



Kalle Merusk

*Professor of Constitutional and Administrative Law,  
Dean of the Faculty of Law, University of Tartu*

# Presumptions of Law for Ensuring Fundamental Rights in Administrative Proceeding

## Introduction

The issue of legislation and performance of acts by an administrative authority and the administrative proceeding organically related thereto are, above all, aimed at the efficient implementation of laws, guided by the principles of the rule of law.

One of the main objectives of the administrative proceeding is thus to ensure expedient and legitimate activities of an administrative authority in finding and making administrative rulings. At the same time, this objective cannot be separated from the other main objective of the administrative proceeding — ensuring and implementation of the fundamental rights and freedoms of individuals by administrative rulings.

Until recently, Estonia lacked a law on administrative procedure and a modern regulation of the rights of participants in a proceeding. At the same time, a number of laws applied, governing specific types of administrative proceeding, which, apart from a limited number of exceptions, failed to secure the procedural rights of participants in a proceeding arising from the Constitution (the right to be heard, the right to examine documents, *etc.*). On 6 June 2001, the parliament adopted the Administrative Procedure Act that entered into force on 1 January this year. This Act proceeds from the text and spirit of the Constitution and the rights of participants in a proceeding have been placed in the foreground. According to § 1 of the Act, the purpose of the Act is to ensure the protection of the rights of persons by creation of a uniform procedure which allows participation of persons and judicial control.\*<sup>1</sup>

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<sup>1</sup> Riigi Teataja (The State Gazette) I 2001, 58, 355.

# 1. Fundamental rights and administrative proceeding

The administrative proceeding is related to fundamental rights in various manners. This applies both to substantive and procedural fundamental rights. Here § 14 of the Constitution plays an important role, according to which the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. The section concerned firstly involves both an organisational and procedural dimension and secondly draws attention to the fact that public authority is, above all, related to what is demanded by the fundamental rights. The obligation to guarantee rights and freedoms does not merely consist in the obligation to adhere to the fundamental rights by the legislative, executive and judicial powers and local governments, but also entails their active development. This is primarily a task of legislation.<sup>2</sup> Proceeding from this, § 14 of the Constitution guarantees subjective right and shall be implemented together with the other fundamental rights, as it lacks independent substantial constituent elements.

Due to § 14 of the Constitution, the protection of fundamental rights and freedoms in administrative proceeding has been provided rather conspicuously in the Administrative Procedure Act. One of the important principles of the administrative procedure is the protection of rights according to § 3 of the Act. According to subsection (1) of the provision, in administrative procedure, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law. The wording “pursuant to law” cannot be regarded as if the fundamental rights and freedoms could be restricted by, for example, only regulations or administrative legislation on the basis of the general delegation of the legislator. The possibility to restrict the fundamental rights and freedoms must be provided by law. This conceptually derives from the first sentence of § 3 (1) of the Constitution — the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. This means, above all, that the state authority may be exercised only when the Constitution and laws which are in conformity therewith grant a right to do that. This has also been pointed out by the Constitutional Review Chamber of the Supreme Court. In its decision of 12 January 1994 (Revocation of subsection (4) of Part II of the Republic of Estonia Police Act Amendment and Supplementation Act), the Supreme Court notes that according to §§ 11, 26, 33 and 43 of the Constitution, the rights and freedoms may be restricted only in accordance with the Constitution and in the cases and according to the procedure provided by law. The Supreme Court found that the *Riigikogu* should have established by itself the specific cases of and detailed procedure for the implementation of operational and technical special measures and the possible restrictions of rights related thereto, and not have delegated them to the officials of the Security Police and justices of the Supreme Court. The activities which the legislator is entitled or obliged to perform according to the Constitution cannot be delegated to the executive power, even not temporarily and provided that the judicial power has an opportunity of supervision.<sup>3</sup>

Attention is drawn to this principle once again in another decision made on the same day — the possible restrictions of the fundamental rights and freedoms may be established only by legislation having the force of law.<sup>4</sup> Here it is important to note that the fundamental rights are not limited only to the specific fundamental rights provided in the Constitution, but their range is considerably wider. This assertion is based on § 19 (1) of the Constitution that establishes a general freedom right, the object of which is general freedom of activity, but which also involves a status. This grants an individual the right to the protection against unconstitutional interference. The interference itself is only possible on the basis of law. This directly derives from the principle of legality of the state authority (§ 3 (1) of the Constitution).

Subsection 3 (2) of the Administrative Procedure Act provides the principle of proportionality of administrative acts and measures — administrative acts and measures shall be appropriate, necessary and proportionate to the stated objectives. The provision is directly based on § 11 of the Constitution, which gives rise to the principle of proportionality.

