette of the Republic of Slovenia, 24/2003), Slovenia joined the group of countries with freedom of information legislation, a group that is growing rapidly.[52] The new law is a concrete application of the provision enshrined in Article 39 of the Slovenian Constitution, which states that everybody has the right obtain information that is public in nature. The ZDIJZ is the first pillar of a new open public administration. An open public administration is a precondition for greater democracy, responsiveness to citizens and efficiency. Only citizens empowered by information can participate in public debates and put forward their own positions. The public administration collects and manages one of the largest information collections in the country so it is important that the collection is open to citizens.

3.1.2. Principle of free access and exceptions

The ZDIJZ is based on a liberal principle of free access to all public information. The act does not contain detailed or exhaustive definitions of public information. It only contains a negative definition: all information not included in the exceptions set out in Article 6 is in the public domain. This approach is typical of modern public access legislation: Denmark, Ireland, the Netherlands, Norway, Sweden and the United States all introduced the principle of free access with a list of exceptions. The principle of free access is very important, as the negative definition of public information means that everyone has the right to information unless otherwise stated. The exceptions include confidential information, business secrets, personal data and other special protected data as defined either in the ZDIJZ or specific legislation. The exceptions also include other areas with similar legal arrangements.[53] Defining the exceptions is an important part of the law, as experience has shown that the biggest problem in practice is differentiating between the general principle of free access and its exceptions. Norway has a new freedom of information act in preparation precisely because its exceptions were defined too vaguely.

Of considerable importance in regard to the new Slovenian law is the fact that in contrast to the Constitution, it presumes that a legal interest exists. In the

[51] See P. Craig, G. deBurca, supra, op. 17, pp. 393-394.
[52] See B. Bugarič, S. Pličanič, Prost dostop do informacij javnega značaja, *Pravna praksa* (2003), pp. 3-4.
[53] See J. Wadham, J. Griffiths, B. Rigby, *Blackstone's Guide to the Freedom of Information Act 2000* (2001), pp. 10.23.

second paragraph of Article 39 of the Constitution it states that only those with a well founded legal interest are entitled to access. The law regulates the area more liberally than the constitution, which is always acceptable in a constitutional democracy. Legal interest does not have to be specifically demonstrated according to the provisions of the ZDIJZ. The legislature considered this such an important right that it should not be limited by the need to specifically check for a legal interest, but rather everyone should be acknowledged as having legal interest. The legislature always retains the right to define a specific constitutional provision more broadly than in the constitution (though never more narrowly).

Other countries generally do not require legal interest to be proved as a condition for access to public information. One of the few exceptions is Italy where the law on administrative procedures that regulates the right to access requires legal interest to be demonstrated.[54]

3.1.3. The extent of public access

The agencies and bodies required by the Slovenian law to make information public are all state and public administration bodies, the National Assembly (Slovenia's parliament) and the court system. It is extremely important to emphasise that it is not only the state administration that is required to act in accordance with this law. The ZDIJZ is much broader and requires all public administration bodies to place information in the public domain: local community bodies, public agencies, public funds and other public legal entities, all holders of public authorisation and providers of public services. Every year the Slovenian government publishes a catalogue of bodies and agencies obliged to make information public. The catalogue is intended to provide information, primarily to citizens, so that they have access to a comprehensive list of agencies obliged to provide access to public information. If an agency is not listed in the catalogue but falls within the definition given in the first paragraph of Article 1 of the ZDIJZ then that agency is nevertheless obliged to provide access to public information.

The Swedish, British and Irish laws apply to all three branches of power. This is not the case in the Netherlands and the United States where the public access laws are only binding on the executive branch of power.[55]

[54] See D. Banisar, supra, op. 44, p. 21.
[55] See S. Pličanič, Pravica do informacij javnega značaja, Inštitut za javno upravo, Eighth Public Law Conference (2002), pp. 100-101.

3.1.4. Judicial protection

An extremely important section of the law concerns judicial protection of the right of access. Only if the right has judicial protection can it actually contribute to greater openness in the public administration. To mention just one example, a similar law passed in Ireland in 1997 significantly contributed to reforming Ireland's state administration and transforming it into an open public administration.[56] In Slovenia, the procedure for accessing information has been simplified. The ZDIJZ does not envisage a body issuing a decision to grant a request for information, but just an official notification (Article 22). More formal procedures only commence later, if an applicant files an appeal claiming that he or she did not receive the information requested or that the information was incomplete. Unless there is an appeal, the procedure is simple and less formal, which will facilitate the efficiency and speed of the procedure. This is a very important point as lengthy procedures would devalue the significance of the right under judicial protection. The right to access information is a kind of right that is current at the time the applicant exercises the right. A lengthy court procedure could completely annul the meaning of such a right, as information that obtained after a number of years does not have the same value as current information. The first instance court in an appeal is a special institution or position held by a commissioner authorised to adjudicate on access to information, the second instance (and first judicial level) is the administrative court, which is important as it provides recognition of the right to full judicial protection. Appeals at the first level are governed by the rules on general administrative procedure. Having two levels is extremely important, as neglecting the first and dealing with complaints as administrative disputes would threaten the very purpose of this right. Cases before the administrative court can last a long time so it is vital in addition to full judicial protection to have a first instance that can quickly and effectively deal with appeals.[57] As with comparable institutions in other countries the commissioner's position is apolitical and independent. He or she is proposed by the President of the Republic and appointed by parliament, although the parliament may only remove commissioners from office on the grounds of a criminal offence, long-term inability to perform their work, or if they so request themselves. This system secures the commissioner's independence, as he or she cannot be dismissed for political reasons. The commissioner's term in office is five years and can be renewed once. A significant solution in the ZDIJZ is a special provision on promoting access to public information and providing advice on the issue. Most comparable systems include a special

[56] OECD, *Regulatory Reform in Ireland* (2001), p. 52.
[57] For more on this topic see R. Baxter, Freedom of Information: Dispute Resolution Procedures, *European Public Law* (1996), pp. 635-661.

body with a proactive role in the field to assist citizens in accessing public information.[58] In Slovenia this is the responsibility of the Ministry of the Information Society. The role of the human rights ombudsman will also be important as his or her responsibilities will include the right of access to public information.

