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Public participation and access to justice in environmental matters in  
Croatia\*\*

*Abstract*

*Environmental protection is often achieved through participation in administrative procedures by the interested public in the form of interested parties. Such parties are able to participate in administrative procedures through which, for example, building permits and environmental permits are issued. In this manner, the public is able to challenge administrative decisions in front of first-instance and second-instance bodies in administrative procedure, and, subsequently, in administrative disputes in front of competent administrative courts. However, in many sector laws this opportunity is being bypassed by narrowing the possibility to participate in administrative procedure. Croatia is also a party to the Aarhus Convention, which guarantees the possibility of the public concerned (having only factual interest to prove) to participate in administrative procedures regarding administrative matters. Furthermore, the possibility to partake in spatial planning will also be analyzed in this paper, as spatial planning has a huge impact on the environment. Therefore, this paper will analyze the opportunities and challenges for public participation and access to justice in environmental matters in Croatia.*

**Keywords:** party in administrative procedure, public participation, environmental protection, spatial planning

## 1. Introduction

Environmental protection is primarily the responsibility of the state. The Constitution<sup>1</sup> prescribes that everyone has the right to a healthy life and that the state is obliged to ensure conditions for a healthy environment (Article 69, para. 1<sup>2</sup>).<sup>3</sup> Therefore, it is the duty of the state to ensure that the environment is protected. Furthermore, the Constitution also prescribes in Article 3<sup>4</sup> that one of the fundamental

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<sup>1</sup> Constitution of the Republic of Croatia, OG, nos. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14. I am using the redactor version of the Constitution made by the Constitutional Court of the Republic of Croatia, so the numbering of articles is different from that in the official version used by the Parliament.

<sup>2</sup> "Everyone shall have the right to a healthy life. The State shall ensure conditions for a healthy environment."

<sup>3</sup> See Ofak, 2021 with regard to the constitutional protection of the right to a healthy environment.

<sup>4</sup> "Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution."



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constitutional values of the constitutional order of the Republic of Croatia is the protection of nature and the environment. It is also important to note that the protection of nature and the environment is the basis for interpreting the Constitution according to Article 3, which is of great importance for this paper and the thesis set in it.<sup>5</sup> It is also worth mentioning that the Constitution establishes special protection by the state for certain things and goods – natural resources, parts of nature, and things legally prescribed as things of interest to the Republic of Croatia (Article 52<sup>6</sup>).<sup>7</sup> Therefore, the obligation of the state to protect and care for the environment is evident, and the state achieves this through various means. For example, the state is obliged to prosecute those who commit crimes against the environment.<sup>8</sup> The state is obliged to perform its duties according to the Constitution, international documents in force, and relevant legislature, most importantly the Environmental Protection Act (EPA).<sup>9</sup> It is the duty of the state, for example, to issue only permits and other legal acts in accordance with its obligation to care for and protect the environment. However, sometimes the state neglects its duties, mostly through ignorance of various acts, EU legislature, and the still existing reluctance to apply the Constitution, the European Convention for Human Rights, or the Aarhus Convention, to which Croatia is a party, directly. It is important to mention that Croatia signed and ratified the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention), which came into force in Croatia on June 25, 2007. This is a fact that will be stressed repeatedly in this study. Now is the time to mention Article 69 para. 3 of the Constitution, which reads:

*“Everyone shall, within the scope of his/her powers and activities, accord particular attention to the protection of human health, nature, and the human environment.”*

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<sup>5</sup> See Ofak 2021, 89.

<sup>6</sup> *“The sea, seashore, islands, waters, air space, mineral resources, and other natural resources, as well as land, forests, flora and fauna, other components of the natural environment, real estate and items of particular cultural, historical, economic or ecological significance which are specified by law to be of interest to the Republic of Croatia shall enjoy its special protection.”*

<sup>7</sup> See Ofak 2021, 93–94.

<sup>8</sup> Protection of the environment is assured through the Criminal Act (OG nos. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.), which has a special section on crimes against the environment. There are such crimes as pollution of the environment (Art. 193), dumping of pollutants from a ship (Art. 194), endangering the ozone layer (Art. 195), endangering the environment with waste (Art. 196), endangering the environment by facilities (Art. 197), endangering the environment by radioactive matter (Art. 198), endangering by noise, vibrations or non-ionizing radiation (Art. 199), destroying protected natural values (Art. 200), destroying habitats (Art. 201), trafficking in wild species (Art. 202), unlawful entering into environment wild species or GMO (Art. 203), unlawful hunting and fishing (Art. 204), killing or torturing of animals (Art. 205), transmitting of infectious diseases of animals and organisms harmful for plants (Art. 206), manufacturing and trafficking harmful matters for treatment of animals (Art. 207), giving veterinary help recklessly (Art. 208), destroying forests (Art. 209), changing the water lanes (Art. 210), unlawful exploitation of ores (Art. 211) and unlawful building (Art. 212). The Criminal Act also prescribes especially severe crimes against the environment (Art. 214).

<sup>9</sup> OG, nos. 80/13, 153/13, 78/2015, 12/18, 118/18.