Subsection 3 (2) of the Administrative Procedure Act provides for a three-part test upon the implementation of the principle of proportionality. It is worth noting that the court practice has adopted the same position.<sup>5</sup> Firstly, it must be identified whether the relevant measure is appropriate (suitable) for achieving the legal

<sup>2</sup> See R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in Estonian Constitution). – *Juridica eriväljaanne*, 2001, p. 73 (in Estonian).

<sup>3</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 12 January 1994 (III-4/A-1/94). – *Riigi Teataja* (The State Gazette) I 1994, 8, 129 (in Estonian).

<sup>4</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 12 January 1994 (III-4/A-2/94). – *Riigi Teataja* (The State Gazette) I 1994, 8, 130 (in Estonian).

<sup>5</sup> Regulation of the Administrative Law Chamber of the Supreme Court, 23 May 2000 (3-3-12-00). – *Riigi Teataja* (The State Gazette) III 2000, 14, 152 (in Estonian).

goal. The measure must contribute to and be aimed at achieving the goal set. Based on the context of restriction of the fundamental rights and freedoms, this constituent part of the principle of proportionality can be interpreted as follows: interference with fundamental rights is in conflict with § 11 of the Constitution and § 3 (2) of the Administrative Procedure Act, if this is not appropriate (suitable) for achieving the goal set by public authority. A measure is appropriate, if the goal set can be achieved both legally and factually. Secondly, the measure must be necessary for achieving the goal. When planning the measure, it must be clarified whether this is necessary for achieving the goal and whether the measure minimally restricts the rights of an individual and also secures the achievement of the goal. This has also been called a principle of minimum interference (milder measure) in legal literature.<sup>6</sup> Here we also have to take into account that the necessity must arise from a pressing social need, *i.e.* from the weightiness of the goal. The third constituent part of the principle of proportionality is proportionality in its narrower sense. Here the correct relation between the goal and the measure is important. A measure is proportional, if it does not go beyond the framework of the goal and it lacks excessive impact (proportionality *stricto sensu*). The weightiness of the goal must comply with the intensity of the interference with the rights, or in other words, the more intensive the interference, the weightier must be the goal in order to implement relevant measures.

An administrative procedure may involve interference with these substantive fundamental rights, which are not directly related to the outcome of the administrative procedure, *i.e.* the decision that interferes with the fundamental rights this way or another. Here belong the so-called general personal rights of participants in a proceeding, which may be violated by procedural acts and indiscreet activities of officials.<sup>7</sup> Thus, for example, according to § 18 of the Constitution, no one shall be subjected to torture or to cruel or degrading treatment or punishment. From the aspect of the administrative procedure, the protection of the dignity of a participant in a proceeding is topical above all. Here we may point out § 17 of the Constitution — no one's honour or good name shall be defamed.

An administrative procedure also comes into contact with the so-called procedural fundamental rights. Here § 14 of the Constitution — the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments — which was already discussed above, is of importance. Based on this, the legislative power has a duty to guarantee the fundamental rights of an individual also by regulating the procedure. This means, above all, that an individual has a right to efficient protection of his or her rights by a fair and just procedure.

Apart from this section, several other sections of the Constitution also contain a clear procedural dimension. Thus, § 44 of the Constitution, according to which, for example, all state agencies, local governments, and their officials have a duty to provide information about their activities, pursuant to procedure provided by law, to an Estonian citizen at his or her request, except information the disclosure of which is prohibited by law, and information intended exclusively for internal use, also performs a procedural function. The same may be claimed about § 46 of the Constitution, which guarantees everyone the right to address state agencies, local governments, and their officials with memoranda and petitions. Besides these provisions, procedural regulation is also contained in many other provisions of the Constitution, securing substantive fundamental rights. Here the Constitution uses a typical wording, “/.../ in the cases and pursuant to procedure provided by law”. The word “procedure” presumes a procedural regulation of the restriction of a relevant fundamental right. Consequently, the interference with the fundamental rights must be restricted and monitored not only through substantive elements, but also procedurally. Here § 33 of the Constitution, which provides the inviolability of the home, may serve as an example. The substantive presumptions of the restriction of this right are public order, health or the protection of the rights and freedoms of others, combating of a criminal offence or apprehension of a criminal offender or ascertaining of the truth in a criminal procedure. At the same time, the section also contains the wording “in the cases and pursuant to procedure provided by law”, which demands procedural regulation.

