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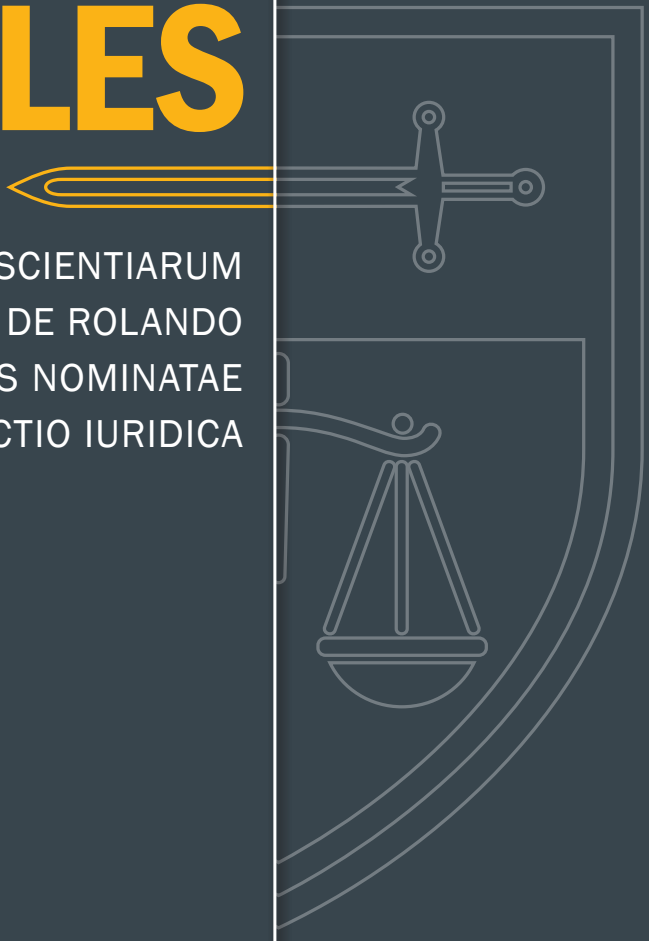
ANNALES

UNIVERSITATIS SCIENTIARUM
BUDAPESTINENSIS DE ROLANDO
EÖTVÖS NOMINATAE
SECTIO IURIDICA



2017
BUDAPEST

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TOMUS LVI.

ELTE | LAW

Budapest, 2017

Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae
Established in 1959

Contact: annales@ajk.elte.hu
Eötvös Loránd University, Faculty of Law
H-1053 Budapest, Egyetem tér 1–3. www.ajk.elte.hu/annales

DOI: 10.56749/annales.elteajk.2017.lvi

ISSN 0524-899X (Print)
ISSN 2939-6263 (Online)

Editorial work: Eötvös University Press
H-1088 Budapest, Múzeum krt. 4.
Executive Publisher: the Executive Director of Eötvös University Press
Layout: János Csánki
Cover: Ildikó Kmotrik
Printed by: Multiszolg Ltd

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Hoffman, István

Preface to the Issue of the Annales

Local governance and municipalities play an important role in the provision of public services. Modern municipal systems evolved after the mid-19th century. This period was not only the beginning of modern public administration and administrative law in Europe, but also the era of the industrial revolution, which transformed Europe. The administrative systems have been transformed during the last two centuries. Welfare states evolved during the 20th century, and the role of public services provided by public bodies increased. Public service provision has been influenced by European integration and the multilayer governance of Europe resulted in new challenges.

Because the phenomena of public service provision and autonomous bodies can be interpreted as a complex one, different approaches are applied for analysing them. The different regulations on service provision are compared, but with a new approach formed by the evolution of administrative sciences: comparative local governance and the comparison of the different socio-economic systems has become a recent topic for different types of publications. Multi- and interdisciplinary analyses have evolved during the last decades: clearly, discrete legal, economic, social etc. analyses could not show the whole picture of these phenomena. This interdisciplinary approach is similar to a kaleidoscope: if not in motion, we can only see colourful pieces of glass. When the kaleidoscope begins to move, it creates beautiful patterns.

As such, these phenomena cannot be analysed in a monochrome work. Important transformations of the last decades, such as the revolutionary progress of ICT, the fourth industrial revolution and Industry 4.0 transformed the socio-economic environment, and European integration has created and faced new challenges; for example the joint monetary system can be interpreted as a new economic environment for these services. The economic crisis in 2008/2009 hit European systems as well, and new challenges and threats have emerged. Recentralisation tendencies have evolved and the concentration of service provision became a more recent issue.

This issue of the *Annales* is intended to be a kaleidoscope: it focuses on the different approaches and phenomena of public service provision. It contains traditional legal analyses, but even sociological, political, geographical and economic analyses can be found here. Not only are the methods used in the chapters in this book diverse, it analyses different elements and phenomena as well.

Interdisciplinarity is also represented by the authors of the journal. Although the majority of them can be classified as (administrative) lawyers, other fields of jurisprudence – for example European Union law and civil law – are represented by the

authors as well. Economists and experts in regional studies can be found among them to mirror the wide scope of administrative sciences. The articles of the issue are based on a conference organised by the Department of Administrative Law of the Faculty of Law of ELTE Budapest. The participants represented the United Kingdom, Italy, Portugal, Slovenia, Slovakia, Portugal and Serbia. The conference *'Public Services and Autonomies in the Member States of the European Union'* was held in 2017 with a focus on recent questions of the local public service provision in Europe and was supported by the Ministry of Justice of Hungary. We would like to express our gratitude to the patron of this conference.

We wish for the readers of this issue of the *Annales* to see the colourful picture of the 'kaleidoscope' of European public service provision systems, offering different but at the same time very similar views on the transformation of the European systems.

Ahrens, Martin*

Die Bedeutung der Verfahrensgrundsätze am Beispiel der Öffentlichkeit im deutschen Zivilprozess – Vergangenheit, Gegenwart, Zukunft

Abstract

General principles of procedure are important to identify and compare the structure of the procedural design. In the German procedural laws publicity is a general principle of procedure with a specific meaning. It´s role changed during the centuries from an essential element of conflict resolution to the control of state power in the court. Publicity in the courtroom in that meaning was an important requirement of the civil society in the 19th century. At the end of the 19th century it took place in the German *Gerichtsverfassungsgesetz*. By now it is an element of constitutional and European law. A partly assumed new dimension is media publicity in the court.

Keywords: general principles of procedure, publicity in civil procedure, historical, constitutional and European dimensions of procedural publicity, media publicity

I. Die juristische „Entdeckung“

Die Beschäftigung mit abstrakt formulierten Verfahrensgrundsätzen oder, wie es vor allem früher auch hieß, mit den Prozessmaximen,[1] beginnt mit *Nikolaus Thaddäus von Gönners* (1764–1827)[2] zwischen 1801 und 1803 in erster Auflage erschienenem Handbuch des deutschen gemeinen Prozesses.[3] Darin konzipierte er weniger ein vollständiges zivilprozessuales System, vielmehr warf er zentrale Fragen auf, um diese nach prinzipiellen Gesichtspunkten zu erörtern.[4] Erleichtert wurde der Zugang zu den systematischen

* Prof. Dr. Martin Ahrens ist Inhaber des Lehrstuhls für Bürgerliches Recht, Anwaltsrecht und Zivilprozessrecht.