This means that all citizens of the Republic of Croatia, all residents of the Republic of Croatia (all physical persons), and all legal persons functioning in the Republic of Croatia have a constitutional duty to protect the environment.<sup>10</sup> Now, this raises the question, how can ‘everyone’ protect the environment? Besides the obvious answers – recycling, sparsely using natural resources, conserving energy, etc. – there are other ways in which an individual and/or association of people (whether as a legal person or not) can protect the environment. First, there is the opportunity to participate in administrative procedures in which building and/or environmental permits are issued. Second, there is the opportunity to participate in making spatial plans that determine the usage of the land. Third, there is the opportunity to participate in public debates on various legislative acts that are mandatory by law. As will be explained, everyone who can prove that an administrative procedure concerns his or her rights, obligations, or legal interests can participate in such a procedure as a party. This is so, as it is prescribed in the General Administrative Procedure Act (GAPA),<sup>11</sup> which is the paramount administrative procedure source in the Republic of Croatia. According to it, everyone whose rights or legal interests (protection of the environment is a legal interest, as it is a constitutional duty and harmful effects on the environment endanger everyone is right to a healthy life) are endangered by a proposed project is entitled to participate in the administrative procedures with regard to the said project. However, sectoral laws have made an (unconstitutional) path for investors by narrowing down (extremely so) the possibility of being a party in administrative procedures regulated by such laws. This paper will analyze such cases and show that such limitations of the opportunity to participate in administrative procedures as an (interested) party creates the inability for such persons to gain access to the courts, which is clearly unconstitutional. As mentioned above, spatial planning is very important for environmental protection, as spatial plans determine which types of objects can be built on a certain piece of land. The subsequent affair of the building is a separate issue in which conformity with the spatial plan is checked. Therefore, the participation in the making of a spatial plan is very important, as this is the time to try to stop harmful projects that could have detrimental effects on the environment. This study shows that public participation in spatial planning is regulated to a good degree, but also that the impact of such participation can be low.

## 2. The meaning of a party in an administrative procedure

It is important to explain the meaning of a party in terms of administrative procedures. Every administrative procedure revolves around a given party whose rights, obligations, or legal interests are decided in it.<sup>12</sup> Sometimes it is clear who the party in a procedure is – the one that instigated the procedure in order to obtain a right, or the one

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<sup>10</sup> Medvedović also states that by the expression ‘everyone’ we need to understand all state bodies, bodies of local and regional self-government, legal persons with public authority, institutions, companies, artisans, associations, religious communities, and other associations and individuals, domestic and foreign. Medvedović 2012, 42.

<sup>11</sup> OG nos. 47/09, 110/21.

<sup>12</sup> “A central piece of every administrative procedure is the party. Without the party, there is no administrative procedure.” Medvedović 2012, 15.

who will have an obligation imposed on him. However, in certain cases, the question of whether a person (be it a physical or a legal person) is a party in a given procedure is disputed. The question of determining the subjects who are entitled to the status of a party in administrative procedure is a complicated one for the legislator and implementer of a legal norm.<sup>13</sup> In such cases, special procedures (administrative, administrative dispute, or even constitutional disputes) are instigated to resolve such a question.<sup>14</sup> Namely, being a party in an administrative procedure means being able to bring a certain personal right or justified interests to life.<sup>15</sup> Only a person who is given the status of a party is able to participate in an administrative procedure, has procedural rights prescribed by the law, and is able to challenge a decision brought from the procedure in second instance administrative procedure and/or in administrative dispute in front of a competent administrative court. It is obvious, therefore, that it is necessary to regulate who is to be considered a party in an administrative procedure. The legal definition of a party can, like all legal definitions, be determined in a material or formal sense. The former usually has little to give us, but accordingly, is more accurate. The latter has more content but is regularly less accurate.<sup>16</sup> Therefore, it is almost impossible to determine the material definition of the party in an administrative procedure.<sup>17</sup> As Medvedović has written, such a definition would lead to such practice that the status of a party is not acknowledged by persons who should acquire it, and vice versa.<sup>18</sup> GAPA therefore gives a formal and very general definition of a party in administrative procedure as a person upon whose request a procedure was instigated, against whom a procedure was instigated, or a person who, in order to protect his rights or legal interests, has a right to participate in a procedure (see Article 4<sup>19</sup>). From this legislative conception, three types of parties can be derived: an active party (upon whose request a procedure was instigated, for example of issuing different permits), a passive party (against whom the procedure was instigated, for example determining due taxes), and an interventionist party (who has the right to participate in a procedure in order to be able to protect his rights or legal interests, for example the neighbor in the procedure of issuing building or location permit on a neighboring plot).<sup>20</sup> All such parties have the so-called 'party ability' to participate in an administrative procedure.<sup>21</sup> This ability must exist throughout the procedure.<sup>22</sup> The aforementioned problems of acknowledging the status of a party in administrative procedure usually occur around the third type of party – the interventionist party. Sometimes there is a need to question and determine whether in a procedure that is instigated by someone else, the rights or legal interests of another person are also being resolved. Namely, it is a trait of administrative procedure that involves many different

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<sup>13</sup> Medvedović 2012, 15.