Upon the establishment of procedural regulations, § 10 of the Constitution, which provides the principle of a democratic state based on the rule of law, is of importance as well. Proceeding from that, a procedure demands clear and unambiguous rules, precise determination of the legal status of participants in a proceeding, guarantee of their rights, adherence to the principles of legal certainty and protection of trust, as well as determination of the competence of the administrative authority conducting the procedure and guarantees of impartiality.<sup>8</sup>

Here it is also important to point out § 12 (1) of the Constitution, which guarantees the right of equality — everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.

<sup>6</sup> See C. Degenhart. Staatsrecht I. 11<sup>th</sup>, revised ed. Heidelberg, 1995, p. 123.

<sup>7</sup> See D. Berger. Grundrechtsschutz durch Verfahren. Eine rechtsvergleichende Untersuchung des deutschen und britischen Verwaltungs-verfahrensrecht. München, 1998, p. 109.

<sup>8</sup> See H. P. Bull. Allgemeines Verwaltungsrecht. 6<sup>th</sup>, revised edition. Heidelberg, 2000, p. 194; H.-U. Erichsen (ed.). Allgemeines Verwaltungsrecht. 11<sup>th</sup>, revised ed. Berlin, New York, 1998, p. 351.

The first sentence of the provision concerned “everyone is equal before the law” means for the administrative procedure that participants in a proceeding are treated on equal grounds in the procedure and laws are implemented in respect of all the persons in the same manner, *i.e.* the law has to be applied uniformly to all the persons. This requirement also involves a prohibition against arbitrary action. The second sentence of the provision establishes a prohibition against discrimination, which involves restriction of any interests of an individual, which are based on the characteristics mentioned in the sentence.

The regulations of the administrative procedure must proceed from the requirements laid down in the Constitution and specify them and furnish them with a content. We will now proceed to discuss the most important rights of participants in a proceeding provided in the Administrative Procedure Act and derived from the Constitution.

## 2. Right to be heard

Although the right to be heard has not been clearly laid down in the Constitution, it can be derived from the principle of a democratic state based on the rule of law (§ 10 of the Constitution). The right to be heard is a generally recognised principle in the administrative procedures of democratic states. It has been emphasised in legal literature that the main idea of the requirement to be heard is the protection of human dignity in a procedure and it also serves as an instrument for implementing thereof.<sup>9</sup> It is worth noting that the Administrative Chamber of the Supreme Court has paid attention to guaranteeing the right to be heard in administrative procedure; the Chamber has noted in its decision of 14 May 2002 that it follows from the principle of the democratic state based on the rule of law (§ 10 of the Constitution) and the duty to protect the rights and freedoms (§ 14 of the Constitution) that before issuing an administrative act interfering with the rights of an individual, the individual must be notified of the procedure in progress and given an opportunity to express his or her opinion about the planned administrative act.<sup>10</sup>

Generally, this important principle had not been laid down in the specific laws governing the administrative procedure in Estonia until now. Few exceptions may be pointed out. For example, according to § 31 of the Social Welfare Act, in the resolution of issues pertaining to social welfare, the opinion of the person shall be considered.<sup>11</sup> This right has been guaranteed, to a certain extent, also in the Juvenile Sanctions Act, Refugees Act, Immovables Expropriation Act and in some more specific laws. The right concerned has been constituted in detail in § 40 of the new Administrative Procedure Act. The first subsection of this section provides the right to be heard upon the issue of an administrative act, the second subsection upon taking any measures. According to the first subsection, an administrative authority shall, before issue of an administrative act, grant a participant in a proceeding a possibility to provide his or her opinion and objections in a written, oral or any other suitable form. On the one hand, such regulation guarantees a participant in a proceeding the right to be heard, and on the other hand, imposes on the administrative authority the obligation to ensure the implementation of that right. The administrative act issued by the administrative authority is protected only insofar as the participant in the proceeding has an opportunity to express his or her opinion. This does not mean that the right has to be implemented, it is important that such an opportunity was granted to the participant in the proceeding.

The right to be heard is not a strictly personal type of right. This means that the right also extends to a representative of a participant in a proceeding. According to § 13 (1) of the Act, a participant in a proceeding has the right to use a representative who may represent a participant in a proceeding in all procedural acts which, arising from law, need not be performed personally by the participant in the proceeding.