3.1.5. Some unresolved issues

The basic right regulated by laws on access to information is very simple: the right to obtain all public information not covered by an exception in the law, or in other words which the law counts as information in the public domain. It is very important that the individual has a clearly regulated legal protection of this right. An essential part of these laws are the provisions that differentiate between accessible (public) information and information that cannot be accessed. It is making this differentiation that produces the greatest problems in practice. Some countries use a positive definition and set out in the law everything to be counted as public information, while others use a negative definition, whereby all information is accessible unless covered by an exception. Slovenia's law takes the latter route, with all information in the public domain unless otherwise stated. The exceptions are set out in Article 6 of the ZDIJZ and include information related to criminal, administrative, tax and other procedures, and various forms of business, state and other secrets. Differentiating between accessible and inaccessible material is a vital area of practice that follows the law's entry into force. We can only have an open public administration if the law interprets the right of access as broadly as possible, and not to the detriment of the citizen. This is the only way to achieve the main objective of the law, which is bringing the public administration's operations into the public domain (Article 2, ZDIJZ). The second paragraph of Article 2 states that bodies and agencies must work to ensure that the public receive as much information as possible about their operations, and this paragraph is the basis principle for explanations of individual cases. Even if a body decides that certain information does not belong in the public domain, it must still define the exception as narrowly and restrictively as possible. This means that the practice of the institutions adjudicating on complaints by the public will be extremely important, and the practice of both the commissioner and the courts will entail the definition of basic parameters for interpreting the law. As I stated above, most countries have special bodies to support the application of the law. These are usually special ombudsmen or commissioners that supervise the application of the right to access legislation. The literature stresses the benefit of systems with a

[58] See OECD, *Citizens as Partners*, supra, op. 23, p. 35.

central authority responsible for implementing the law,[59] as court cases can be rather lengthy. Furthermore, the lack of a central authority also reduces the possibility of accurately supervising the law's implementation. David Banisar's calls the US system deficient in this respect.[60] No less important is the role of the courts that will adjudicate on the content of this right in individual cases. In countries that do not have a rich tradition of open administration we can expect a certain amount of resistance to opening up their files. This will make the court practice of the regular and constitutional courts even more important, as it should support the liberal interpretation of the law by judicial casuistry.[61]

The right to public information is the first pillar of the new open public administration. Access to information gives citizens democratic control over the work of the authorities, facilitating the discovery of different forms of irregularities, illegal acts and corruption. At the same time it creates the conditions required for citizens to participate in the adoption of regulations and other acts issued by the state authorities. The next step to democratising the public administration is therefore the right to participate in adopting regulations.

3.2. The right of public participation

3.2.1. Legal definition and scope of the right to participate in adopting regulations

The right to participate in adopting regulations covers the right of citizens to express their opinion on a proposed regulation.[62] It gives citizens an opportunity to express their own opinions, positions, comments and proposals. The public administration is not obliged to take these views into consideration; the state's only obligation is to give a response to the views put forward. This point makes clear how the right of participation functions. The right is structured as a right to a procedure, in which anybody may express their opinion, but does not entail the right to participate in the actual decision-making. Hence the term "right to consultation" is often used instead of right to

[59] See M. O'Neill, The Right of Access to Community-Held Documentation as a General Principle of EC Law, *European Public Law*, (1998), p. 426.
[60] See D. Banisar, supra, op. 44, p. 43.
[61] There was resistance to the newly adopted legislation even in countries with a rich and otherwise democratic culture. US administrations opposed the introduction of a law until Watergate, which changed the American public's attitudes to the freedom of information act. See A. Frost, Restoring Faith in Government: Transparency Reform in the United States and the European Union, *European Public Law* (2003), p. 90.
[62] See T. Ziamou, *Rulemaking, Participation and the Limits of Public Law in the United States and in Europe* (2001).

participation.[63] The procedure arises from an emphasis on the public right to state an opinion within a time period and to receive a response to that opinion. Despite the nature of the procedure, the right to participate has significant consequences. There is an overwhelming recognition that public consultation not only increases how democratic decisions are, but also their quality.[64]

Involving the public in the adoption of regulations gives the authorities an opportunity to obtain a wider range of information, views and possible solutions, which improves the quality of decisions adopted.[65] This right also boosts the public's confidence in its institutions, raises the level of democracy and strengthens the role and importance of civil society. The second aspect of the right to participate, its democratic function, is easily explained. If the public authorities include the public in the preparation of regulations,[66] it can expect public confidence to increase, while also strengthening the status of the public and raising the level of democracy. By definition the right to participate is an expression of participatory democracy. However, it is not a replacement for representative democracy but complementary to it, supplementing and increasing the democratisation of society.[67] The primary function of the right to participate, its effect on the quality of adopted legislation, is somewhat more difficult to explain. Including the public here primarily involves making a wider range of information and proposed solutions available than if a public authority were to decide on a case alone. Here there seems to be a clash between the more efficient functioning of the public administration and the principle of democracy. In some quarters it has been stated that involving the public in the work of the executive branch will make it less efficient, as public participation will mean going through procedures of varying degrees of formality that could slow down the administration's work and prevent the quick and effective adoption of executive regulations. These views represent an outdated theory of regulation that views administration as a one-way, hierarchical process. Contemporary theories of regulation stress the importance of a different approach to regulation, based on cooperation between public authorities and civil society.[68] Public participation, according to these theories, improves the quality of regulations, as they are no longer one-way and hierarchical. Citizens are always closer to the area being regulated than the public body actually preparing the regulatory system.