<sup>14</sup> Staničić 2019, 25.

<sup>15</sup> Krbek 1928, 15.

<sup>16</sup> Krbek 1928, 15–16.

<sup>17</sup> Ofak 2014, 988.

<sup>18</sup> Medvedović 2012, 17.

<sup>19</sup> *“The party means a person at whose request the procedure was initiated, against whom the procedure is conducted, or who is entitled to participate in the procedure in order to protect his rights or legal interests.”*

<sup>20</sup> Staničić 2019, 25; Borković 2002, 418.

<sup>21</sup> Križan 2006, 88.

<sup>22</sup> Đerđa 2010, 88.

parties with rather different roles and rights and who are because of that impossible to be determined (as in civil procedure) as falling in one of only two groups – plaintiff and prosecutor – in the formal sense where the prosecutor is the one who filed a lawsuit and the plaintiff the one against the lawsuit is filed. One categorization of parties made long ago by Krbek<sup>23</sup> distinguishes between ‘main’ and ‘incidental’ parties, with the former being the ones with direct interest in the procedure and the latter being the ones with indirect interest in the procedure. He also wrote in favor of including a broader group of persons in the procedure with the argument that an administration, being organized strictly on an authoritarian idea, will take care of the public interest and will not consistently attract other persons to state their objections of public-right nature against a petitioned permit. Contrarily, an administration organized on a democratic idea will welcome all third parties to support its own activity. In doing so, it primarily uses those whose private interests are targeted. These are primarily immediate neighbors. However, in cases of greater importance, the administration will be inclusive more broadly and allow an objection to a wider circle of persons.<sup>24</sup> Medvedović also states that the question is open whether the care for the protection of legality in deciding a concrete administrative matter and the care for public interest should be given only to the body that is carrying out the procedure, or whether this is the right and duty of other subjects.<sup>25</sup> This idea has been interwoven in all laws regulating general administrative procedures since 1956 and the first Yugoslav General Administrative Procedure Act.<sup>26,27</sup> Therefore, the legislative definition of a party in GAPA stands for a very broad formal definition of a party that should enable all whose rights, obligations, or legal interests<sup>28</sup> are being decided on in an administrative procedure to participate in such a procedure with all procedural rights prescribed by law. Problems usually do not arise regarding active or passive parties, but are often created when interventionist parties emerge because of the need to ascertain whether their rights or legal interests are being decided on in the procedure. Unfortunately, it is the long-standing practice of Croatian administrative courts<sup>29</sup> and public bodies to restrictively interpret the existence of rights and legal interests of an interventionist party in a concrete administrative procedure, so they usually dismiss such claims for participation in a procedure based on a lack of party legitimation.<sup>30</sup> In the case law of the Croatian High Administrative Court of the Republic

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<sup>23</sup> Krbek 1928, 25.

<sup>24</sup> Krbek 1982, 27.

<sup>25</sup> Medvedović 2012, 16.

<sup>26</sup> OG SFRJ no. 52/56. It was amended several times (OG SFRJ, nos. 10/65, 4/77, 11/78, 9/86) but this was never changed.

<sup>27</sup> See Ofak 2014, 988. See also Majstorović 1957, 65–66.

<sup>28</sup> Križan wrote that a ‘legal interest’ must have its basis in the law or other by law, that it must exist at the time the procedure is being decided and that must be linked to the administrative matter being decided. Also, the content of that interest is based only on the protection of rights of other person from violation. Križan 2006, 88–89. Legal interest is also known as ‘party legitimation’ according to Đerđa 2010, 90.

<sup>29</sup> “The owner of a real estate that has a common border with a real estate for which a demolition decision has been issued is not a party in the procedure of issuing a decision regarding the change of the investor.” See Us-4618/2009.

<sup>30</sup> Đerđa 2010, 92; Medvedović 2012, 29.

of Croatia, legal interest represents a possibility that the plaintiff hopes to achieve the legal benefit that he wants to achieve through the requested legal protection, and a legal interest has such a person whose rights and obligations depend on the manner the concrete administrative procedure will be decided, or when a decision influences the legal relations of said person. Legal interest in applying legal remedies refers to the legal benefit that is represented in an annulment or change of a decision detrimental to a party.<sup>31</sup>

### 3. GAPA's role in Croatia's administrative procedure

It is important to note that GAPA is a general procedural act and that its application is mandatory in all administrative matters. This is prescribed by Article 3, para. 1 of GAPA, which reads as follows:

*“This Act shall apply in deciding all administrative matters. Only individual questions of administrative procedure may be regulated otherwise by law, where this is necessary for deciding in particular administrative areas and where this is not contrary to the fundamental provisions and the purpose of this Act.”*