The Administrative Procedure Act of Estonia uses a wider approach to the right to be heard than, for example, § 28 (1) of the Administrative Act of the Federal Republic of Germany (*Verwaltungsverfahrensgesetz*). The right to be heard must be guaranteed here only in the cases when, firstly, the administrative act interferes with the rights of a participant in a proceeding and secondly, if the circumstances are essential to the making of a decision.<sup>12</sup> Subsection 40 (1) of the Administrative Procedure Act of Estonia does not establish such restrictions. This means that upon the refusal to issue an alleviating administrative act, including on the basis of the right of discretion, the right to be heard is implemented.

<sup>9</sup> See M. Albertini. Der verfassungsmässige Anspruch auf rechtliches Gehör im Verwaltungsverfahren des modernen Staates. – H. Hausheer (ed.). Abhandlungen zum schweizerischen Recht. Bern, 2000, p. 71.

<sup>10</sup> Decision of the Administrative Chamber of the Supreme Court, 14 May 2002 (3-3-1-25-02). – Riigi Teataja (The State Gazette) III 2002, 15, 172 (in Estonian).

<sup>11</sup> Riigi Teataja (The State Gazette) I 1995, 21, 323; 2001, 85, 509 (in Estonian).

<sup>12</sup> See F. O. Kopp, U. Ramsauer. Verwaltungsverfahrensgesetz. 7<sup>th</sup>, revised ed. München, 2000, p. 455.

The second subsection of the provision concerned establishes the right to be heard upon the taking of measures — before taking any measures which may damage the rights of a participant in a proceeding, the administrative authority shall grant him or her a possibility to provide his or her opinion and objections. This means that in the case of a possible interference with a subjective right, the administrative authority must guarantee an individual the right to be heard. In other cases, the administrative authority may, but need not hear the participant in the proceeding. For example, if a health protection supervisory official informs media that a product of a particular company does not comply with the health requirements, he or she must guarantee a representative of the company the right to be heard. Such public announcement is, firstly, a measure, and secondly, it may damage the good name of the company and also have a negative impact on its financial status.

The right to be heard extends to participants in a proceeding according to the Administrative Procedure Act. The participants in a proceeding are:

- 1) a person applying for the issue of an administrative act or the taking of a measure, or a person who makes a proposal for entry into a contract under public law (§ 11 (1) 1));
- 2) a person at whom an administrative act or measure is directed or to whom an administrative authority makes a proposal for entry into a contract under public law (§ 11 (1) 2));
- 3) a person whose rights or obligations the administrative act, contract under public law or measure may affect (third person) (§ 11 (1) 3)).

The extension of the right to be heard to third persons particularly deserves to be noted. An administrative act, a contract under public law and a measure may interfere with the legal and economic interests of third persons. The provision of an opportunity to express an opinion and objections serves as a preventive judicial remedy.

According to the Act, a participant in a proceeding is also an administrative authority which, according to an Act or regulation, is required to submit to an administrative authority which hears the matter its opinion on or approval for issue of a legal act or for taking of a measure (§ 11 (1) 4)). Granting of the right to be heard to such participants in a proceeding is problematic. It is an administrative authority to which procedural fundamental rights should not be extended. In addition to those mentioned above, participants in a proceeding may include other persons that an administrative authority has involved as participants in the proceeding and whose interests may be affected by an administrative act, contract under public law or administrative measure (§ 11 (2)).

In order to guarantee a participant in a proceeding the right to be heard, an administrative authority must provide the participant in the proceeding with necessary information before issuing an administrative act. This involves notification of the participant in the proceeding of the commencement of a proceeding (in a proceeding commenced on the initiative of an administrative authority), presentation of factual circumstances and results of proof, as well as the making public of the content of the planned decision in such a form as it would be clear for the participant in the proceeding concerning which he or she should present his or her opinion or objections. The authority is not obliged to present to the participant in the proceeding evidence and to interpret them. The participant in the proceeding may examine evidence on the basis of § 37 of the Administrative Procedure Act (the right to examine documents). It is important here that the participant in the proceeding receive a summary of the factual circumstances and evidence serving as the basis for decision-making that he or she had an opportunity to present his or her opinion and objections with regard thereto. The same also applies to measures. Before taking a measure, an administrative authority must present the results of proof concerning the factual circumstances that serve as the basis for taking a measure. It is a prevalent opinion in the German legal doctrine that an administrative authority is not obliged to provide a legal discussion of the matter to give the participant in the proceeding an opportunity to present his or her opinion and objections with regard thereto.<sup>\*13</sup>