[63] See OECD, *Citizens as Partners*, supra, op. 23, pp. 36-40.
[64] See J. Freeman, supra, op. 22, p. 22.
[65] See J. Cohen, C. Sabel, Directly-Deliberative Polyarchy, *European Law Journal* (1997), pp. 313-342.
[66] To arrive at these consequences certain preconditions must be met: the process of participation must be regulated in a simple and transparent manner, the public authority must respect the rules of the procedure, and citizens must have the feeling that their opinions are relevant, despite the fact they are not legally binding on the public authority.
[67] See O. de Schutter, Europe in Search of its Civil Society, *European Law Journal* (2002), p. 202.
[68] See M. Dorf, C. Sabel, supra, op. 22, pp. 323-336.

Hence consulting the public improves the range of resources and information on which a regulation is based. It also reduces the heteronomous nature of the regulation, which makes its implementation more effective. The effects of public participation are therefore the opposite of those attributed to it by proponents of older positions on regulations. The experience of OECD member states convincingly illustrates that greater participation leads to better quality regulations.[69]

3.2.2. Comparative overview of the right to participate

Globally, the right to participate is found somewhat less frequently than the right of access to public information.[70] Given that it is a more recent legal institution, still being elaborated even in developed countries, this is hardly surprising. Furthermore, the substance of this right is treated differently from country to country and procedures are a good deal less standardised than those on the right of access to information. Hence in different places it encompasses the participation of citizens in the adoption of fundamental political decisions, strategies, resolutions, constitutions, laws, and – of greatest interest to this paper – executive or implementing regulations. The right to participate in the process of adopting new constitutions, resolutions or laws is by no means a recent innovation to western countries and their legal domain, and similar rights are well established in numerous democratic countries. The right is exercised either in the form of consultative referendums, other forms of referendum, and the right to petition and present public opinion on the adoption or a constitution or laws. The right to participate in the adoption of executive regulations, however, is new to continental Europe, as is the right to participate in the initial phase of drafting laws. Public participation in adopting regulations has been considered unnecessary, as the theory taught that the administration simply implemented the decisions of the executive, so there was no discussion of the democratic deficit in the administration's functioning. The principle of legality alone should already place the administration within a framework permitted by the legislature and public participation in the adoption of laws should then take place via its elected representatives in representative bodies.

The European Union is also getting ready to take decisive steps in this direction. The main strategic document addressing the reform of EU institutions, the White Paper on European Governance, states that the legal order of the European Union and its member states should include minimum

[69] See OECD, *Citizens as Partners*, supra, op. 23, p. 11.
[70] See OECD, ibid, pp. 36-38.

standards for public participation in decision-making by public authorities.[71] The Mandelkern report, the EU's main programming document in this area has already set out a time frame for the introduction of these standards: by June 2003, all member states must "provide adequate procedures for public participation."[72] A considerable number of countries are already familiar with this kind of system, while others are preparing to introduce public participation to their domestic legislation. The court practice of the ECJ has also contributed to this process by introducing softer forms of the right to consultation into EU law on the basis of Article 253/TEC.[73]

Countries with an Anglo-Saxon legal tradition have had this right for almost half a century. The United States was one of the first countries to introduce it, with its Administrative Procedures Act (APA) in 1946.[74] Other countries with the Anglo-Saxon tradition have similar systems. It offers a process of "notice and comment", in which the public have the legally protected right to participate and give their opinion in the adoption of executive regulations.[75] Public participation also has a long tradition in the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), although until recently it has been based on informal rules such as public administration codices and non-binding legal norms.[76] The United Kingdom regulates consultation in a similar codex, the Code of Practice on Written Consultations.[77] In 1990 Italy adopted a new law on administrative procedure, which regulates the right of citizens to participate in the adopting regulations.[78] In the Netherlands, a general law on administration came into force in 1994, providing legal regulation of public participation.[79] Spain and Finland have similar laws.[80] The Spanish and Finnish laws on administrative procedure govern the right to consultation in the form of the public presentation of regulations and the public right to be informed about the adoption of a regulation. In 2001 Hungary adopted a special law on public participation that covers Regulatory Impact Assessment (RIA).[81] The examples above demonstrate that the legal forms that regulate the right to participation or consultation are rather varied

[71] See COM (2001), supra, op. 32, p. 4.
[72] See Mandelkern Group on Better Regulation, Final Report, supra, op. 33, p. 31.
[73] See M. Shapiro, Institutionalizing Administrative Space, in A. Stone Sweet, W. Sandholtz, N. Fliegstein, *The Institutionalization of Europe* (2001), p. 101.
[74] See T. Ziamou, supra, op. 22, pp. 1-2.
[75] For more on the "notice and comment" process, as regulated by the APA, see B. Schwartz, *Administrative Law* (1991), pp. 193-197.
[76] See OECD, *Citizens as Partners*, supra, op. 23, p. 36.
[77] See OECD, *Citizens as Partners, Handbook on Information, Consultation and Public Participation in Policy-Making* (2001), p. 108.
[78] See OECD, *Regulatory Reform in Italy* (2001), pp. 57-58.
[79] See OECD, *Regulatory Reform in the Netherlands* (1999), pp. 126-127.
[80] See OECD, *Citizens as Partners*, supra, op. 23, p. 37.
[81] See OECD, *Regulatory Reform in Hungary* (2000)

and include formal and informal instruments. In continental Europe so-called "hard law" predominates, i.e. binding legislation, while in the Anglo-Saxon and Nordic countries "soft law" prevails in the form of codices, instructions, guidelines and other "softer" regulations.[82] France is preparing for an important shift in this area, as it has legally regulated the participation process at the local level. Germany is also set to experience considerable change, especially in environmental and spatial planning legislation.[83] In fact, the right to consultation is often found incorporated into specific areas of legislation, and environmental and spatial planning law in particular (Germany, Finland, Norway, Slovenia).[84]

In Slovenia the right to consultation on the adoption of executive regulations has yet to be systematically regulated and is found within a range of different areas of legislation.[85] I believe that Slovenia should introduce a comprehensive solution for this right by adopting a new law stipulating how the right is to be put into effect.[86] By establishing this the second pillar of open public administration, Slovenia would be pursuing a trend to be found in Europe and even further afield that is significantly improving the quality of public administration operations.