1 Stein/Jonas/Kern, *ZPO,* 23. Aufl., vor § 128 Rn. 3; Prütting/Gehrlein/Prütting, *ZPO,* 13. Aufl., Einleitung, Rn. 23.

2 Holzhauer, Gönner, *Handwörterbuch zur Deutschen Rechtsgeschichte (HRG),* (1971) Sp. 1755.

3 Ahrens, *Prozessmaximen, HRG,* 2. Aufl., Sp. 916.

4 Stintzing/Landberg, *Geschichte der deutschen Rechtswissenschaft,* Abt. 3, Halbbd. 2, Text, Nachdruck (1978) S. 148.

DOI: 10.56749/annales.elteajk.2017.lvi.1.7

Gestaltungen durch grundsätzlich formulierte Alternativen. Auf der Grundlage dieser vernunftrechtlich geprägten Konzeption entwickelte er das Begriffspaar der Verhandlungs- und Untersuchungsmaxime.[5] In ihnen erkannte er allgemeine, mit reinen Vernunftsätzen übereinstimmende Grundsätze einer Ordnung des gerichtlichen Verfahrens.[6] Beide Maximen wollte er sowohl empirisch, als dem deutschen gemeinen Prozess innewohnend, als auch normativ verstehen, als Anforderung an die Gesetzgebung.[7]

Neu waren nicht die mit den Prozessmaximen formulierten Problemlösungen, sondern ihr methodisch eigenes, modellhaftes Verständnis und ihre Erhöhung, aber wohl auch Überhöhung. Bereits im romanisch-kanonischen Prozessrecht waren leitende Verfahrensregeln bekannt, die dann oft in Parömien aufgenommen wurden.[8] Beispielhaft steht dafür das Rechtssprichwort *„quod non est in actis, non est in mundo"*.[9] Überhaupt prägten bereits im romanisch-kanonischen Prozess bestimmte Grundkonstanten das Erscheinungsbild des Verfahrens,[10] doch fehlte eine großräumig verallgemeinernde wissenschaftliche Erfassung.

Gönners Prinzipienbildung fiel auf einen fruchtbaren Boden, denn für die entstehende systematisch ausgerichtete Prozessrechtswissenschaft waren damit klare Orientierungsmuster formuliert. Binnen kurzer Zeit erwuchsen die Prozessmaximen zum allgemeinen verfahrensrechtlichen Gedankengut.[11] In einer raum- und gegenstandsumgreifenden Entwicklung wurden sie auf andere prozessuale Elemente erstreckt, die vielfach in Gegensatzpaaren operationalisiert wurden. Zu nennen sind Öffentlichkeit oder Heimlichkeit, Mündlichkeit oder Schriftlichkeit, Dispositions- oder Offizialgrundsatz bzw. Unmittelbarkeit oder Mittelbarkeit. Der Erfolg der Maximenkonstruktionen beruhte jedoch nicht allein und vielleicht nicht einmal erstrangig auf ihren verfahrensrechtlichen Systematisierungsleistungen. Wegen ihrer plakativen Aussagen ließen sich insbesondere in der Zeit zwischen Restauration und bürgerlicher Revolution die Forderungen nach Öffentlichkeit und Mündlichkeit als Schlagworte im politischen Meinungskampf einsetzen.[12]

Einer kritischen Dekonstruktion konnten allerdings die vielfach übersteigerten Gedankenführungen nicht standhalten.[13] Exemplarisch für sie steht, wenn nach *Gönner*

[5] Gönner, *Handbuch des deutschen gemeinen Prozesses,* 2. Aufl., (1804) 1. Bd., S. 175 ff.
[6] Gönner, *Handbuch des deutschen gemeinen Prozesses,* 2. Aufl., (1804) 1. Bd., S. 177.
[7] Gönner, *Handbuch des deutschen gemeinen Prozesses,* 2. Aufl., (1804) 1. Bd., S. 178.
[8] Ahrens, *Prozessmaximen, HRG,* 2. Aufl., Sp. 916 f.
[9] Nörr, *Romanisch-kanonisches Prozessrecht,* (2012) S. 47, https://doi.org/10.1007/978-3-642-23483-5
[10] Nörr, *Ein geschichtlicher Abriss des kontinentaleuropäischen Zivilprozesses,* (2015) S. 18.
[11] Bomsdorf, *Prozessmaximen und Rechtswirklichkeit,* (1971) S. 159 ff. https://doi.org/10.3790/978-3-428-42359-0
[12] Fögen, *Der Kampf um Gerichtsöffentlichkeit,* (1974) S. 122, https://doi.org/10.3790/978-3-428-43034-5; Ahrens, *Prozessreform und einheitlicher Zivilprozess,* (2007) S. 81 f., 154.
[13] Bomsdorf, *Prozessmaximen und Rechtswirklichkeit,* S. 146 ff.; Wassermann, *Der soziale Zivilprozeß,* (1978) S. 108 f.

die Verhandlungs- und Untersuchungsmaxime auf den Gegensätzen „nichts von Amts wegen" bzw. „alles von Amts wegen" beruhten.[14] Eine rigide Maximenkritik sah darin eine – so wörtlich – „einzigartige Fehlabstraktion",[15] die den analytischen Wert der Prinzipienkonstruktion für die Prozessrechtswissenschaft weithin infrage stellte.

Zwischenzeitlich hat sich jedoch die Diskussion von diesen konzeptionellen Extrempunkten entfernt und deswegen weitgehend beruhigt.[16] Terminologisch kommt dies auch in der Abwendung von den Prozessmaximen und der Hinwendung zu den sprachlich flexibleren Verfahrensgrundsätzen[17] oder -prinzipien zum Ausdruck. So besteht gegenwärtig ein weitgehender Konsens über den weder zu übersteigernden noch zu gering zu schätzenden Wert der erkenntnisleitenden Funktion dieser Prinzipienbildungen.[18]

II. Leistungen und Leistungsgrenzen von Verfahrensgrundsätzen

Verfahrensgrundsätze fassen die fundamentalen Entscheidungen bei der Konstruktion eines gerichtlichen Verfahrens zusammen. Sie können in einem engen Sinn auf die innere Struktur des Verfahrens[19] oder umfassender – wie zumeist – auf die Gestaltung des Verfahrensablaufs sowie die verfahrensrechtliche Aufgabenverteilung zwischen Gericht und Parteien[20] oder nahezu konturenlos auf sämtliche prinzipielle Wertungen bzw. übergeordneten Grundsätzen[21] oder allgemeine Regeln[22] bezogen werden. Ihre Modellierungen spiegeln seit den Anfangstagen der Maximendiskussion die gesellschaftlichen und rechtspolitischen Entwicklungen wider.

Disposition- und Offizialgrundsatz sowie Verhandlungs- und Untersuchungsprinzip können auch als Faktoren im Wettstreit zwischen den erwachenden Kräften

[14] Gönner, *Handbuch des deutschen gemeinen Prozesses,* 1. Bd., S. 183 f.
[15] Bomsdorf, *Prozessmaximen und Rechtswirklichkeit,* S. 146.
[16] Prütting/Gehrlein/Prütting, *ZPO,* 13. Aufl., Einleitung, Rn. 23.
[17] Z.B. bei Rosenberg/Schwab/Gottwald, *Zivilprozessrecht,* 18. Aufl., § 76 ff.; Stein/Jonas/Kern, *ZPO,* 23. Aufl., vor § 128 Rn. 3; Zöller/Greger, *ZPO,* 33. Aufl., vor § 128 Rn. 2; Musielak/Voit/Musielak, *ZPO,* 18. Aufl., Einl. Rn. 26; anders Wieczorek/Schütze/Prütting/Gebauer, *ZPO,* 5. Aufl., Einleitung Rn. 80; MünchKommZPO/Rauscher, Einleitung Rn. 335.
[18] Vgl. Braun, *Lehrbuch des Zivilprozessrechts,* (2014) S. 70; Wieczorek/Schütze/Prütting/Gebauer, *ZPO,* 5. Aufl., Einleitung Rn. 80.
[19] Braun, *Lehrbuch des Zivilprozessrechts,* (2014) S. 70.
[20] Stein/Jonas/Kern, *ZPO,* 23. Aufl., vor § 128 Rn. 7; MünchKommZPO/Rauscher, 6. Aufl., Einleitung Rn. 335; Prütting/Gehrlein/Prütting, *ZPO,* 13. Aufl., Einleitung, Rn. 23; Musielak/Voit/Musielak, *ZPO,* 18. Aufl., Einl. Rn. 26; Ahrens, *Prozessmaximen, HRG,* 2. Aufl., Sp. 915 f.; Vollkommer, Verfahrensgrundsätze des Zivilprozesses, in Lüke/Prütting, *Lexikon des Rechts, Zivilverfahrensrecht,* (1989) S. 337.
[21] Zöller/Greger, 33. Aufl., vor § 128 Rn. 2; kritisch Stein/Jonas/Leipold, *ZPO,* 22. Aufl., 2005, vor § 128 Rn. 3.
[22] Hk-ZPO/Saenger, 9. Aufl., Einführung Rn. 43.

der bürgerlichen Gesellschaft und der öffentlichen Gewalt gedeutet werden. Öffentlichkeit und Mündlichkeit sind etwa in ihrer liberalen Dimension als Bauelemente eines demokratisch kontrollierten Rechtsstaats zu verstehen. So verstanden, gestalten die Verfahrensprinzipien auch die grundlegenden gesellschaftspolitischen Anforderungen an das Zivilverfahren aus.