In order to enable a participant in a proceeding to express his or her opinion and present objections, a reasonable period of time must be provided, during which the participant in the proceeding can analyse the factual circumstances and the results of proof, check them and present his or her opinion and objections. The term naturally depends on the particular administrative matter. The more complicated the matter, the longer should also be the term for presenting an opinion and objections. A participant in the proceeding may present his or her opinion and objections in a written, oral or other suitable form. Oral form is more preferable in more complicated administrative matters, where it may be presumed that the participant in the proceeding may be unable to present his or her opinion and objections sufficiently clearly and understandably. The right to be heard may also be implemented in the hearing of an administrative matter at a session (§ 45). The right to be heard means, *inter alia*, a function of exchanging information. Administrative matters become increasingly complicated in the contemporary state and the identification of factual circumstances

<sup>13</sup> See C. H. Ule, H.-W. Laubinger. *Verwaltungsverfahrenrecht*. 4<sup>th</sup>, revised ed. Köln, Berlin, Bonn, München, 1998, p. 237.

also becomes increasingly complicated. An administrative authority is not omniscient. In order to make a correct and just decision, the authority frequently requires additional information. This has also been emphasised by the Administrative Chamber of the Supreme Court. In its above-mentioned decision of 14 May 2002, the Administrative Chamber has stressed that hearing of an individual enables an administrative authority to identify to what extent the planned administrative act will interfere with the rights and interests of the individual and to seek opportunities for achieving a solution that satisfies all the persons concerned.<sup>14</sup>

After a participant in a proceeding has presented his or her opinion and objections to an administrative authority, the authority must take notice thereof and consider them when making the decision and also be guided by them when reasoning the decision.

The special regulation of the right to be heard in open proceedings has been laid down in § 49 of the Administrative Procedure Act. In the case of open proceedings it is natural that besides participants in a proceeding the right also extends to interested persons. The range of interests may be very wide, and this actually means that anyone may have access to open proceedings.

Proceeding from the principle of lawfulness of administration, an administrative authority must guarantee participants in a proceeding the right to be heard. Exceptions thereto may be made only in the cases prescribed by law. Such exceptions have been provided in § 40 (3) of the Administrative Procedure Act. Provided that the prerequisites indicated in the provision concerned exist, deciding on the guarantee of the right to be heard belongs to the right of discretion of an administrative authority. An administrative proceeding may be conducted without hearing the opinions and objections of a participant in the proceeding in the following cases (§ 40 (3)):

- 1) if prompt action is required for prevention of damage arising from delay or for the protection of public interests. In this case, the legislator has granted an administrative authority two benefits to be considered — the right to be heard and efficiency of administration. If an administrative authority finds that a delay in issuing an administrative act or taking a measure results in damage or it damages public interests, the administrative authority may, proceeding from the need to ensure the efficiency of administration, decide on the administrative matter without hearing the opinion and objections of a participant in the proceeding. In doing so, the administrative authority must interpret the unspecified legal notions of “prevention of damage” and “protection of public interests” and apply them to specific circumstances. If the specific circumstances “furnish the unspecified legal notions with a content”, the right of discretion has been granted to the administrative authority to decide on whether to guarantee the participant in the proceeding the right to be heard or not. If there are no relevant circumstances, there are no necessary elements and the right of discretion of the administrative authority is precluded;
- 2) if there is no deviation from the information provided in the application or explanation of the participant in the proceeding and there is no need for additional information. This concerns a case where an administrative authority takes as the basis for making a decision the factual circumstances presented by the participant in the proceeding and there is no deviation therefrom. Therefore, there is no additional need to clarify the circumstances. The right to be heard may be relevant here, if the refusal to issue an administrative act is based on legal grounds;
- 3) if the resolution is not made against the participant in the proceeding. Here the making of an exception is related to the fact that both the factual circumstances and legal basis allow for the making of a decision in favour of the participant in the proceeding. For example, the participant in the proceeding applies for a leave to appeal and it is clear for the administrative authority before issuing an administrative act (before granting the leave) that it will satisfy the application;
- 4) if notification of the administrative act or measure, which is necessary to allow submission of opinions or objections, does not enable achievement of the purpose of the administrative act or measure. The legislator has granted the administrative authority also here the right to consider two benefits, consisting in the right to be heard and the efficiency of administration. If the efficiency of administration outweighs the right to be heard, the administrative authority has a clear means to exercise the right of discretion;
- 5) if the participant in the proceeding is not known or if the measure taken affects an infinite number of persons and identification of the persons is impossible within a reasonable period of time. Here we have two prerequisites for the exercise of the right of discretion. Firstly, it concerns a matter where a participant in the proceeding is not known. This prerequisite is topical, above all, in administrative action. The other prerequisite is a matter where the measure taken concerns an infinite number of people and they cannot be identified within a reasonable period of time. “A reasonable period of time” is an unspecified legal notion here, which an administrative authority