From these two separate principles, the following emerges: First, it is clear that deviations from GAPA are permitted only in special cases and that even then the principles and fundamental provisions of GAPA apply; second, only particular questions can be regulated otherwise by law, which leads to the conclusion that the administrative procedure as a whole cannot be regulated by the provisions of any other act. Therefore, the importance of GAPA in the Croatian legal order is paramount.<sup>32</sup> That said, it is important to note that many special acts regulate certain aspects of administrative procedures.<sup>33</sup> GAPA itself allows for deviations from many of its provisions (Art. 12/1, Art. 21/3, Art. 25/1, Art. 27/1, Art. 56/1, Art. 59/3, Art. 109, Art. 112/1, Art. 118/2, Art. 135/3, Art. 140/1, Art. 161/1,5 etc.).<sup>34</sup> Of course, there is a need to allow for deviations in special administrative areas, and GAPA recognizes this need. For example, the General Tax Act<sup>35</sup> regulates a great part of the administrative procedure and does this in a way that is significantly different from that provided by GAPA. In this particular case, the differences are justified by the specificities of tax administrative matters, and they do not clash with the main principles of the GAPA. However, this is not the case in many other acts. This leads to practical problems.<sup>36</sup> As Croatian legal theory repeatedly stated, the norms of the general act and the norms of special acts must form a unified whole, allowing for a just and efficient functioning of the legal system.<sup>37</sup> Yet another reason for passing the new GAPA was the wish to unify the administrative procedure throughout Croatia, which represents a task yet to be completed. Namely, the primary problem regarding the relationship between GAPA and special acts concerns the unclear relationship between GAPA and the special acts that also prescribe administrative

<sup>31</sup> See Usl-1637/12-7.

<sup>32</sup> Britvić Vetma & Staničić 2021, 17.

<sup>33</sup> Ljubanović 2006, 20–22; Ljubanović 2010, 325–328.

<sup>34</sup> Staničić 2016, 2.

<sup>35</sup> OG nos. 115/16, 106/18, 121/19, 32/20, 42/20.

<sup>36</sup> Britvić Vetma & Staničić 2021, 18.

<sup>37</sup> Medvedović 2006, 1; Šikić & Staničić 2009, 43; Ofak 2014, 989–991.

procedures or certain parts of them. Consequently, GAPA has failed to fully perform its role as a general procedural act, notwithstanding the formal efforts of the state to ensure this.<sup>38</sup>

#### 4. The link between the right to be a party in administrative procedure and constitutional rights

As mentioned above, every administrative procedure revolves around a party. In every administrative procedure, someone's rights, obligations, or legal interests are decided. According to our constitutional setup, every individual act of a public body is subject to judicial scrutiny, as all individual acts of public bodies must be grounded in law (the principle of legality of administration; see Article 19<sup>39</sup> of the Constitution). his constitutional provision must be linked with another – Article 29 para. 1,<sup>40</sup> which guarantees the right to a fair trial (access to court). One must also mention Article 14 para. 2<sup>41</sup> of the Constitution, which proclaims equality of all before the law. It is important to note that Croatia is also a party to the European Convention on Human Rights and Fundamental Freedoms (ECHR).<sup>42</sup> This international document is part of Croatia's internal legal system and is considered of quasi-constitutional rank by Croatia's Constitutional Court.<sup>43</sup> In her analysis, Ofak clearly states that Article 6 para. 1 of the ECHR is applicable to administrative procedures because the right to a fair trial is protected in all procedures in which the rights and obligations of civil nature are decided. Whether a matter is of a 'civil nature' depends on the practice of the European Court of Human Rights, which has built an autonomous definition of procedures in which rights and obligations of a civil nature are decided.<sup>44</sup> According to its practice, the Court considers all administrative procedures that have an effect on the property private rights of individuals or when they concern rights that do not have a strictly proprietary character, such as the right to life, health, and healthy environment, the right to respect of private and family life, right to access to information, etc., under the scope of Article 6, para. 1 of the ECHR.<sup>45</sup> When we take into account the constitutional setup, which, first, binds the administration to the law, second, guarantees judicial scrutiny of all individual acts of public bodies, and third, ensures the right to a fair trial (access to court), and the ECHR, which also guarantees the right to a fair trial, which applies to administrative procedures as well, one only has to acknowledge that the right to participate in an administrative procedure as a party is and should be a protected fundamental right. Furthermore, denying the status of a party to a person who should

<sup>38</sup> Britvić Vetma & Staničić 2021, 18.

<sup>39</sup> "Individual acts of state administration and bodies vested with public authority shall be grounded in law. Judicial review of individual acts made by administrative authorities and other bodies vested with public authority shall be guaranteed."

<sup>40</sup> "Everyone shall be entitled to have his/ her rights and obligations, or suspicion or accusation of a criminal offence, decided upon fairly and within a reasonable time by an independent and impartial court established by law."

<sup>41</sup> "All persons shall be equal before the law."

<sup>42</sup> OG IC nos. 18/97, 6/99, 8/99, 14/92, 1/06.

<sup>43</sup> See decision U-I-745/1999 from November 8, 2000. See also in Šarin 2014, 86.

<sup>44</sup> Ofak 2014, 992.