Die nicht selten ebenfalls unter die Verfahrensgrundsätze eingeordneten verfassungsrechtlichen Anforderungen an den Zivilprozess und insbesondere die Verfahrensgrundrechte[23] können als Teil der Entwicklung zum Verfassungsstaat angesehen werden. Diese Konstitutionalisierung bildet eine moderne Stufe der gesellschaftlichen Entwicklung. Während jedoch Verfahrensgrundsätze leitende Elemente einer Prozessart kennzeichnen, normieren Prozessgrundrechte allgemeine Anforderungen an Verfahrensformen unter einer Verfassung. Sie sind deswegen nicht geeignet, um qualifizierende Unterschiede zwischen den verschiedenen, vom Mantel einer Konstitution umhüllten Prozessordnungen zu bezeichnen.[24]

Typischerweise besitzen die Verfahrensprinzipien keine Rechtsnormenqualität,[25] was im Einzelfall eine Positivierung nicht ausschließt. So ist etwa der Mündlichkeitsgrundsatz in § 128 I ZPO verankert. Auf die Besonderheiten des Öffentlichkeitsgrundsatzes wird noch einzugehen sein. Verfahrensgrundsätze fungieren als systematische Bindeglieder zwischen den Prozesszwecken und den verfahrensrechtlichen Einzelnormen.[26] Damit erleichtern sie eine Verständigung über Zusammenhänge und die Lösung konkreter Einzelfragen.[27] Methodisch ermöglichen sie teleologische Auslegungsansätze sowie die Schließung von Gesetzeslücken.[28] Rechtsdogmatisch übersetzt, besitzen Verfahrensgrundsätze keinen absoluten Geltungsanspruch bzw. keine umfassende Bindung, sondern lassen Ausnahmen zu.[29] Sie müssen also weder formuliert noch überhaupt ausdrücklich angeordnet sein. Prozessgrundsätze schärfen in der Auseinandersetzung das Bewusstsein für die Ordnungsaufgaben und die konzeptionelle Ausgestaltung des Verfahrens.

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[23] Musielak/Voit/Musielak, *ZPO,* 18. Aufl., Einl. Rn. 27; Zöller/Greger, 33. Aufl., vor § 128 Rn. 2 ff.; differenzierend Stein/Jonas/Kern, *ZPO,* 23. Aufl., vor § 128 Rn. 8; Hk-ZPO/Saenger, 9. Aufl., Einführung Rn. 43.

[24] Ahrens, *Prozessmaximen, HRG,* 2. Aufl., Sp. 919.

[25] Prütting/Gehrlein/Prütting, *ZPO,* 13. Aufl., Einleitung Rn. 23; MünchKommZPO/Rauscher, 6. Aufl., Einleitung Rn. 336; Vollkommer, Verfahrensgrundsätze des Zivilprozesses, in Lüke/Prütting, *Lexikon des Rechts, Zivilverfahrensrecht,* (1989) S. 337.

[26] MünchKommZPO/Rauscher, 6. Aufl., Einleitung Rn. 336; Braun, *Lehrbuch des Zivilprozessrechts,* (2014) S. 71.

[27] Prütting/Gehrlein/Prütting, *ZPO,* 13. Aufl., Einleitung, Rn. 23.

[28] MünchKommZPO/Rauscher, 6. Aufl., Einleitung Rn. 336; Vollkommer, *Verfahrensgrundsätze des Zivilprozesses,* S. 337.

[29] Stein/Jonas/Kern, *ZPO,* 23. Aufl., vor § 128 Rn. 9; Vollkommer, Verfahrensgrundsätze des Zivilprozesses, in Lüke/Prütting, *Lexikon des Rechts, Zivilverfahrensrecht,* (1989) S. 337; s.a. *Bericht der Kommission zur Vorbereitung einer Reform der Zivilgerichtsbarkeit,* (1961) S. 173.

III. Öffentlichkeit – ein etwas anderer Verfahrensgrundsatz

Aus dieser Leistungsbeschreibung der Prozessgrundsätze fällt die Öffentlichkeit des Verfahrens in verschiedener Hinsicht heraus. Begrifflich lässt sie sich jedenfalls auf den ersten Blick nur schwer auf eine innere Verfahrensstruktur, sondern allenfalls auf die Gestaltung des Verfahrensablaufs beziehen. Obwohl die Öffentlichkeit ganz überwiegend zu den Verfahrensgrundsätzen gezählt wird,[30] rechnen einige Stimmen in der Literatur sie wohl auch wegen ihrer besonderen Erscheinung nur zu den Umständen der gerichtlichen Tätigkeit.[31] Vereinzelt wird in dem Attribut der Öffentlichkeit des gerichtlichen Verfahrens sogar nur eine formale Kategorie gesehen.[32] Obwohl solche terminologischen Anknüpfungen eher äußerlich bleiben und sachlich nur wenig weiterführen, zeigen sie bereits im ersten Zugriff eine erhebliche Meinungsbreite dabei auf, wie die Öffentlichkeit des gerichtlichen Verfahrens systematisch eingeordnet wird.

Bereits die normative Ausgestaltung der Öffentlichkeit begründet einen von den sonstigen Prozessgrundsätzen abweichenden, eigenständigen Fixpunkt. Die Öffentlichkeit des Verfahrens ist gerichtsverfassungsrechtlich in § 169 GVG sowie in den Art. 6 I EMRK und Art. 47 II der Europäischen Grundrechtscharta (EuGRC) positivrechtlich ausgeformt und verfestigt. Mit diesen Gesetzesnormen wird der bindende Charakter des Öffentlichkeitsgrundsatzes statuiert. Diese gerichtsverfassungs- und grundrechtlichen Positivierungen entkoppeln die Gerichtsöffentlichkeit von der sonstigen, eher exegetischen Aufgabe der Prozessgrundsätze. Auch dadurch fehlt ihr die methodische Flexibilität anderer Verfahrensgrundsätze, wie etwa des Verhandlungsgrundsatzes. Zugleich erhält sie dadurch eine von dem konkreten Prozessmodell unabhängigere Struktur.

Näher an den verfahrensrechtlichen Kern führt die Überlegung, was die Öffentlichkeit des Verfahrens zu leisten imstande sein kann oder soll. Bemerkenswerterweise hat sich trotz der seit über 140 Jahren und, wenn man die partikularen Regelungen hinzunimmt, noch länger bestehenden normativen Auskleidung der Gerichtsöffentlichkeit die Aufgabenbestimmung als besonders wandlungsfähig erwiesen. Gerade die früher der Öffentlichkeit beigemessene Sicherungs- und Kontrollfunktion[33] weist über eine

[30] MünchKommZPO/Rauscher, 6. Aufl., Einleitung Rn. 428; Stein/Jonas/Kern, *ZPO,* 23. Aufl., vor § 128 Rn. 332; Prütting/Gehrlein/Prütting, *ZPO,* 13. Aufl., Einleitung Rn. 33; Wieczorek/Schütze/Prütting/Gebauer, *ZPO,* 5. Aufl., Einleitung Rn. 100; Musielak/Voit/Musielak, *ZPO,* 18. Aufl., Einl. Rn. 49; Zöller/Greger, *ZPO,* 33. Aufl., vor § 128 Rn. 2; Hk-ZPO/Saenger, 9. Aufl., Einführung Rn. 73; Nikisch, *Zivilprozeßrecht,* (1950) S. 199; Schilken, *Zivilprozessrecht,* 7. Auf., Rn. 381.

[31] Rosenberg/Schwab/Gottwald, *Zivilprozessrecht,* 17. Aufl., § 21 Rn. 12 ff.; Schilken, *Gerichtsverfassungsrecht,* 4. Aufl., Rn. 154; auch Thomas/Putzo/Reichold, *ZPO,* 42. Aufl., Einl I Rn. 1 ff., führen die Öffentlichkeit nicht bei den wesentlichen Prozessgrundsätzen auf.