It should be added that the consultation process must respect the legal and broader social context of the environment it is introduced to, or else it may have a negative effect and even reduce the level of public participation. In a comparative study De Vries points out that excessive formalisation of the consultation process can have this effect.[87] This happened in the Netherlands when a change in the system led to a fall in the level of public participation in the adoption of regulations. The new Dutch law formalised the public administration's previously voluntary practice of consulting civil society when preparing legislation. The first result was a fall in participation.[88] The

[82] For more on the difference between hard and soft law, see D. Trubek, L. Trubek, Hard and Soft Law, paper (2003).
[83] See H.Siedentopf, Public Participation: Models and Practice in Administrative Procedure, e.g. Environmental Protection, Physical and Urban Planning, in H.Siedentopf, C. Hauschild, K.P Sommermann, Modernization of Legislation and Implementation of Laws (1994), pp. 59-68.
[84] See OECD, *Citizens as Partners*, supra, op. 23, p. 37.
[85] See D. Čepar, Postopek sprejemanja podzakonskih predpisov v Sloveniji, in D. Čepar, T. Ilešič, M. Orehar, *Sprejemanje podzakonskih predpisov* (2000), pp. 105-113.
[86] For arguments in favour of introducing such procedures to Slovenia see R. Pirnat, Razmišljanje o postopku sprejemanja splošnih upravnih aktov, Zbornik Znanstevnih Razprav Pravne fakultete v Ljubljani (1995), p. 250. The arguments cited by Pirnat are similar to those I present in this paper.
[87] M.S. de Vries, The bureacratization of participation, *International Review of Administrative Sciences* (2000), p. 325.
[88] See OECD, *Regulatory Reform in the Netherlands*, supra, op. 79, p. 127. The report states that the drop in participation could be due to the fact that the procedure is used very rarely and that it is a new procedure that will only gain in meaning through wider and more frequent use.

important lesson other European countries should draw from this experience is that one must be very careful when introducing procedures of this kind. This means primarily using informal forms of consultation as in the United States. US authors have pointed out the negative sides of the notice and comment process.[89] Only the basic components of the system should be legislated, while the others do not need excessive formalisation and can either remain uncodified or be regulated by softer forms that give the administration more leeway in running their public consultations. It is interesting that the court practice of the ECJ has a similar objective: first, it provides legal protection for consultation; second, it does not provide an excessive amount of judicial standards on conditions administrations have to fulfil in such procedures.[90] The European Commission recommendations are also similar: states should adopt minimum standards on consultation, but this should be done informally, in the form of soft law, as much as possible.[91] Given the arguments set out above, it is worth carefully studying the specific circumstances of the domestic legal environment and adapting the rules on public participation in adopting regulations accordingly.[92] There is no single model that can be prescribed for the consultation process itself. A significant professional consensus has only been reached on the need for such procedures to exist, while their precise make-up must be adapted to the needs of each individual country. This is one reason the European Union has promoted the introduction of minimum standards on consultation but has not prescribed any particular model, leaving that instead to the member states themselves.

3.2.3. Types of legislation subject to public participation procedures

As the objective is to eliminate the democratic deficit from the executive branch of power, it is vital to include any legislation coming from the executive, including executive regulations from the government and from ministers.[93] There should be a standard procedure for adopting these regulations, in which public participation has a special role to play. The participation process cannot be applied to certain regulations such as those concerning confidential information (official secrets), or areas where consultation would present an unnecessary obstruction to the public administration's work (see 3.2.4. – Exceptions). Organising consultation on the adoption of executive regulations is the least problematic and globally has become the most common form of public participation in the regulatory

[89] See M. Shapiro, APA: Past, Present and Future, *Virginia Law Review* (1986), p. 447.
[90] See M. Shapiro, supra, op. 73, pp. 107-110.
[91] See COM (2001), supra, op. 32, p. 17.
[92] See K. Armstrong, Rediscovering Civil Society: The European Union and the White Paper on Governance, *European Law Journal* (2002), p. 112.
[93] Pirnat takes a similar position. See R. Pirnat, supra, op. 86, p. 250.

process. Because until recently the opportunity for public participation in adopting executive regulation was almost unknown in most countries, introducing a change of this kind ushers a "cultural revolution" into the public administration, so some form of resistance from the public administration is to be expected. The objections are of course unfounded if they are simply motivated by a resistance to any form of change in the administration's operational culture. The benefits that consultation brings to the public administration's work are simply too great to be given up because of initial opposition from those within the administration. However, one must concede to the public administration a number of well-founded objections against such processes. The main grounds for the certain level of scepticism about consultation that we find in the administrations of many countries is the fear of the administration's work being unnecessarily and irrationally increased. For this very reason the US law has a special provision allowing the public administration to forego the consultation process in cases where public participation would be inexpedient, unnecessary or contrary to the public interest.[94] A provision of this kind provides public administrations with the flexibility to bypass the consultation process if its use would be unreasonable.