<sup>45</sup> Ofak 2014, 995.

have obtained such status inevitably leads to denying the same person the constitutional and conventional right to access the court and a fair trial. Therefore, as Ofak rightly states, the provision of Article 4 of GAPA can be seen as a reflection of: 1) the guarantee of a fair trial protected by Article 6, para. 1 of the ECHR, and 2) equality of all in front of the law and the right to a fair trial guaranteed by Article 14 para. 2 and Article 29 para. 1 of the Constitution.<sup>46</sup> If an outcome of an administrative procedure can be detrimental to the rights or legal interests of a person, such a person must be able to protect the said rights or legal interests while the administrative procedure is ongoing. This can only be done if such a person is granted the status of a party during the procedure.<sup>47</sup> However, there are examples of laws that deny such status to persons who would have it according to GAPA.

### **5. Examples of narrowing the possibility to participate in administrative procedures linked with environmental matters**

In our legislative setup, there are several sectoral laws that narrow down the possibility to be granted the status of a party in administrative procedures in which they apply.<sup>48</sup>

For example, the Construction Act<sup>49</sup> provides party status in administrative procedures only to the investor, owner of the plot on which the construction is underway, and owners of surrounding real estate and/or persons who are the holders of real rights (for example, easement) on this real estate (Article 115 para. 1). There are even greater restrictions if the building permit is issued for a building of interest of the Republic of Croatia or is issued directly by the Ministry, where the status of a party is given only to the investor, owner of the plot, and/or persons who are the holders of real rights (for example, easement) on this real estate (Article 15 para. 3). All others are not granted the status of a party and therefore are unable to participate in any administrative procedure regarding issuing of building permits. One must mention that the practice of the administrative court has been rather strict concerning the determination of whether a person fits the criteria 'surrounding real estate' for neighbors that are entitled to the status of a party. For a long time, only the owners of the plots that have a common border with the plot for which the permit is claimed were considered owners of the 'surrounding real estate.' However, in certain judgements<sup>50</sup> of the now High Administrative Court of the Republic of Croatia (then the Administrative Court of the Republic of Croatia) this has been revised.

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<sup>46</sup> Ofak 2014, 992.

<sup>47</sup> Borković 2002, 418; Ofak 2014, 995.

<sup>48</sup> See especially Ofak 2014, 999.

<sup>49</sup> OG, nos. 153/2013, 20/2017, 39/2019, 125/2019.

<sup>50</sup> See Us-1134/1998, in which the Court said that determining the legal interest of neighbors to participate in an administrative procedure regarding building permits depends on the factual status of the administrative matter (for example, the distance between the buildings). All those who have a direct common border are parties by law, and the status of others depends on the factual state of the matter.



An even more striking example of narrowing the possibility of being granted the status of a party can be found in the Construction Act, which prescribes that in the procedure of issuing a usage permit for a building, the only persons eligible for the status of a party are the investor or the owner of the building (depending on who filed for the permit).

Another example is the Spatial Planning Act,<sup>51</sup> which narrows the possibility for a person to acquire the status of a party in administrative procedures regarding the issuing of spatial permits in which this Act applies in a very similar manner as was described when discussing the Construction Act. The possible parties are listed in the Act (see Article 141 paras. 1 & 2): the instigator of the procedure, owner of the real estate for which the permit is being issued and the bearers of real rights on that real estate, owners of surrounding real estate, and/or persons who are the holders of real rights (for example, easement) on this real estate. According to the Construction Act, the restrictions are even greater if the location permit is issued for an intervention in the space of interest of the Republic of Croatia or that is issued directly by the Ministry, where the status of a party is given only to the instigator of the procedure, owner of the plot, and/or persons who are the holders of real rights (for example, easement) on this real estate.

The Mining Act<sup>52</sup> prescribes that, in all procedures in which it applies, only the owners of the real estate regarding which the procedures are being held can attain the status of a party (Article 15). All others were excluded.

Lastly, the now retracted Sustainable Waste Management Act<sup>53</sup> should be mentioned, as it also restricts participation in administrative procedures in which it is applied. Only parties were also numbered in the Act (instigator for the issuing of a permit, owner of the real estate for which the permit was issued, and the holders of other real rights on the real estate and the local municipality; Article 95 para. 1). In procedures regarding temporary permits, not even the municipalities were given the status of a party. However, the new 2021 Waste Management Act<sup>54</sup> does not contain such restrictions and is a step in the right direction.

This restriction of a fundamental right, as shown, is said to be justified by economic gains from investment,<sup>55</sup> but there are other ways to ensure the speedy and efficient conduct of these procedures. Namely, one should ask whether the economical carrying out of the procedure is a legitimate goal because of which the legislator is allowed to restrict the position of a party in administrative procedure?<sup>56</sup> Of course, the principle of economical and efficient procedures exists in GAPA (Article 10), and one should abide by it. However, it is a 'second rate' principle when it conflicts with other 'more important' principles of administrative procedure enshrined in GAPA. This principle cannot be enforced if it is detrimental to the aim and purpose of administrative procedures, and it especially cannot be detrimental to the principle of material truth.<sup>57</sup>

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<sup>51</sup> OG, nos. 153/13, 65/17, 114/18, 39/19, 98/19.

<sup>52</sup> OG, nos. 56/13, 14/14, 52/18, 115/18, 98/19.

<sup>53</sup> OG, nos. 94/13, 73/17, 14/19, 98/19.

<sup>54</sup> OG, no. 84/21.