[32] Rohde, *Die Öffentlichkeit im Strafprozeß,* 1972, S. 46, der dennoch, S. 50, von einer Verfahrensmaxime spricht.

[33] Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 1; zu den Veränderungen unten V.1.*b).*

zweidimensionale Aufgabenverteilung zwischen Gericht und Parteien hinaus. Über diesen Drittbezug, sei es als Einbeziehung einer personalen Allgemeinheit, sei es als staatsrechtliche Funktion, wird die Öffentlichkeit von den Umständen im konkreten Gerichtsverfahren zum nicht ganz kleinen Teil abgelöst.

In dieser Außendimension kommt der von den sonstigen Verfahrensgrundsätzen abweichende besondere Charakter ebenfalls zum Ausdruck. Soweit Prozessprinzipien Grundsätze des Gerichtsverfahrens erklären sollen, die das Handeln der Prozessbeteiligten selbst betreffen, lässt sich die Öffentlichkeit nicht in diesen Rahmen einfügen. Die Öffentlichkeit kann zwar auf im Einzelnen bestimmbare Funktionalitäten für das konkrete Verfahren und wohl auch auf individualrechtliche Formungen bezogen werden. Für einen Verfahrensgrundsatz durchaus untypisch dient sie aber zumindest ebenso einem durch den Zugang der Allgemeinheit vermittelten, vom subjektiven Rechtsschutz zu unterscheidenden Institutionenschutz. Ihre über die konkreten Rechtsschutzinteressen hinausreichende Aufgabe löst sie aus dem Zusammenhang der sonstigen prozessualen Gewährleistungen. Vollständig getrennt ist dieser Kontext jedoch nicht, denn auch hier ist die prozesszweckbezogene Funktion sichtbar und wirksam.

Nicht zufällig weist die Öffentlichkeit des Verfahrens eine lange, wendungsreiche und sehr eigene historische Entwicklung auf. In ihr erweisen sich besonders deutlich die veränderten Aufgabenstellungen und damit die verschiedenartigen Qualitäten dessen, was unter Öffentlichkeit des Verfahrens zu verstehen ist. Letztlich transportiert der Öffentlichkeitsgrundsatz vielfach zeitbedingte Auffassungen von der Stellung der Rechtspflege im Staat[34] und ist damit durch rechtspolitische und staatsrechtliche Vorstellungen überformt. In einem kurzen Überblick sollen hier zunächst einige Aspekte schlaglichtartig beleuchtet werden. Bei dieser *Tour d´Horizon* durch Vergangenheit, Gegenwart und Zukunft der Gerichtsöffentlichkeit werden die zahlreichen komplexen Einzelfragen jeweils nur kurz angerissen, um einen allgemeinen Eindruck von Entwicklungsverläufen und Aufgabenstellungen zu vermitteln.

IV. Tiefe historische Wurzeln

1. Mittelalter und frühe Neuzeit

a) Öffentlichkeit als Funktion der Konfliktlösung

Im rechtsgeschichtlichen Zeitraffer können einige Entwicklungsschritte bei dem öffentlichen Gerichtsverfahren aufgezeigt und dadurch Strukturwandlungen sichtbar

[34] Vgl. *Bericht der Kommission zur Vorbereitung einer Reform der Zivilgerichtsbarkeit,* (1961) S. 172.

gemacht werden.[35] Durch die Abstraktionshöhe der anschließenden Überlegungen gehen partikulare Unterschiede ebenso verloren wie die Verschiedenartigkeit der untergerichtlichen gegenüber den obergerichtlichen oder gar reichskammergerichtlichen Verfahren. Nahezu selbstverständlich mutet schließlich die Aufforderung an, mittelalterliche Erscheinungen nicht mit modernen Inhalten der öffentlichen Gerichtsbarkeit zu füllen.[36]

Eine weitgehend schriftlose Gesellschaft ohne eine verwissenschaftlichte Rechtsanwendung und einen staatlichen Rechtsdurchsetzungszwang musste zu ganz eigenen Konfliktlösungen gelangen.[37] Die frühmittelalterliche dinggenossenschaftliche Rechtsbildung wurde maßgeblich im Konsens der Betroffenen vollzogen,[38] da ihr andere Instrumente der Rechtsdurchsetzung fehlten. Obwohl es vielleicht nicht auf die Zahl der Urteiler ankam,[39] existierten offenbar doch dinggenossenschaftliche Gerichtsversammlungen mit der Teilnahme sämtlicher waffenfähiger Männer der Genossenschaft.[40] Dann war Öffentlichkeit notwendig ein konstitutives Element der konsensbezogenen Rechtsfindung.[41] Es existierte eben keine Trennung zwischen Gericht und Publikum.[42] Im germanischen Rechtsgang kann Öffentlichkeit insoweit auf den Akt der Rechtsbildung selbst bezogen und als essenzieller Bestandteil der Konfliktlösung interpretiert werden.[43]

Die ersichtlich schwerfällige Dingversammlung wurde in der karolingischen Zeit durch kleinere Versammlungen mit einem beschränkten Urteiler- bzw. Schöffenkreis für weniger bedeutsame Konflikte beschränkt.[44] Damit ging die ursprüngliche Aufgabe der Öffentlichkeit der rechtlichen Konfliktlösung in der und durch die Gemeinschaft zumindest partiell verloren. Dennoch bildet für eine grundsätzlich orale Gesellschaft die mündliche und öffentliche Versammlung die geeignete Kommunikationsgrundlage.[45] Zudem war die Eidesleistung, sei es als Urteilserfüllungseid[46] oder sei es der als irrationales Beweismittel eingesetzte Reinigungseid, auf eine öffentliche Erbringung gegenüber der Gemeinschaft angelegt. Öffentlichkeit stellte insoweit ein Element der Förmlichkeit und der sozialen Kontrolle dar.

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35 Zum Folgenden Ahrens, *Öffentlichkeit, HRG,* 2. Aufl., Sp. 113 ff.
36 Weitzel, *Dinggenossenschaft und Recht,* (1985) 1. Bd., S. 24.
37 Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren,* (2015) S. 17.
38 Weitzel, *Dinggenossenschaft und Recht,* (1985) 1. Bd., S. 92.
39 Weitzel, *Dinggenossenschaft und Recht,* (1985) 1. Bd., S. 125, 131, 147.
40 Kern, *Geschichte des Gerichtsverfassungsrechts,* (1954) S. 1.
41 Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren,* (2015) S. 59 f.; Ahrens, *Öffentlichkeit, HRG,* 2. Aufl., Sp. 114.
42 Rohde, *Die Öffentlichkeit im Strafprozeß,* (1972) S. 51 f.; Alber, *Die Geschichte der Öffentlichkeit im deutschen Strafverfahren,* (1974) S. 12, https://doi.org/10.3790/978-3-428-43240-0
43 Ahrens, *Öffentlichkeit, HRG,* 2. Aufl., Sp. 114.
44 Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren,* (2015) S. 59 f.
45 Ahrens, *Öffentlichkeit, HRG,* 2. Aufl., Sp. 114.
46 Kaufmann, *Urteilserfüllung, HRG,* Sp. 617 f.

***b)* Durchbrechungen und Funktionsverluste**

Verschiedene Entwicklungen höhlten die Öffentlichkeit immer mehr aus, bis hin zu einem weitgehenden Funktionsverlust und letztlich ihrer partiellen Aufgabe.[47] Bei der herausgebildeten Urteilsschelte[48] konnte eine Partei oder ein anderer Schöffe den Urteilsvorschlag anderer Schöffen kritisieren. Infolgedessen wurde ein anderes Gericht, regelmäßig wohl ein Oberhof, um eine Entscheidung ersucht, die dann vom örtlichen Gericht verkündet wurde. Dabei existierten offenbar unterschiedliche Gewohnheiten darüber, welche Gerichtspersonen und Parteien an den Sitz des Oberhofs reisten.[49] Jedenfalls für diesen Zwischenschritt stellte die Öffentlichkeit kein konstituierendes, sondern ein allenfalls akzidentielles Element der Rechtsbildung dar.