<sup>14</sup> Decision of the Administrative Chamber of the Supreme Court, 14 May 2002 (Note 10).

must furnish with a content and apply it to specific circumstances. The existence of necessary elements grants the administrative authority the right to exercise discretion;

- 6) if an administrative act is issued as a general order or the number of participants in the proceeding exceeds 50. General orders are administrative act, which are addressed to people determined on the basis of general characteristics. This means that at the time of issuing the act, the addressees are not individualised and there are many of them, therefore it is not purposeful to hear them. The same also applies to cases where the number of the participants in the proceeding exceeds 50;
- 7) in other cases provided by law. Here the legislator has provided for an opportunity to establish additional restrictions by specific laws.

### 3. Right to examine documents

The right to examine documents has been laid down in § 37 of the Administrative Procedure Act.

It is worth noting that in Estonia<sup>15</sup>, as well as in Sweden, the United States of America, France and Holland<sup>16</sup>, in addition to this, the general right of access to public information has also been laid down; its purpose is to guarantee the democratic supervision exercised by individuals over administration.

The right to examine documents is founded on the Constitution and it has several points of contact with the Constitution. The right to examine documents can be derived from the principle of the democratic state based on the rule of law (§ 10 of the Constitution). The information gathered in the course of a proceeding by an administrative authority cannot be the object of classification in a democratic state based on the rule of law, it must be accessible to a participant in the proceeding, so that he or she could protect his or her interests. The law concerned also supports human dignity (§ 18 (1) of the Constitution). The right to examine documents arises directly from § 44 (2) of the Constitution, according to which all state agencies, local governments, and their officials have a duty to provide information about their activities, pursuant to procedure provided by law, to an Estonian citizen at his or her request, except information the disclosure of which is prohibited by law, and information intended exclusively for internal use. As it is not otherwise provided by law, according to the Constitution, the right also extends to foreign citizens and stateless persons who are in Estonia.

The right to examine documents enables a participant in a proceeding to obtain an overview of the factual circumstances serving as the basis for decision-making and to take measures to protect his or her interests, if necessary. This closely correlates with the right to be heard, as the knowledge of the documents assembled during the proceeding provides a basis for presenting an opinion and objections. The guarantee of the right to examine documents is not solely in the interests of a participant in the proceeding but also in the interests of an administrative authority. This ensures the transparency, comprehensibility and soundness of the administrative procedure and decisions and consequently the authority of administration. According to § 37 (1) of the Administrative Procedure Act, everyone has the right, in all stages of administrative proceedings, to examine documents and files, if such exist, which are relevant in the proceedings and which are preserved with an administrative authority. The provision concerned does not extend only to a participant in the proceeding, but establishes a general right to examine documents, *i.e.* this establishes everyone's right to examine documents and files. Everyone may use the right in any stage of a proceeding. Here the restrictive condition is "documents, which are relevant in the proceedings". The legislator has provided the restrictive condition by an unspecified legal notion (relevant in the proceedings), the furnishing of which with the content and implementation thereof has been placed within the competence of an administrative authority. The documents, which are relevant in the proceedings include, above all, evidence — an explanation of the participant in the proceeding, documentary evidence, physical evidence, on-the-spot visit of inspection, statement of witness and expert opinion. As such documents, also minutes of procedural acts, opinions of the other administrative authorities, opinions and objections of participants in the proceeding, requests, applications, *etc.* may be mentioned. An administrative authority shall preserve the documents relevant to the administrative proceedings, and create a file if necessary, according to § 19 (1) of the Act. This duty also allows for the actual implementation of the right to examine documents.

Subsection (2) of the section concerned provides exceptions in the case of which the right to examine documents is prohibited. An administrative authority shall prohibit examination of a file, document or a part thereof if disclosure of information contained therein is prohibited by an Act or on the basis of an Act. The restrictions of the right to examine documents have been provided, for example, in the Personal Data Pro-

<sup>15</sup> The Public Information Act. – Riigi Teataja (The State Gazette) I 2000, 92, 597.