<sup>55</sup> Ofak 2014, 1011.

<sup>56</sup> Ofak 2014, 1011.

<sup>57</sup> Popović 1978, 98; Borković 2002, 407; Đerđa 2010, 53.

Denying party status to persons who are entitled to it under GAPA results in the violations of these persons' constitutional and conventional rights – such as the rights to a fair trial, access to courts, and equality before the law. For example, a similar provision in Slovenia's Construction Act was quashed<sup>58</sup> by Slovenia's Constitutional Court in 2011. The Court held that the legislator is not completely free because every man has the right to his constitutionally protected core – the very essence of human rights in which the legislature is not allowed to interfere. According to the Court, the proportionality of measures by which individuals participate in procedures in which their legal interests are being decided cannot be justified by any legitimate goal.<sup>59</sup>

Namely, if there is no denying that a person has a legal interest to participate in a particular administrative procedure (and is a party to it under Art. 4 of the GAPA), but the legislator nevertheless denies him/her this right by a special act (e.g., Art. 115 of the Construction Act), it is obvious that this constitutes a violation of the person's constitutional right. The Constitution guarantees the right of access to courts (Art. 29) and prescribes that everyone is equal before the law (Art. 14, para. 2), including those whose rights are made void by the provisions of special acts. If a person cannot be a party to the administrative procedure, he/she is also denied the right to challenge the decision ensuing from the administrative procedure before a court, which is clearly in violation of the said person's right of access to the courts and equality before the law.<sup>60</sup> The economic swiftness of the procedure cannot be a legitimate goal because of which the right to a fair trial could be restricted. Furthermore, this goal must not endanger equality before the law. It is and should be achieved through legal provisions that regulate legal aid, costs of the procedure, merging matters in one procedure, deadlines for certain actions, etc.<sup>61</sup>

## **6. The Aarhus Convention and its implementation regarding the participation of public in environmental matters in Croatia**

As mentioned above, Croatia is a party to the Aarhus Convention, which has been in force in Croatia since June 25, 2007. The importance of this convention for many special administrative procedures cannot be overstated, for example, procedures regarding access to information on the environment owned by public bodies and procedures of deciding regarding certain activities that can have a significant impact on the environment.<sup>62</sup> Such activities are listed in Addendum 1 of the Convention (energy, manufacturing and processing metal, processing minerals, chemical industry, waste management, and other activities). The Convention defines the 'public' as one or more physical or legal persons and, according to domestic law or practice, their associations,<sup>63</sup> organizations, or groups (Article 2 para. 4). It applies to every person, notwithstanding

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<sup>58</sup> See Decision U-I-165/09-34 of March 3, 2011.

<sup>59</sup> See also Ofak, 2014, 1002.

<sup>60</sup> Britvić Vetma & Staničić 2021, 22.

<sup>61</sup> Ofak 2014, 1002.

<sup>62</sup> Ofak 2014, 1003.

<sup>63</sup> On associations and their position in public participation in environmental matters, see Medvedović & Ofak 2011, 69–84.

their nationality, residence, or seat (for legal persons). It also applies to a group of people, organizations, and associations who do not have the status of a legal person (for example, residents of a settlement or citizens organized in an association that is not registered).<sup>64</sup> ‘The public concerned’ is defined as those affected or likely to be affected by, or having an interest in, the respective environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest (Article 2 Point 5). This definition is very broad, although somewhat narrower than that of the public. It encompasses persons whose rights, for example, their right to property or the right to a healthy environment, could be violated. However, the definition also applies to persons who are interested in decisions on the environment and who are not obliged to prove their legal interest, but only their factual interest.<sup>65</sup> It is clear that some activities can affect multiple people. If we consider gas pipelines, the definition of ‘the public concerned’ can encompass thousands, and in the case of a nuclear power plant, millions from several countries could be severely impacted; it cannot be limited by number.<sup>66</sup> Therefore, the public concerned must have access to participation in administrative procedures, as this is guaranteed by the Convention. Non-governmental organizations that promote environmental protection are being held as members of the concerned public if they meet the demands set in the domestic legislature. However, those requirements must be aligned with the principles of the Aarhus Convention, such as the ban of discrimination on the ground of the seat (of the association).<sup>67</sup> The necessary requirements were set by the Croatian legislator in the Environmental Protection Act under Article 167. According to it, an association has a sufficient legal interest if it fulfills the following requirements: (1) If it is registered in accordance with special regulations governing associations and if environmental protection, including protection of human health and protection or rational use of natural resources, is set out as a goal in its statute; (2) If it has been registered for at least two years prior to the initiation of the public authority’s procedure (in relation to which it is expressing its legal interest), and if it can prove that in that period it actively participated in activities related to environmental protection in the territory of the city or municipality where it has a registered seat in accordance with its Statute.

Such an association shall have the right to file an appeal with the Ministry or file a lawsuit before the competent court for the purpose of challenging the procedural and/or substantive legality of decisions, actions, or omissions.<sup>68</sup> If an association does not meet these requirements, it is not assumed to belong to the ‘public concerned.’ This does not prevent the association from proving its legal interest in a procedure; rather, such an interest is not assumed.<sup>69</sup> With respect to individuals, pursuant to the EPA, any natural or legal person who can prove a violation of his/her right due to the location of the project and/or the nature and impact of the project or which is affected or is likely to be

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<sup>64</sup> Ofak 2014, 1003–1004.