The second category of regulations where public participation could occur is in fact all other legal acts. A range of dilemmas arise in this category that must be studied before participation is introduced. First there are statutes where it is particularly important to allow consultation at an early stage, i.e. when they are being drafted. When a draft law has been formally proposed to parliament the public can contribute through existing democratic channels: political parties, various forms of direct democracy, and other informal forms of consultation, such as presenting opinions in parliament. It is important when dealing with laws to organise participation during the drafting phase, when the public has no other means of making its contribution. Here the participation process overlaps with another process, RIA or regulatory impact analysis[95], so at this point there should be a study on whether or nor to include an RIA as a special section of the public participation procedure. Consultation is an essential part of the RIA process so on that point there is complete overlap with the general public participation process. Very few countries have a formal RIA procedure[96], so it is important at this point to consider whether or not to introduce the RIA as a separate legal category or to regulate it in another manner: e.g. within the Government Rules of Procedure, other legal mechanisms such as instructions, or via even "softer" legal measures. In

[94] See B. Schwartz, supra, op. 75, p. 198. This is the so-called "escape clause".
[95] For more on RIA see OECD, *Regulatory Impact Analysis: Best Practices in OECD Countries* (1997), pp. 33-49.
[96] Hungary is one that does have a formal RIA procedure. See OECD, supra, op. 81.

addition to draft legislation, this category also covers various forms of strategic national documents (programmes, resolutions, declarations). Here too there is a need to ensure public participation in the form of special procedures to decide whether the documents should be adopted. Problems similar to those encountered with laws also arise with this category of legal act. Strategic documents should be reviewed to decide which of them are important enough to warrant a consultation procedure, as that should certainly not be automatic for all such documents. Public participation procedures for legal acts including laws, resolutions, national programmes are often prescribed by legislation from the relevant area. Many countries for example have a special RIA procedure for the environment an environmental protection[97], and it is actually a requirement of EU law.[98] Planning and construction law feature similar mechanisms.

3.2.4 Exceptions

It is important to exclude areas with content for which consultation would be unnecessary or irrational. These include areas such as defence and national security, which involve the preparation and publication of official secrets and other confidential information.[99] Public participation in such matters could be detrimental to the state's functioning. Also falling into this category are the internal management of administrative bodies and certain financial activities of the state such as public ownership, loans, contracts and so on. In addition to areas designated as exceptions, it is important to remember the general exceptions mentioned above when participation would not be rational or against the public interest.[100] Other areas where an exception must be made are state foreign policy and the internal management of the public administration. Consultation is very important to improving the work of the public administration, but at the same time we must assess how it affects the speed at which regulations are adopted in areas where the state must move quickly or in areas where the administration has to deal with its own internal management where public input may not be required.

Other special cases may well require specific solutions, such as regulations that need to be issued immediately to secure state intervention in a specific area, or cases where the purpose of the regulation would be nullified if the public were aware of it before its adoption. In such cases a special consultation procedure should be organised, simpler and less formal than

[97] See OECD, *Citizens as Partners*, supra, op. 23, p. 37. Canada, Finland, France, Iceland and Japan have similar systems.
[98] Directive 85/337/EEC.
[99] See B. Schwartz, supra, op. p. 75, p. 197.
[100] Ibid, p. 198.

normal consultations on drafting regulations. An alternative is to simply exclude the option of consultation from such cases. Of course which cases an exclusion could apply to would have to be very carefully defined by law. Provisions that are too lax or broad would soon undermine the very purpose of public participation, as by playing the defence or security card the state could repeatedly avoid public consultation, even if there were no real justification for doing so.[101]

Above and beyond these specific cases, the general principle still holds of not holding consultations when it would be unreasonable, unnecessary or contrary to the public interest to do so. When applying this principle the public administration must justify its reasons for excluding consultation on a case by case basis.

If the public participation procedure is less formal then numerous other exceptions are possible, such as the importance of the area being regulated, and the financial implications of the law or regulation. If politically a regulation's content is completely uncontroversial or its consequences will be financially negligible, then an administrative body may propose not holding consultations. The more informal the process, the more discretion the body or agency has in assessing whether consultations are needed. Such informality has advantages and disadvantages. The advantages include allowing administrative bodies to focus on cases where consultation is most needed, and to adapt the form of participation to the content being discussed, which is not possible with more formal structures.[102] The disadvantages include the fact that when dialogue with civil society and citizens in general is not highly valued by society at large, it allows the authorities to avoid this obligation.

3.2.5. Procedures

The procedural aspects of consultation are an essential part of the participation process. A balance has to be maintained between the principles of openness financial prudence within the public administration. The procedure should be as simple as possible and binding on all participants; it must also be transparent and realistic. What the administration has to put forward for consultation, the method of consultation and how the public offers its comments must all be defined. How the administration gathers the public's comments and responds to them is also very important.[103]

[101] Ibid, p. 197.
[102] See M. de Vries, supra, op. 87, p. 326.
[103] See S. Rose-Ackerman, American Administrative Law Under Siege: Is Germany a Model?, *Harvard Law Review* (1994), pp. 1294-1295.

The participatory procedure begins with the publication of the draft regulation. This can be done in a variety of ways from the official gazette where all agencies and bodies publish material, to less centralised options such as individual bodies making the regulations available on the website. The solution depends on how formal the participatory process will be. In less formal procedures the dialogue is decentralised and runs between the public and individual administrative bodies, so placing the regulation on the internet makes sense. To ensure transparency the body must keep a special file for every regulation, recording any alterations to the regulation, explanations and comments received from those entitled to participate in the process of adopting the regulation. This file must be accessible to the public, and access must continue for the duration of the drafting process. An alternative solution is not opening the first phase of preparations up to participation, which only then begins when a first draft of the regulation has been produced.

When the regulation has been drafted it is published in one of the methods stated above. Publication of a regulation of this type must contain a series of items including the legal basis for adopting the regulation, the text of the regulation, the name of the administrative body preparing the regulation, an official commentary on the draft regulation, the deadline by which interested parties must submit comments or other submissions. The official commentary must contain the purpose and objectives of the regulation, precisely stated reasons for specific solutions, alternate solutions the body studied in preparing the regulation and the expert and legal bases it used to prepare the regulation. The commentary must be as precise and detailed as possible, and general arguments or reasoning will not be sufficient.