<sup>16</sup> See C. H. Ule, H.-W. Laubinger (Note 13), p. 249.

tection Act, Databases Act, Archives Act, State Secrets Act and in the Public Information Act. Here it is important to note that the Administrative Procedure Act and the Public Information Act do not synchronise to a certain extent. Subsection 37 (1) of the Administrative Procedure Act lays down a general right to examine documents and according to subsection (2), the right may be prohibited by an Act or on the basis of an Act. According to § 35 (2) 2) of the Public Information Act, the head of a state or local government agency or a legal person in public law may classify draft administrative legislation of specific application and its accompanying documents before passage or signature of the administrative legislation as information intended for internal use. Here an administrative authority has been granted the right to exercise discretion, but it is very unfortunate that the legislator has not laid down the legal boundaries of exercising the discretion. This means that an administrative authority may, at its own discretion, classify as information intended for internal use (information to which access is limited) the documents of any administrative procedure, which are related to the issue of an administrative act. In this manner, § 37 (1) of the Administrative Procedure Act may become an “empty” provision, a mere declaration. Such regulation is in conflict with the principles of a democratic state based on the rule of law and lawfulness of administration. In an administrative procedure, the relevant provisions of the Administrative Procedure Act should be applied, which are in conformity with the Constitution.

The special regulation of examination of documents has been provided in § 48 of the Administrative Procedure Act and concerns open proceedings. On the basis of the comparison of §§ 37 and 48, it may be said that there are no substantial differences between them. Both provisions grant everyone access to the documents of the proceedings. In the first case, the Act refers to “documents, which are relevant in the proceedings”, in the second case “other relevant and important documents”. The main difference is that the public is notified of open proceedings (§ 47 (3)), whereas, as a rule, only participants in the proceeding are notified of the ordinary proceedings (§ 35).

## 4. Right to receive explanations

Already for a long time, the court practice of democratic states has accepted the principle, according to which officials are not only servants of the state but also helpers of citizens. This means that officials are also obliged to counsel, inform, instruct and service individuals in administrative matters.<sup>17</sup> The Administrative Procedure Act only includes the right of a participant in a proceeding to receive explanations (information). According to § 36 (1) (duty of an administrative authority to give explanations), an administrative authority shall explain to a participant in a proceeding or to a person who considers submission of an application, at the request of the person, the rights and duties of the participant in the proceeding in administrative procedure; within which term the administrative proceeding is presumably conducted and which are the possibilities to expedite the administrative proceeding; which applications, evidence and other documents must be submitted in the administrative proceeding; which procedural acts must be performed by participants in the proceedings. Subsection (2) of the section concerns a case where it is necessary, in order to issue an administrative act or take a measure which is applied for, to issue another administrative act beforehand. In such a case, the administrative authority shall promptly explain the procedure for application for the necessary administrative act and for review of the application, and other conditions for issue of the other administrative act

The Administrative Procedure Act does not directly provide for, for example, the right of a participant in a proceeding to receive advice from the administrative authority for eliminating deficiencies in an application, explanation, *etc.*, which involve an apparent mistake or which are caused by ignorance. The importance of the assisting role of the administrative authority could have been higher in the Act.

When interpreting the provision concerned, a problem may arise concerning whether the administrative authority is obliged to explain to a participant in a proceeding at his or her request only procedural rights or also substantive rights. Taking the interpretation conforming to the constitution as the basis, it may be said that the administrative authority is obliged to explain to the participant in the proceeding also substantive rights, since § 14 of the Constitution imposes on the executive power and local governments the duty to guarantee rights and freedoms.

<sup>17</sup> H. Maurer. Allgemeines Verwaltungsrecht. 12<sup>th</sup> revised ed. München, 1999, p. 455.



## 5. Right to confidentiality of business and personal data

The right to the confidentiality of business and personal data derives from the Constitution. Subsection 19 (1) of the Constitution is important, containing a general personality right — everyone has the right to free self-realisation. This provision protects the conditions that are essential to the free self-realisation of personality and express human dignity. This covers the areas of private life and private personal data, which remain outside the sphere of protection of the other provisions of the Constitution. The provision concerned also constitutes the right to informational self-determination, which involves the right of an individual to decide himself or herself when and to what extent his or her personal data are published.<sup>\*18</sup> Different areas of personal data are protected by § 17 of the Constitution, which protects honour and good name, § 26, which ensures the inviolability of family and private life, and § 42, which protects the beliefs of an individual. For administrative procedure, also § 45 is important, which provides, on the one hand, a general freedom of information, and on the other hand, also relevant restrictions — this right may be restricted by law for state and local government public servants, to protect a state or business secret or information received in confidence, which has become known to them by reason of their office, and the family and private life of others, as well as in the interests of justice.