Aus diesem mittelalterlichen Gebrauch der Urteilsschelte[50] entstand im gelehrten Recht das Institut der Aktenversendung. Urteiler, die das gelehrte Römische Recht nicht hinreichend beherrschten, konnten die Akten an ein anderes Spruchkollegium oder eine Juristenfakultät versenden. Die Aktenversendung schloss praktisch eine Öffentlichkeit aus,[51] zumal es funktional um einen einzuholenden Rechtsrat ging und die juristischen Fakultäten kaum auf die Durchführung von Verhandlungen eingerichtet waren. Dennoch bestand im romanisch-kanonischen Prozess zumindest bei Verkündung des Urteils Publizität, verstanden als Partei- und Publikumsöffentlichkeit.[52]

Existenzbedingung der Aktenversendung bildete ein schriftliches Verfahren. Ausgehend vom kanonischen Prozess wurde eine immer engmaschigere Verschriftlichung des gelehrten Zivilprozesses geschaffen.[53] Die zunächst nur angeordnete Protokollierung richterlicher Handlungen veranlasste die Parteien dazu, ihre Sachvorträge sowie Angriffs- und Verteidigungsmittel langwierig zu Protokoll zu diktieren. Dieses umständliche Verfahren untersagte etwa Theil 1, Tit. XI, § 5 der Reichskammergerichtsordnung von 1555, s.a. Theil 3, Tit. XV, § 2 f., weswegen die Parteien ihre Vorträge zunehmend schriftlich einreichen mussten. Die so entstandenen Prozessakten bildeten schließlich die alleinige Entscheidungsgrundlage.[54]

Durch die Ortsferne, gerade der Obergerichte, nur schwer überbrückbare Distanzen und sprachliche Hürden aufgrund lateinischer Distinktionen im gelehrten Prozess führten zu weiteren natürlichen Schranken. Unter diesen Umständen büßte

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47 Ahrens, *Öffentlichkeit, HRG,* 2. Aufl., Sp. 114 f.
48 Kaufmann, *Urteilsfindung – Urteilsschelte, HRG,* Sp. 620.
49 Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren,* (2015) S. 93.
50 Dahlmanns, *Strukturwandel des deutschen Zivilprozesses im 19. Jahrhundert,* (1971) S. 18 Fn. 21; Wetzell, *System des ordentlichen Civilprocesses,* 3. Aufl., (1878) S. 536 f.
51 Wetzell, *System des ordentlichen Civilprocesses,* 3. Aufl., (1878) S. 536 ff.; Bayer, *Vorträge über den deutschen gemeinen ordentlichen Civilproceß,* 9. Aufl., (1865) S. 284 f.
52 Nörr, *Ein geschichtlicher Abriss des kontinentaleuropäischen Zivilprozesses,* (2015) S. 31.
53 Nörr, *Romanisch-kanonisches Prozessrecht,* (2012) S. 46.
54 Zur Parömie „quod non est in actis, non est in mundo" bereits oben; Nörr, *Romanisch-kanonisches Prozessrecht,* (2012) S. 47; Ahrens, *Prozessreform und einheitlicher Zivilprozess,* (2007) S. 16.

Öffentlichkeit ihren Sinn ein,[55] auch wenn sie noch nicht ganz verloren gegangen war. Die Tür für das Publikum fiel langsam zu. Dennoch blieb wohl auch die Grenzziehung zwischen Öffentlichkeit und Heimlichkeit, wie die zwischen Mündlichkeit und Schriftlichkeit,[56] wesentlich vom partikularen Recht und dem Gerichtsgebrauch bestimmt. Zu kennzeichnen ist die Tendenz, nicht das Detail. Umgekehrt sollte die Heimlichkeit als Widerpart der Öffentlichkeit dazu dienen, den Richter vor sachfremden Einflüssen zu schützen.[57] Damit entsprach sie durchaus dem Modell einer rationalen Rechtsfindung.

2. Öffentlichkeit als Reformpostulat im 19. Jahrhundert

a) Französischer Einfluss

Einem erwachenden bürgerlichen Bewusstsein mussten besonders die Berührungspunkte zwischen dem Individuum und der öffentlichen Gewalt als sensible Konfliktstellen erscheinen.[58] Infolgedessen gehörte die Umformung des Zivilrechtsgangs von den veralteten Prozessformen hin zu einem freiheitlichen Verfahren zu den hervorragenden Themen bei der Ausbildung eines vom Bürgertum mitgeprägten Staats. Ganz im Mittelpunkt standen die Forderungen nach Mündlichkeit und Öffentlichkeit.[59]

Ein erstes Leitbild bot der französische Zivilprozess. Im Kontrast zu den vielfach kritikwürdigen gemeinrechtlichen und partikularen Einrichtungen transportierte der *Code de procédure civile* (cpc) einen Geist, aus dem zentrale justizpolitische Forderungen abzuleiten waren.[60] Namentlich betraf dies die Kulturidee eines öffentlichen und mündlichen Verfahrens nach den Art. 87 ff. cpc. Aufgrund der gerade für national geprägte Anschauungen manifesten Diskreditierung französischer Institutionen durch die Besetzungszeit wurde demgegenüber auch ein Anschluss an die altdeutschen Institutionen gesucht.[61] Dennoch blieb insbesondere in den preußischen und bayerischen Rheinlanden das französische Verfahren mit der öffentlichen Prozessform bestehen.

Starken Auftrieb erhielt die Diskussion nach der bürgerlichen Revolution von 1848 durch § 178 S. 1 der Paulskirchenverfassung vom 28.3.1849, die ein öffentliches

[55] Oestmann, *Wege zur Rechtsgeschichte: Gerichtsbarkeit und Verfahren,* (2015) S. 118.
[56] Nörr, *Ein geschichtlicher Abriss des Kontinentaleuropäischen Zivilprozesses,* (2015) S. 20.
[57] Mit nicht ganz fernen Erwägungen ist in moderner Zeit eine Restriktion der Öffentlichkeit begründet worden, vgl. Bockelmann, (1960) *NJW,* 217, 221.
[58] Mittermaier, *Gemeiner Prozeß,* 1. Beitrag, (1822) S. 8 ff.; Dahlmanns, in Coing (Hrsg.), *Handbuch,* Bd. III/2, S. 2615; Ahrens, *Prozessreform und einheitlicher Zivilprozess,* (2007) S. 1.
[59] Rohde, *Die Öffentlichkeit im Strafprozeß,* (1972) S. 90; s.a. Gierhake, (2013) *JZ,* 1030, 1032 ff., https://doi.org/10.1628/002268813X13790620720102
[60] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* (2007) S. 81.
[61] Befördert durch das Preisausschreiben der Münchener Akademie von 1821 über das öffentliche Gerichtsverfahren in der altdeutschen Rechtspflege sowie der prämierten Arbeit von Maurer, *Geschichte des altgermanischen und namentlich altbairischen oeffentlich-mündlichen Gerichtsverfahrens,* (1824).

und mündliches Gerichtsverfahren vorschrieb. Fußend auf dem revolutionären Umbruch von 1848,[62] schrieb etwa die Hannoversche Bürgerliche Prozessordnung vom 8.11.1850 (BPO) eine öffentliche Verhandlung vor, die allerdings auf übereinstimmenden Antrag der Parteien oder von Amts wegen ausgeschlossen werden konnte, §§ 87 ff. BPO. Um die Mitte des 19. Jahrhunderts wurde so in zahlreichen deutschen Staaten ein öffentliches Verfahren eingeführt, doch blieben einige Territorien bis zum Inkrafttreten des GVG am 1.10.1879 in dem geheimen gemeinen Zivilprozess verwurzelt. Ganz unterschiedliche Strömungen flossen damit in der Revitalisierung der Öffentlichkeit zusammen.