The next phase is gathering comments from outside parties. There must be a precise timeframe within which outside parties can submit their comments on the regulation. The law may state a general deadline from thirty to sixty or more days after publication. Within that deadline the publishing authority may also set a deadline from more than thirty days and to sixty days or more from publication of the regulation. When the comments have been collected the body must study all the comments submitted correctly and on time. It must be clearly stated during this procedure that the body is not obliged to take the comments into account. If it were legally obliged to do so the whole adoption procedure would be paralysed. No country legally obliges its bodies to take these comments into account. However, it is important that these comments are seriously studied and deliberated.[104] The only legal remedy that can

[104] For more see M. Shapiro, The Giving Reasons Requirement, *The University of Chicago Legal Forum* (1992), pp.182-185.

provide a form of legal obligation, albeit a softer form, is the body's duty when publishing the final text to state its reasons for rejecting comments. It should be added that court practice in the United States as in the European Union does not interpret this to mean that the administration must answer each comment individually and it usually suffices to state reasons for rejecting select comments.[105] In this way the body clearly demonstrates that it takes the comments into consideration and accepts or rejects them on the basis of substantive argument. The publication of the regulation at an early stage and the public comments are both important parts of the overall preparation procedure.

3.2.6. Extent to which public comments are binding on the administration

This is one of the most complex sections of the system as too strict an obligation to take all comments into account would paralyse the work of the administration, while no obligation would devalue the entire process. The main obligation of the administration is to provide a reasoned response to the proposals, with court practice developing and adding detail to the criteria.[106] The fact that the body or agency is not legally bound to the proposals in no way means that the body can ignore the public's comments. Significantly, the body must state its reasons for accepting or rejecting the comments received when it publishes the final text. This form of legal obligation, if accompanied by adequate legal protection, substantially alters the dialogue between the public and the administration. The public administration must remain aware that it cannot overlook well made and convincing arguments, and that it must provide a suitable response to them. Furthermore, the EU acquis also contains a provision of this type in Article 253/TEC which states that community bodies must always provide reasons for the adoption of regulations, directives and decisions.[107] As I stated above it is characteristic of most European countries that the administration's obligation to respond to the public's comments is not necessarily set out in the form of a compulsory legal rule. The practice in European countries is to leave this to softer forms of law or to the discretion of the administrative bodies themselves. In such cases the legal culture is also very important, such as in the Nordic countries where dialogue is no less of a public administration obligation, despite it not being prescribed by any regulation. It is very difficult however to transfer that kind of practice to countries where the legal culture is less developed.

3.2.7. Legal remedies

[105] See P. Craig, G. deBurca, supra, op. 17, pp. 120-121.
[106] See M. Shapiro, supra, op. 73, p. 101.
[107] See P. Craig, G. deBurca, supra, op. 17, p. 121.

Legal remedies are an essential component of the overall process. The parties involved must have a right to call on efficient legal remedies that can halt the adoption procedure if the administrative body does not respect the rules of consultation. The administration must respect deadlines and the requirement that it provide substantial responses to all comments. Court practice develops more detailed criteria. The most important element of the legal remedy is the possibility of appeal when bodies do not respect the provisions of the participation procedure. One possibility is an appeal at the first instance, the second is a special appeal to the Supreme Court. In all appeals the active legitimacy for the type of action must be specified. There are two options in assigning the right to participate: first, according the right to all citizens irrespective of legal interest, or second, only according the right to the specific interest group to which the regulation applies. The solution for this problem also answers the issue of active legitimacy. The first option consists of a popular appeal that can be made by anybody that has participated in the process of adopting the regulation, the second applies only to those with a clear legal interest. The US legal remedy model offers the individual very broad access to legal protection, unmatched by European solutions.[108] Even US authors have stated that the overly formal legal procedure has slowed down the work of the US public administration. This is one reason for the European Commission's scepticism about the US "notice and comment" model. It is therefore worth considering a more limited right of appeal, according to which the appellant would have to demonstrate a certain legal interest.

3.2.8. Legal supervision

It is important that legal supervision concerns itself primarily with the procedural aspect of consultation and not the content, which means that the court cannot adjudicate on the adequacy of the legal act, but only the substantiation of responses to public comments. This difference can be difficult to determine so very precise rules are needed, stating the grounds for instituting a judicial supervision procedure. A court's basic reasons for annulling a specific regulation must be procedural in nature, i.e. violations of any of the procedural requirements set out in law, and may relate to the content of a regulation, its publication, respecting the deadlines for comments, etc. The only extension to this is that legal protection must also cover the body or agency's obligation to give the reasons it did not take specific comments into account. It is worth reiterating that the judicial branch is not authorised to

[108] See F. Bignami, The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology, *Harvard International Law Journal* (1999), pp. 504-505.

assess the content of the regulations. It can only assess whether the body responded to citizens' comments in the legally prescribed manner. The reason this is worth emphasising is that US courts started to assess the content of administrative acts through this type of supervision, which is not the purpose of the consultation process and which is incompatible with the principle of the separation of powers.[109] The judiciary should be responsible for questions of legality, while the executive is responsible for the content of its own activities. It should be mentioned that the stance of the regular courts in Europe is not as activist as that of their US counterparts. Nevertheless, court practice in Europe demonstrates that it is difficult to differentiate between the procedure and content of an administrative regulation, so this problem should be the focus of careful attention. One possibility is a different system of legal protection, which would only be accessible when the proposed regulation enters into force. According to Mashaw, a system of that kind would mean a significant reduction in the number of court disputes and also affect the type of appellants – appellants with a sound legal interest in the administrative act being annulled would predominate in such a system.[110]

3.3. Regulatory Impact Assessment – RIA

A very specific, but no less important, form of public consultation is built into the important mechanism known as RIA – regulatory impact analysis or assessment.[111] This is a systematic analysis of the (negative and positive) impact of legislation on the area of society it is to regulate. The economic, environmental and social effects of legislation must be assessed and RIA is a special procedure that precisely defines how to assess these aspects of regulation. RIA is generally used for regulations thought likely to have a considerable impact on society. The RIA procedure itself is usually regulated by instructions or government guidelines that apply to the entire public administration. RIAs are carried out by the ministry preparing the legislation. Most countries have a central body responsible for the consistent application of RIA, usually a special office connected to the prime minister's office or finance ministries.