<sup>65</sup> Ofak 2014, 1004.

<sup>66</sup> Ofak 2014, 1004.

<sup>67</sup> Ofak 2014, 1005.

<sup>68</sup> Ofak 2020, 335–336.

<sup>69</sup> Ofak 2020, 336.

affected by environmental damage shall have the right to instigate a legal action against an administrative act of a public authority, and may file an appeal with the Ministry or file a complaint before the competent court in line with the special legislation for the purpose of challenging the procedural and/or material legality of acts, actions, or omissions of public authorities, but only if he/she participated in the procedure as the public concerned (Article 168, para. 1 in connection with Article 167, para. 1).<sup>70</sup>

## 7. Public participation and access to justice in the processes of spatial planning

Spatial planning is extremely important for every country. By spatial plans, the means of use of space is regulated. One must also consider that space is a limited resource and that it should be carefully used, with the future in mind in such limitations.<sup>71</sup> Because of the importance of spatial planning, it is paramount to establish the surveillance of the public regarding the making of spatial plans and also regarding individual acts that enable interventions in the space, which must be in accordance with the spatial plan. The public must have an insight into the complete process of making spatial plans of all levels so it can correct mistakes and/or illegalities with special regard to environmental protection and quality space management in a timely fashion. Additionally, there must be a special emphasis on the obligation of enabling the public to participate in the procedures of issuing individual acts – location permits, not only in issuing them but also in challenging them in front of the courts.<sup>72</sup> Spatial planning in Croatia is regulated by the Spatial Planning Act, which defines space as an especially valuable and limited national good (Article 2). The system of spatial planning is based on three principal segments: spatial and urbanistic planning, arrangement of settlements and areas outside the settlement, and implementation of spatial planning documents that are interconnected and interdependent.<sup>73</sup> It is also based on the following principles: an integral approach in spatial planning, acknowledging scientific and professionally determined facts, spatial sustainability of development and quality of build, achieving and protecting public and individual interest, horizontal integration in space protection, vertical integration, and public and free access to data and documents important for spatial planning.<sup>74</sup>

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<sup>70</sup> Ofak 2020, 336. Arguably, this provision of the EPA, which requires the participation of individuals in the administrative procedure as a condition for access to justice in environmental matters, is not in line with the Administrative Disputes Act (OG nos. 20/10, 143/12, 152/14, 94/16, 29/17, 110/21), according to which any natural or legal person who believes that his rights and legal interests were violated may file a lawsuit before the administrative court. Pursuant to the Administrative Disputes Act, there is no obligation to participate in the administrative procedure prior to filing an action before the administrative court, but only a requirement to submit an appeal to the second-instance body if such possibility exists. In addition, it can be argued that the obligation to participate in the administrative procedure as a condition for access to justice in environmental matters is contrary to the Aarhus Convention and the respective EU Directive concerning access to justice in environmental matters. Ofak 2020, 336.

<sup>71</sup> Staničić 2017, 32.

<sup>72</sup> Staničić 2017, 32.

<sup>73</sup> Bienenfeld 2007, 24.

<sup>74</sup> See Article 7.

One should especially highlight the principle of public and free access to data and documents important for spatial planning. This means that there are obligations for the competent bodies as the state and municipalities are obliged to notify the public of the state of the space, enable and encourage its participation by developing social cohesion, and by strengthening the awareness of the need to protect space. The public also has the right to access information on space, which is owned by all public bodies.<sup>75</sup> Public participation in making or changing spatial planning documents is an important element of their making and/or change. Such participation ensures that the broader public that the spatial plan impacts is informed on its making or change. In this manner, the eventual conflicts lessened as various economic interests undoubtedly existed when making or changing spatial plans.<sup>76</sup> Therefore, the carrier of the making/change of a spatial plan is required to inform the public on the municipal website and through the information system of the Croatian Institute for Spatial Development. Neighboring cities and municipalities are to be also informed in writing, as they are also entitled to participate in the making/change of a spatial plan, as it can influence their rights.<sup>77</sup> There is a mandatory public debate on the proposal of a spatial plan that is open to everyone. The proposal must consist of graphic and textual parts, an explanation, and a summary for the public. Public debate must be publicly announced no later than eight days before it is scheduled. Simultaneously, the proposal of the spatial plan is put into public view.<sup>78</sup> During the duration of the public view, the carrier of the plan is to organize one or more public debates to explain the solutions in the plan or the quashing of a plan. The public debates are first given by the carrier of the plan, experts, and others who are collaborating in the making of the plan. All other participants were entitled to ask questions and put suggestions and objections on the record. All the public is entitled to send written proposals and objections in the deadline previously set in the announcement of the public debate. After the end of the public debate, a report must be prepared during the next 30 days for a new plan and 15 days for the changes. This report must be published on the board and website of the carrier and in the information system.<sup>79</sup> As a result of the public debate, there may be significant changes to the proposal of the spatial plan when a new public debate is required (the public view then takes eight to fifteen days). Before the carrier sends a final proposal of the spatial plan to the representative body to enact it, he is required to deliver to the participants of the public debate a written notice containing an explanation of why their proposals and objection were not fully accepted. The representative body can then enact the spatial plan or its changes. It is important to mention that the legality of a spatial plan can be brought in front of the High Administrative Court of the Republic of Croatia using Article 83 of the Administrative Disputes Act.<sup>80</sup> However, one must state that the carrier is by no means obligated to take

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<sup>75</sup> Staničić 2017, 36.