***b)* Bürgerliche Öffentlichkeit**

Mit der politischen Aufladung und prinzipiellen Ausgestaltung der Öffentlichkeit als Verfahrensgrundsatz veränderte sich ihre Aufgabenstellung. Sie sollte nunmehr der Kontrolle der Zivilrechtspflege[63] und damit dem Schutz der Verfahrensbeteiligten vor willkürlicher obrigkeitlicher Behandlung dienen. Gedacht war an eine bürgerliche Öffentlichkeit,[64] die auch über eine entsprechende Bildung zum Verständnis des Verfahrens und Muße verfügte. Dementsprechend wurde diskutiert, wer diese Kontrollfunktion ausüben könne, wobei vereinzelt eine Beschränkung auf achtbare Männer bzw. die wohlhabende gebildete Klasse gefordert wurde. Frauen sollten ohnedies ganz überwiegend aus dem Gerichtssaal ausgeschlossen sein.[65]

In einer ferneren Wendung kann in der Öffentlichkeit auch ein Element zum Schutz des Richters vor Einmischung anderer staatlicher Instanzen und damit zur Gewährleistung richterlicher Unabhängigkeit erkannt werden. Während die Heimlichkeit vormals vor einer Beeinflussung durch die Parteien schützen sollte, diente die Öffentlichkeit nunmehr dem Schutz vor obrigkeitlicher Gefährdung. Offensichtlich hatte sich die Bedrohungsanalyse gewandelt.

Nicht übersehen werden darf noch eine andere Dimension. Öffentlichkeit bietet stets auch den professionalisierten Advokaten eine große Bühne. Letztlich ermöglicht sie dadurch eine breite Leistungsschau der Advokatur. Dies gilt gleichermaßen für die politische wie die allein forensisch tätige Advokatur. Auch diese Standesinteressen mögen den Ruf nach einem öffentlichen Gerichtsverfahren in Zivilsachen gefördert haben.

Bei diesem Verständnis deutet sich zugleich eine weitere Häutung der Öffentlichkeit an. Öffentlichkeit konnte damit nicht mehr allein auf die Saalöffentlichkeit beschränkt werden. Das Publikum im Gerichtssaal vermochte vielleicht noch die folgerichtige Verhandlung und Entscheidung zu beurteilen sowie die rhetorische und intellektuelle Brillanz der Advokaten zu erkennen. Eine übergreifende Wirkung ermöglichte indessen allein die Weiterung in den medialen Bereich hinein.

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[62] Ahrens, *Prozessreform und einheitlicher Zivilprozess,* (2007) S. 430 ff.
[63] Fögen, *Der Kampf um Gerichtsöffentlichkeit,* (1974) S. 23.
[64] Rohde, *Die Öffentlichkeit im Strafprozeß,* (1972) S. 94.
[65] Fögen, *Der Kampf um Gerichtsöffentlichkeit,* (1974) S. 23.

V. Aktuelle Dimensionen

1. Gerichtsverfassungsrechtliche Ausgestaltung

a) Ausprägungen

Der in § 169 S. 1 GVG formulierte Grundsatz der Öffentlichkeit der Verhandlung bezeichnet das Recht unbeteiligter Dritter, an der Verhandlung vor einem erkennenden Gericht teilnehmen zu dürfen.[66] Verstanden wird darunter die Saalöffentlichkeit,[67] also das Recht, im Gerichtssaal anwesend zu sein. Dieses Zugangsrecht besteht auch für die – teils mittelbar – ermöglichte Medienöffentlichkeit.

Die Parteiöffentlichkeit bezeichnet das Recht der Parteien, an der Verhandlung teilzunehmen und von den Verfahrensakten Kenntnis zu erlangen, etwa nach § 357 ZPO. Ob sie zum Grundsatz der Öffentlichkeit gehört, wird nicht einheitlich beantwortet.[68] Teilweise wird hierin auch eine Ausprägung des rechtlichen Gehörs gesehen.[69]

b) Funktionsveränderungen

Bei den Funktionsbestimmungen der Öffentlichkeit haben sich im Zeitenlauf wesentliche Veränderungen ergeben. Die während der intensiven Auseinandersetzungen über die Einführung des öffentlichen Gerichtsverfahrens im 19. Jahrhundert angeführten Zielsetzungen sind vielfach nur noch von historischem Interesse. Zu denken ist etwa an die Kontrolle der Geschworenen, die Beruhigung für den Angeklagten, die Ehrenrettung für die in Zweifel gezogene Unschuld, die Warnung vor verdächtigen Subjekten u.a. mehr.[70]

Andere Funktionen haben zumindest viel von ihrer früheren Bedeutung verloren. Zu den geradezu klassischen Aufgabenbeschreibungen der Gerichtsöffentlichkeit gehört seit der Aufklärung[71] die Kontrolle des Gerichts und des Verfahrensgangs durch die Allgemeinheit.[72] Gemeint ist damit der Schutz der zivilprozessualen und materiellrechtlichen Institutionen vor einseitiger staatlicher Einflussnahme. Gegenüber einer

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[66] Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 1.

[67] *BVerfG NJW* (2001) 1633, 1634.

[68] Bejahend Feuerbach, *Betrachtungen über die Oeffentlichkeit und Mündlichkeit der Gerechtigkeitspflege,* Bd. 1, (1821) S. 96 ff.; MünchKommZPO/Rauscher, 6. Aufl., Einleitung Rn. 431; verneinend Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 3; Rosenberg/Schwab/Gottwald, *Zivilprozessrecht,* 17. Aufl., § 21 Rn. 23.

[69] Musielak/Voit/Musielak, *ZPO,* 18. Aufl., Einl. Rn. 51; Braun, *Lehrbuch des Zivilprozessrechts,* (2014) S. 146.

[70] Vgl. den Überblick bei Alber, *Die Geschichte der Öffentlichkeit im deutschen Strafverfahren,* (1974) S. 36, 77.

[71] Stein/Jonas/Jacobs, 23. Aufl., § 169 Rn. 4, beschränken die Wurzeln auf diese Zeit.

[72] *BGH NJW* (1977) 157, 158; Stein/Jonas/Jacobs, 23. Aufl., § 169 Rn. 4; Prütting/Gehrlein/Neff, 13. Aufl., § 169 GVG Rn. 2.

solchen Kontrollleistung erscheint inzwischen eine gewisse Skepsis angezeigt. Im gewaltenteilenden Rechtsstaat mit seinen vielfältigen, auch überstaatlichen Sicherungsmitteln und der institutionell hochstabilisierten richterlichen Unabhängigkeit hat diese Gewährleistungsfunktion der Öffentlichkeit viel von ihrer Relevanz verloren.[73] Auch findet die Masse der Gerichtsverfahren ohne Beteiligung der Öffentlichkeit statt. Dieser Gewähr kommt wohl nur noch die Bedeutung einer im Bedrohungsfall aktualisierbaren Reservesicherung zu.

Ein modernes Verständnis erkennt in der Öffentlichkeit von Gerichtsverhandlungen einen Bestandteil des Rechtsstaatsprinzips,[74] der dem allgemeinen Öffentlichkeitsprinzip der Demokratie entspricht.[75] Teilweise wird der Gerichtsöffentlichkeit deswegen Verfassungsrang beigemessen[76] mit der Konsequenz, dass ihre Abschaffung verfassungswidrig wäre[77] und eine Verletzung zum Verfassungsverstoß führen müsste. Ausdrücklich hat demgegenüber das BVerfG in einer inzwischen allerdings gut 50 Jahre alten Entscheidung die Öffentlichkeit der Gerichtsverhandlung nicht als Verfassungsrechtsgrundsatz, sondern als Prozessrechtsmaxime bezeichnet.[78] Inzwischen hat es hierbei einen gewissen Wandel vollzogen.[79]

Zweifellos transportiert die Gerichtsöffentlichkeit einen rechtsstaatlichen Gehalt und spiegelt mit der Zugänglichmachung gerichtlicher Handlungen für den öffentlichen Meinungsbildungsprozess Elemente des Demokratieprinzips wider. Ebenso selbstverständlich ist bei einer dem demokratischen Staat angemessen Rechtspflege[80] ein Dialog zwischen Justiz und Gesellschaft erforderlich.[81] Recht und Gerichte müssen sich den Legitimationsanforderungen der Gesellschaft stellen. An die Stelle der Kontroll- ist damit verstärkt eine Informationsfunktion getreten.[82] Die Verbindung zum verfassungsrechtlichen Rechtsstaats- und Demokratieprinzip wirkt jedoch zu flüchtig, um eine Erhöhung zum Verfassungsgrundsatz des nationalen Rechts rechtfertigen zu können. Gerade die richterliche Unabhängigkeit zeigt Grenzen einer demokratischen Rückkoppelung auf.