Public consultation before a regulation is adopted is an important RIA component. Although the basic objectives of an RIA are economic – reducing the cost of a regulation and improving its quality – one of its effects is much broader: involving the public in the adoption of legislation not only to improve its quality and the standard of implementation, but also to eliminate

[109] See M. Shapiro, supra, op. 73, p. 101.
[110] See F. Bignami, supra, op. 108, pp. 504-505.
[111] See OECD, *Regulatory Impact Analysis*, supra, op. 95, pp. 13-15.

the democratic deficit from the public administration. RIA is a very popular mechanism among OECD countries.[112] In 1995 all OECD members committed themselves to using RIA as an essential part of regulation impact analysis. By 1996 over half the members had already brought RIA into their legislation. In the first systematic overview of the effect of RIA, an OECD study found that RIA has a positive impact and improves the functioning of the public administration.[113] One of the preconditions for successfully applying RIA is public participation in the preparation of legislation. The purpose of participation is similar to that in the consultation processes discussed above. Public consultation gives the ministry or other body preparing a regulation more information and input, brings forward alternative solutions, and above all is an attempt to obtain the views of the people the regulations will affect. Furthermore, Radaelli points out that RIA may broaden participatory democracy and even affect the overall culture of dialogue and participation within a society.[114] Some countries introduced RIA with dedicated regulations, other introduced it in the form of guidelines or government recommendations (soft law). At the end of 2002 the Slovenian government adopted a resolution introducing RIA to the Slovenian public administration.

Social partnership is a special form of consultation, usually featuring a special tripartite body (economic and social councils or committees), and is found in many European countries, especially in the fields of social and labour law.[115] This form of consultation is very well developed in Slovenian legislation.

3.4. The right to co-decision-making in adopting regulations and other fundamental political decisions

The third pillar of open public administration is the public right to participate in decision-making on regulations. The right to consultation or participation is a somewhat weaker right as it gives the public the right to give their opinion on proposed regulations and receive a substantiated reply to their opinion, but does not require the public administration to take those opinions into account. The right to participate in decision-making is a broader right that give the public a decisive influence on regulatory content. Older forms of this right include the right to popular legislative initiative (Austria, Poland and Spain) and the right to propose referendum in specific topics or areas (New

[112] See European Parliament, Regulatory Impact Analysis: Developments and current practices in the EU Member States, on the EU level and in selected third countries (2001).
[113] See OECD, *Regulatory Impact Analysis*, supra, op. 95, pp. 23-28.
[114] See C. Radaelli, The Politics of Regulatory Impact Analysis in the OECD Countries: Best Practice and Lesson-Drawing (2002), p. 13.
[115] See OECD, *Citizens as Partners*, supra, op. 23, p. 38.

Zealand).[116] More recent legal forms of regulating this right are still in their infancy. Although it is sometimes difficult to differentiate between participation and co-decision-making, there is an important difference: in public participation it is the government that defines the problem, form and timescale of participation, in co-decision-making both sides define the problem and work together to solve it. What is most significant is the public's active role in taking decisions. For the government this means designing strategies and programmes in select areas to introduce different ways for citizens to participate in decision-making. Usually the responsibility and authority for these projects is not centralised or focused on one public administration body, but is spread between different forms and units of the public administration.

Canada, Finland and the Netherlands have all therefore drawn up strategic guidelines on more active participation by citizens in the public administration's decision-making. In June 2001 the "Expertise Bureau for Innovative Policymaking" was set up in the Netherlands. Its main task is to gather knowledge and experience in the field of innovative policymaking. A vital role is played by the bureau's website, which is to be run as a virtual market where ministries, regional and local authorities, and citizens can meet. A similar initiative was launched in Canada called the voluntary sector initiative (VSI), which is a form of cooperation between the government and volunteer-based NGOs, known there as the voluntary sector. The project is divided into joint tables that address specific areas. There are similar initiatives in Denmark, France and Norway.[117] These examples are very new forms of public involvement in the public administration's decision-making process, so it should not be surprising that many are still only in the initial phase. This in no way diminishes their importance. It is only by implementing different forms of participation in the adoption of regulations and other strategic political decisions that we will succeed in making open and participatory public administration a reality. Consultation is an important step towards that end, and active participation in decision-making is the next step in that process.[118]

4. Conclusion

Access to public information, participation in adopting regulations, RIA and active participation in the decision-making of the public administration are

[116] See OECD, ibidem, p. 42.
[117] Ibid, p. 51.
[118] See J. Freeman, supra, op. 23, p. 27.

just four of the most important examples of open public administration in action. Open public administration comes in many other forms and includes many other principles that are currently contributing to the transformation in how public administrations function. In this paper I have limited myself to these four as they stand alone as extremely important innovations to public administration operations. Their introduction represents a major change in the way public authorities function. Transparency, openness and democratic decision-making in particular are on the increase. What was for a long time the exception, is now becoming the rule: citizens are being included in the public administration's functioning and in the process of taking decisions that will fundamentally affect society. This kind of open public administration actively engages in pursuing two important objectives: more democratic and more efficient decision-making in the public administration. The paper points out that introducing open public administration often comes up against a range of problems such as poorly designed consultation processes which can cause additional costs, without improving the quality of decisions. Drawing up the actual rules, procedures and institutions for a particular project or process is therefore vital. The examples given are no panacea that will single-handedly improve the work of a public administration. Their success depends on numerous factors that go hand in hand with the introduction of projects in this field. The quality of legal rules and regulations and the legal environment itself are just two factors that can essentially influence the functioning of open public administration, for good or for bad. Nevertheless, despite the problems that face open public administration, it remains a momentous challenge for those responsible for its functioning. It opens up the opportunity for democratic decision-making in the public administration, which in of itself would be an immense change from existing practice in our public administrations.