Subsection 7 (3) of the Administrative Procedure Act lays down protection of data as an objective duty of an administrative authority — an administrative authority is required to maintain state and business secrets and the confidentiality of information intended for internal use of an agency, including private personal data. Here also a subjective public right arises with regard to a participant in a proceeding. The regulation of the protection of private personal data has been provided in greater detail in the Personal Data Protection Act and in the Public Information Act, § 37 of which lays down a restriction on access to private personal data intended for internal use. Access to such information by persons outside the agency is not permitted (§ 38 (4)).<sup>\*19</sup> According to the Personal Data Protection Act, such duty terminates with the consent of the person or in the cases prescribed by law (§ 9).<sup>\*20</sup>

## 6. Right to representation

The right to representation is based on the principle of a democratic state based on the rule of law (§ 10 of the Constitution), according to which all-round and wide-ranging protection of the rights and freedoms shall be guaranteed to a person, including in administrative procedure. Currently, administrative matters become increasingly complicated and deciding thereon often requires qualified legal or professional knowledge, which cannot be demanded of an ordinary citizen. In order that an individual be able to protect and implement his or her rights in complicated administrative matters, he or she frequently requires the assistance of a professional specialist as a representative.

The right to representation has been laid down in § 13 of the Administrative Procedure Act. On the basis of subsection (1) of the provision concerned, in an administrative procedure, a participant in a proceeding has the right to use a representative, who may represent a participant in a proceeding in all procedural acts which, arising from law, need not be performed personally by the participant in the proceeding. For example, the representative may submit on behalf of the participant in the proceeding applications, requests, opinions, objections, examine documents, receive information and explanations from the administrative authority, if requested, represent the participant in the proceeding at the hearing of the matter at a session, *etc.* However, there are particular acts that the participant in the proceeding must perform personally and this requirement may arise only from law. For example, upon applying for a weapons permit, before receiving the permit, the individual shall, according to the Weapons Act, pass an examination in police authorities on his or her knowledge regarding the Weapons Act and other legislation and a practical test on handling the weapon that he or she wishes to acquire (§ 35 (5)).<sup>\*21</sup> It is clear that only the participant in the proceeding himself or herself can perform such acts.

In administrative procedure, the provisions of the General Part of the Civil Code Act apply to representation (§ 13 (3) of the Administrative Procedure Act).<sup>\*22</sup> The types of representation are legal representation, in

<sup>18</sup> See R. Alexy (Note 2), p. 50.

<sup>19</sup> Riigi Teataja (The State Gazette) I 2000, 92, 597 (in Estonian).

<sup>20</sup> Riigi Teataja (The State Gazette) I 1996, 48, 944; 2000, 104, 685 (in Estonian).

<sup>21</sup> Riigi Teataja (The State Gazette) I 2001, 65, 377; 102, 673 (in Estonian).

<sup>22</sup> Riigi Teataja (The State Gazette) I 1994, 53, 889; 89, 1516; 1996, 40, 773 (in Estonian).

which the powers of the representative are determined on the basis of law, and representation by transaction or contract, where the principal determines the powers of the representative. Thus, an authorisation is a collection of rights, within the limits of which the representative may act on behalf of the participant in the proceeding. A representative shall certify his or her authorisation in an administrative proceeding by an unattested proxy (§ 13 (2)). This may be, for example, full powers, in which the representative represents the participant in the proceeding in all the acts of the relevant administrative procedure, which the participant in the proceeding is not required to perform personally on the basis of law. The authorisation may also include particular acts, which the representative of the participant in the proceeding may perform on behalf of the participant in the proceeding. In the case of representation a problem may arise from whether the participant in the proceeding may, besides the representative who performs acts on behalf of the participant in the proceeding, use also an advisor, for example, when hearing the matter at a session. For instance, § 45 (3) of the Administrative Procedure Act does not preclude the participation of other persons in a session, if no participants in the proceeding objects thereto. The Act makes no mention of other cases. The author of the article is of the opinion that such opportunity should not be precluded, regardless of the fact that it has not been directly provided by law. The participant in the proceeding performs an act or acts independently, but he or she has an opportunity to obtain qualified advice and assistance to protect his or her rights. The Administrative Procedure Act as a whole serves this purpose.

## Conclusions

The laws governing the specific types of administrative procedure have paid very little attention to ensuring the rights of participants in a proceeding. The existing regulations are unsystematic and contain gaps. The Administrative Procedure Act that entered into force on 1 January 2002 eliminated these regrettable gaps in our legislation. It may be said that the Act guarantees the protection of the rights arising from the Constitution and fully complies with the principles of a democratic state based on the rule of law. It is also in conformity and complies with the principles of European administrative procedure law. We may hope that the purpose of the Act will be implemented in practice, since an Act is one thing and the implementation thereof another thing.