Verbreitet wird angenommen, die Öffentlichkeit schütze über die Transparenz des Verfahrens das Vertrauen der Allgemeinheit sowie des konkret Rechtssuchenden in

[73] Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 1; Schilken, *Gerichtsverfassungsrecht,* 4. Aufl., Rn. 155.
[74] *BVerfG NJW* (2012) 1863, 1864.
[75] *BVerfG NJW* (2001) 1633, 1635; Stein/Jonas/Jacobs, 23. Aufl., § 169 Rn. 1; MünchKommZPO/Rauscher, 6. Aufl., Einleitung Rn. 428; Rosenberg/Schwab/Gottwald, Zivilprozessrecht, 17. Aufl., § 21 Rn. 12; Stürner, FS Baur, (1981) S. 647, 660; ähnlich auch *EGMR NJW* (1986) 2177, 2178.
[76] Dürig/Herzog/Scholz/Grzeszick, *GG,* 95. EL., Art. 20 Rn. 34; Stein/Jonas/Jacobs, 23. Aufl., § 169 Rn. 6; Baumbach/Lauterbach/Hartmann/Anders/Gehle/Becker, 79. Aufl., § 169 GVG Rn. 1.
[77] Jarass/Pieroth, *GG,* 16. Aufl., Art. 20 Rn. 19 m.w.N.
[78] *BVerfG NJW* (1963) 757, 758; ablehnend auch Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 2.
[79] *BVerfG* (2001) 1633, 1635; aber *NJW* (2012) 1863, 1864.
[80] Von der Zöller/Lückemann, 33. Aufl., § 169 GVG Rn. 1, spricht.
[81] Fögen, *Der Kampf um Gerichtsöffentlichkeit,* (1974) S. 120.
[82] Vgl. Britz, (2015) (3) *jM,* 127, 129.

die Korrektheit der Entscheidung.[83] Soweit ersichtlich wird diese wiederkehrende Argumentationsfigur nicht systematisch vertieft. Ein entscheidender Erkenntnisgewinn ist aber aus der Rückkoppelung mit den Zwecken des Zivilprozesses zu gewinnen. Ein Verbot der Selbsthilfe setzt einen verlässlichen subjektiven Rechtsschutz voraus, auf den die Parteien vertrauen können. Zudem verlangt die Sicherung des Rechtsfriedens eine Verfahrenstransparenz, die willkürlichem Handeln eine klare Grenze setzt. Hierin erweist sich die einleitend angesprochene Funktion der Öffentlichkeit als Prozessgrundsatz, der ein Bindeglied zwischen den Verfahrenszwecken und prozessualen Einzelvorschriften bildet. Eine gewisse Friktion besteht aber bei dem Schutz subjektiver Rechte, auf die noch zurückzukommen sein wird.

Eine Zwischenstellung nimmt der selbständige Beweisaufnahmetermin ein, der nach § 357 ZPO partei-, aber nicht allgemeinöffentlich ist.[84] Die Beweisaufnahme ist zwar zur Feststellung streitiger Rechte unerlässlich, aber vielleicht doch nicht so eng an die Prozesszwecke angebunden, wie die Verhandlung zur Sache. Insoweit existiert ein grundlegender Unterschied zum Strafprozess. Möglicherweise bieten die eigenen Verfahrenszwecke des Strafverfahrens einen Erklärungsansatz zum Verständnis der dort strengen Durchführung des Öffentlichkeitsprinzips.

***c)* Kollektiv- und individualrechtliche Komponenten**

In dem seit dem 19. Jahrhundert vertretenen staatsgewendeten Verständnis wird Öffentlichkeit als Recht der Allgemeinheit angesehen. Dies gilt gerade auch dann, wenn der Gerichtsöffentlichkeit eine demokratische Komponente unterlegt wird. Unerheblich ist dafür, ob man einen Wandel von einer im Gerichtssaal anwesenden repräsentativen zu einer medial vermittelten kollektiven Öffentlichkeit annehmen will.[85] Diese vergemeinschaftete Rechtsstellung beinhaltet einen gravierenden, ja vielleicht sogar fundamentalen Unterschied zu den sonstigen, auf die prozessuale Stellung der Verfahrensbeteiligten gerichteten Verfahrensgrundsätzen.

Langsam nur gewinnt die Gerichtsöffentlichkeit eine individualrechtliche Komponente. Zuerst ist sie bei der Parteiöffentlichkeit der Beweisaufnahme sichtbar geworden, mit der die Parteien davor geschützt werden sollten, von der Zeugenvernehmung ausgeschlossen werden zu können.[86] Der individualrechtliche Schutz der Parteien scheint noch als Reflex aus dem Zugangsrecht der Allgemeinheit zu resultieren, das die konkrete Verfahrensdurchführung sichern und rechtsstaatlich gewährleisten soll. Primär dient die Parteiöffentlichkeit der Beweisaufnahme im Zivilverfahren jedoch dem Schutz des rechtlichen Gehörs. Insoweit gewinnt die individualrechtliche Dimension

[83] *EGMR NJW* (1986) 2177, 2178; Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 3; Musielak/Voit/Musielak, *ZPO,* 18. Aufl., Einl. Rn. 50; Schilken, *Gerichtsverfassungsrecht,* 4. Aufl., Rn. 155.
[84] Stein/Jonas/Berger, 23. Aufl., § 357 Rn. 1; Zöller/Greger, 33. Aufl., § 357 Rn. 1.
[85] Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 1.
[86] Hahn, *Die gesammten Materialien zu den Reichsjustizgesetzen,* Bd. II, (1880) S. 305.

eine andere Qualität. Sichtbar wird die individuelle Komponente aber etwa beim Akteneinsichtsrecht aus § 299 ZPO, ohne diesem bereits eine unmittelbare Qualität im Rahmen des Öffentlichkeitsgrundsatzes beizumessen.

Inzwischen scheint aber ein Individualschutz vermehrt gegen und nicht durch die Öffentlichkeit erforderlich zu werden, wenn der Schutz von Persönlichkeitsrechten, vor Bloßstellungen oder von betrieblichen Geheimnissen eingefordert wird. Während der Nutzen der Öffentlichkeit für die Prozessparteien oft sehr mittelbar bleibt, können sie die Nachteile sehr unmittelbar erfahren. Ob es weitere Individualisierungen geben wird, ist derzeit aus der Sicht des nationalen Rechts nur schwer zu beantworten.

2. Europäische Einflüsse

a) Art. 6 I EMRK

Nach Art. 6 I 1 EMRK hat jede Person ein Recht auf ein faires öffentliches Verfahren. Die Norm spricht von einem fairen Verfahren, das öffentlich zu verhandeln ist. Ergänzend verlangt Art. 6 I 2 EMRK eine grundsätzlich öffentliche Verkündung des Urteils. Die Funktion dieser Regelungen und die methodische Flexibilität der EMRK belegen die damit intendierte Öffentlichkeit nicht nur von Verhandlung und Verkündung des Urteils, sondern des Verfahrens.

Dieses Recht sichert grundsätzlich jedermann die Zugänglichkeit der Verhandlung.[87] Übereinstimmend mit den nationalen Deutungsansätzen soll dadurch die Transparenz gefördert und das Vertrauen der Öffentlichkeit gewahrt werden.[88] Die Gewährleistung geht aber über diesen kollektiven Bezug hinaus und garantiert auch den Parteien und Beteiligten den Zugang zum Verfahren.[89] Ersichtlich wird diese individualrechtliche Schutzdimension aus der Formulierung in der Konvention, wonach jedermann Recht auf ein öffentliches Verfahren hat. Sie erhält eine eigenständige Gestalt, weil die Rolle als Prozesssubjekt gestärkt werden soll.[90]

b) Art. 47 II EuGRC

Art. 47 II EuGRC eröffnet ebenfalls für jede Person das Recht auf ein faires öffentliches Verfahren und ist insoweit auf Art. 6 I EMRK gegründet.[91] Der Rechtsgewährleistung für jede Person wird – wohl in einer gewissen Überhöhung – ein menschenrechtlicher

[87] Grabenwarter/Pabel, *Europäische Menschenrechtskonvention,* 6. Aufl., § 24 Rn. 86.
[88] Karpenstein/Mayer/Meyer, *EMRK,* 2. Aufl., (2015) Art. 6 Rn. 60; Tubis, *NJW* (2010) 415.
[89] Grabenwarter/Pabel, *Europäische Menschenrechtskonvention,* 6. Aufl., § 24 Rn. 86.
[90] Karpenstein/Mayer/Meyer, *EMRK,* 2. Aufl., (2015) Art. 6 Rn. 60.
[91] Rachauer/Sander/Schlögl, in Holoubek/Lienbacher, *GRC-Kommentar,* (2014) Art. 47 Rn. 4; Jarass, *NJW* (2011) 1393.