<sup>76</sup> Staničić 2017, 40.

<sup>77</sup> Staničić 2017, 40.

<sup>78</sup> It lasts differently for different spatial plans. For the State spatial development plan it lasts for 60 days, and for all others 30 days. If only amendments, changes, or quashing of a spatial plan are planned, the public view lasts for 15 days.

<sup>79</sup> Staničić 2017, 42.

<sup>80</sup> Staničić 2017, 45.

into account any suggestions or objections to the proposal of the spatial plan; he is only obliged to explain why he did not take them into account. Therefore, the influence of the public, although the procedure is well-regulated, is weak at best.

Besides the aforementioned way of participating in making/ changing spatial plans, there are other ways<sup>81</sup> in which the interested public can participate in spatial planning, such as the right to obtain a location information,<sup>82</sup> by accessing reports on spatial condition<sup>83</sup> or participating in the issuing of location permits. It is clear that the possibility of participation in the processes of spatial planning is prescribed very broadly but with rather limited effects on the processes themselves. The public is informed and can participate, but the creators of plans are more or less (except politically and/or personally) free to do as they will (if they abide by the plans of a higher order<sup>84</sup>).

## 8. Conclusion

Public participation in environmental matters is important. It would be wrong to assume that only the state is to be the protector of public interest in most matters, especially in environmental ones. As was stated above, the Constitution dictates that everyone is, within the scope of his/her powers and activities, to accord particular attention to the protection of the human environment. Therefore, it is a duty of all, not just the state (although it is primarily the duty of the state according to the Constitution). When we look at constitutional, conventional, and legislative regulations, it is shown in this paper that GAPA is a paramount legal source, in that it enables every person whose rights or legal interests are being decided in an administrative procedure to participate in such a procedure as a party, as this is the only way in which such rights or legal interests can be protected. It has also been shown that GAPA does not allow for the possibility to be granted the status of party to be narrowed down. However, several sectoral laws have provisions to that effect. This means that in administrative procedures carried out according to those laws, persons who do have the right to be granted the status of a party in such procedures do not have this right. Because they are not granted the status of a party, such persons are unable to protect their rights or legal interests during the procedure. Moreover, they are unable to lodge legal remedies, especially the opportunity to seek court protection in administrative disputes. As said, access to court and the right to a fair trial are guaranteed by the Constitution (Article 29 para. 1) and by the European Convention (Article 6 para. 1). Furthermore, the Constitution clearly prescribes that all are equal before the law (Article 14, para. 2), and that all individual acts of public bodies are subject to judicial control (Article 19, para. 2). All this said, it is clear that provisions in sectoral laws that narrow down the opportunity to be granted the status of a party in

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<sup>81</sup> See in Staničić 2017, 45–47.

<sup>82</sup> An act in written form issued by a competent body with the purpose of acquiring information on spatial use, conditions for taking actions in space according to the in force spatial plan.

<sup>83</sup> A document made for the Croatian Parliament or representative body of the municipalities on the status of the space in a four-year timeframe. It contains various information on the spatial development, implementation of spatial plans, suggestions for improving spatial development, etc. They are publicly published and are therefore available to the public.

<sup>84</sup> There is the state plan, regional plan, and municipal plan (in order of relevance).

administrative procedures contrary to GAPA are not aligned with the Constitution. They are also not aligned with the Aarhus Convention, which defines 'the public concerned' far more broadly than the cited sectoral laws. Therefore, such a provision should be annulled by the Constitutional Court<sup>85</sup> (as the Slovenian Constitutional Court had done). This paper has shown that public participation is very broadly regulated with regard to making or changing spatial plans. The public is entitled to know when, how, and in what manner this will be done, and the duty of the carrier of the plan in this regard is strictly prescribed. The public has the right to object in writing or during public debate. However, the impact of public participation is rather limited, as the carrier is only obliged to explain in writing why he did not heed some (or all) suggestions or objections made by the participants. The responsibility (political or personal) of the carrier is the only thing that can make the carrier heed the suggestions or objections made by the participants. Therefore, the final conclusion is that the right to public participation in environmental matters in Croatia is generally sufficiently prescribed (see Article 4 of GAPA and Article 167 of EPA). However, there are sectoral laws that undermine this right, which creates problems in practice that render these laws clearly unconstitutional. In the area of spatial planning, there is a broad possibility of public participation, but with very limited real effects.

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<sup>85</sup> Ofak 2014, 1011; Staničić 2017, 49; Vitez Pandžić 2019, 314.

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