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dr.Bojan Bugarič: Odprta javna uprava

Povzetek: Prispevek obravnava spremembo klasične Webrove paradigme hierarhične javne uprave v odprto javno upravo. Nov koncept javne uprave vpeljuje neposredno demokratično legitimacijo sprejemanja odločitev v javni upravi in s tem blaži legitimacijski deficit na tem področju. V prispevku so prikazani štirje stebri uvajanja nove odprte uprave: pravica do dostopa do informacij javnega značaja, pravica javnosti do konzultacije, analiza učinkov predpisov in participacija pri sprejemanju politike in predpisov javne uprave. Pravica do dostopa je najbolj razširjena in uveljavljena od navedenih novih oblik odprte javne uprave. Zagotavlja dostop vsem državljanom do tistih informacij, ki so javnega značaja. Postopek konzultacije omogoča javnosti, da sodeluje pri sprejemanju predpisov javne uprave. Pri pravni ureditvi konzultacije je oblika zelo pomembna. Evropska upravna tradicija opozarja pred pretirano formalizacijo postopkov. Analiza učinkov predpisov je dodatna oblika konzultacije, ki v precejšnji meri prispeva k bolj kvalitetni regulaciji. Različne oblike soodločanja predstavljajo najnovejšo in obenem najbolj demokratično obliko odprte javne uprave.

Ključne besede: odprta javna uprava, dostop do informacij, konzultacija, participacija, RIA, Max Weber.

Summary: The article describes the transformation of the traditional Weberian paradigm of public administration and the emergence of a new participatory and open model of public governance. The new concept of public administration introduces direct democratic legitimation to rule-making, in which the public administration collaborates with citizens. Four examples of new participatory governance are discussed: freedom of information, consultation, regulatory impact analysis and participation in public policy-making. The right of access to documents is the most widely used form of open government. It gives citizens a legal right to access all public documents. The right to be consulted enables citizens to participate in public policy-making and rule-making. A legal form of right to be consulted is particularly important. The European legal tradition warns against formalised consultation procedures. Regulatory impact analysis is yet another form of consultation that contributes to higher quality of regulation. Different forms of active participation emerge as the most recent and democratic expression of open government.

Key words: open public administration, access to information, consultation, participation, RIA, Max Weber.

Opennes and Transparency in Public Administration

Summary

The article describes the transformation of the traditional Weberian paradigm of public administration and the emergence of a new participatory and open model of public administration. The new concept of public administration introduces direct democratic legitimation to rule-making, in which public administration collaborates with citizens. The new concept derives from the legal principle of openness as it recognised in various national laws and, more recently, in the case law of the European Court of Justice. The principle of openness demands access to meetings and documents of public authorities. It also requires the inclusion of citizens in public policy-making procedures. The principle of openness is bringing an end to the culture of secrecy, which has prevailed in continental European legal tradition.

Four examples of new open governance are discussed: freedom of information, consultation, regulatory impact analysis and participation in public policy-making. The right of access to documents is the most widely used form of open government. It gives citizens a legal right to access all public documents. Today, more than 40 countries around the world have adopted different freedom of information laws. Slovenia adopted its new Access to Public Information Act in March 2003. As a general principle, most of these laws guarantee unlimited and free access to public documents with a certain number of exceptions. It is very important that the right to access is judicially protected. Sweden has the most developed tradition of open government, which dates back to 1766 when it adopted the first law on access to documents in the world.

The right to be consulted enables citizens to participate in public policy-making and rule-making. A legal form of the right to consultation is particularly important. Whereas the US tradition of notice and comment procedure relies on hard law (statute), most European countries regulate consultation procedures with soft law. This has the advantage of creating a more flexible consultation procedure. European legal tradition warns against overformal consultation procedures. Instead, different codes of conduct, recommendations, and other forms of soft law are used. Consultation plays a prominent role in the Nordic countries. Interestingly, it is not regulated by law, but it is regulated by informal procedures. Recently, several countries changed their administrative laws to adopt a notice and comment procedure. The Netherlands, for example, has regulated consultation in a new law on

public administration. This formalisation of a previously informal procedure has reduced the level of public participation in the Netherlands. A cautious approach is needed: only certain basic features of the consultation procedure should be set out in law. The details should be left to informal practice of public administration.

Regulatory impact analysis (RIA) is another form of consultation that contributes to higher quality of regulation. Following OECD recommendations, most European countries have introduced RIA into their legal systems. RIA is usually regulated by soft law, Hungary seems to be an exception. An essential element of RIA is consultation. It is usually more project oriented and more selective than the general consultation described above. If carefully designed, RIA can lower the costs of regulation, eliminate unnecessary regulation and contribute to higher quality of regulation in general.
Different forms of active participation emerge as the most recent and democratic expression of open government. A distinguishing feature of active participation is the active and ongoing involvement of citizens in the decision-making process. Citizens take part in setting the agenda, procedure and results of the policy-making. Some governments have started new projects to foster active participation in public-policy making by their citizens.

Open public administration promises both more democracy and efficiency in public policy-making. It offers an alternative form of controlling discretion in administrative law, a form that uses public involvement to democratise public administration. Open public administration is not a panacea. Its potential success depends on carefully designed procedures, on public support for new legal instruments, and on capable public administrators. Good examples, or best practice cases from various countries demonstrate that open government could indeed contribute to more democratic and better regulation.