Charakter beigemessen.[92] Rückgekoppelt wird sie dann doch wieder an die Kategorien der öffentlichen Kontrolle und des Vertrauens. So können insbesondere die individualrechtlichen Anknüpfungspunkte übertragen werden. Unabhängig von den Formen der nationalen Positivierungen bildet die Öffentlichkeit des Gerichtsverfahrens den europäischen und insb. unionsrechtlichen Standard.

***c)* Datenschutz-Grundverordnung**

Die Datenschutz-Grundverordnung (EU) 2016/679 vom 27.4.2016[93] wird keine den Öffentlichkeitsgrundsatz limitierende Wirkung entfalten. Ihr sachlicher Geltungsbereich ist nach Art. 2 II lit. c) VO auf den Anwendungsbereich des Unionsrechts beschränkt, zu dem das Zivilprozessrecht gerade nicht insgesamt gehört. Selbst wenn das Selbstverständnis der Datenschutz-Grundverordnung ein anderes sein mag, lässt Art. 23 I lit. f) Beschränkungen des Datenschutzes zum Schutz der Unabhängigkeit der Justiz und dem Schutz von Gerichtsverfahren zu. Die vorrangige Stellung des Verfahrensgrundsatzes der Öffentlichkeit ist wohl auch aus Erwägungsgrund 20 abzuleiten. Der in der EMRK und der EuGRC sowie den nationalen Rechten verankerte Öffentlichkeitsgrundsatz berührt die Datenschutz-Grundverordnung nicht.

VI. Entwicklungsperspektiven

1. Medienöffentlichkeit

Seit dem zumindest ungeschickten Umgang des OLG München insbesondere mit der Zulassung ausländischer Medien zum NSU-Verfahren[94] ist die restriktive Einstellung des GVG zu Film-, Funk- und Fernsehaufnahmen verstärkt unter Druck geraten.[95] Originale Ton-, Fernseh- und Filmaufnahmen zum Zwecke der öffentlichen Vorführung sind allerdings nach § 169 I 2 GVG grundsätzlich unzulässig.[96] Das Verbot gilt während, aber nicht vor und nach der Verhandlung.[97]

In mehrfacher Hinsicht ist dieses Verbot durch das Gesetz über die Erweiterung der Medienöffentlichkeit in Gerichtsverfahren vom 8.10.2017[98] aufgebrochen worden.

[92] Meyer/Eser/Kubiciel, *Charta der Grundrechte der EU,* 5. Aufl., Art. 47 Rn. 22.
[93] ABl L 119/1.
[94] Hegmann, (2014) *DRiZ,* 202; Mitsch, (2014) *ZRP,* 137.
[95] Zuvor etwa Kaulbach, (2011) *JR,* 51; Eckertz-Höfer, (2012) *DVBl,* 389; s.a. Rose, (2014) *SchlHA,* 169; von Coelln, (2014) *AfP,* 193.
[96] Stark differenzierend *BVerfG NJW* (2001) 1633, 1636.
[97] *BVerfG NJW* (2001) 1633, 1635; Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 63.
[98] *BGBl. I* (2017) 3546.

Nach § 169 II GVG sind Tonaufnahmen der Verhandlung einschließlich der Verkündung der Urteile und Beschlüsse zu wissenschaftlichen und historischen Zwecken zulässig, wenn es sich um ein Verfahren von herausragender zeitgeschichtlicher Bedeutung für die Bundesrepublik Deutschland handelt. Zudem dürfen in besonderen Fällen für die Verkündung von Entscheidungen des Bundesgerichtshofs Ton- und Fernsehrundfunkaufnahmen sowie Ton- und Filmaufnahmen zugelassen werden. Eine beschränkte Öffnungsklausel enthält außerdem § 17a BVerfGG insbesondere für die Verkündung von Entscheidungen durch das BVerfG.

Trotz dieser vorsichtigen Öffnung im Bereich der Höchstgerichte werden damit audio-visuelle Medien immer noch gegenüber den Printmedien klar zurückgesetzt, die mit ihren Berichterstattern in der Verhandlung zugegen sein können. Letztlich ist dies aber ein Ausdruck der unterschiedlichen Leistungen sowie Wirkungen von Print- und audio-visuellen Medien.

Da das BVerfG in seiner n-tv-Entscheidung[99] vom 24.1.2001[100] einen verfassungsrechtlich verankerten Anspruch auf Eröffnung von Übertragungen aus Gerichtsverhandlungen verneint hat, bleibt es der gesetzgeberischen Abwägung überlassen, ob derartige Übertragungen den Zwecken der Gerichtsöffentlichkeit dienlich und damit zu empfehlen sind. Sicherlich steigert die elektronische Übertragung von Verhandlungen deren Transparenz und intensiviert wohl auch den Dialog zwischen Justiz und Gesellschaft. Unschädlich ist, dass nur wenige Verfahren medienrelevant sind und daher nur eine segmentierte Öffentlichkeit hergestellt wird, denn auch mit diesen Verfahren können substanzielle Themen berührt werden. Beispielhaft seien der NSU-Prozess oder die Kachelmann-Verfahren genannt.

Digitale Medien entsprechen zudem in besonderer Weise den heutigen Konsumgewohnheiten. Dennoch wird durch sie keine veränderte Funktion erreicht, sondern nur eine gewisse quantitativ erweiterte Öffentlichkeit hergestellt. Auch dies erscheint als ein Wert, doch stehen ihm mögliche Einbußen auf individualrechtlicher Seite entgegen, wenn die Persönlichkeitsrechte von Parteien und Zeugen betroffen sind. Nicht übersehen werden darf auch der Einfluss einer (Live-)Übertragung auf das Verhalten der prozessualen Akteure. Keine Rolle für die Ausformung des Öffentlichkeitsgrundsatzes spielen die wirtschaftlichen Interessen der Medienunternehmen und Anwälte. Ein aus der Aufgabenstellung der Gerichtsöffentlichkeit abzuleitender überwiegender Grund für die Zulassung audio-visueller Medienübertragungen besteht nicht.

[99] Vgl. Britz, (2015) (3) *jM,* 127, 129.
[100] *BVerfG NJW* (2001) 1633; dagegen etwa von Coelln, (2014) *AfP,* 193, 200.

2. Schriftsatzöffentlichkeit

Eine Veröffentlichung der Schriftsätze könnte dagegen eine andere Dimension der Öffentlichkeit bewirken. Bislang galt allerdings uneingeschränkt das Verständnis, wonach Öffentlichkeit Mündlichkeit voraussetze[101] und Schriftsätze nicht der Öffentlichkeit zugänglich seien. Öffentlichkeit beinhalte Zusehen und Zuhören, nicht die Aktenlektüre.[102] Durch die voranschreitende Digitalisierung der gerichtlichen Korrespondenz, erwähnt seien nur die elektronische Gerichtsakte und das besondere elektronische Anwaltspostfach, dürften jedenfalls die technischen Hürden gegenüber einer Schriftsatzöffentlichkeit in naher Zukunft entfallen. Geplant ist eine vollständige elektronische Kommunikation der Justiz mit professionellen Justiznutzern.[103] Dies schafft die Gelegenheit für eine erweiterte Öffentlichkeit. Den Referenzpunkt dafür bildet vor allem das Akteneinsichtsrecht aus § 299 II ZPO, dass nicht zentral zum Öffentlichkeitsprinzip gerechnet wird, welches eine neue Gestalt gewinnen kann.

Im Zivilverfahren könnten damit vollkommen andere Verfahrensschichten öffentlich werden. Komplexere rechtliche Zusammenhänge könnten dadurch gerade dem Fachpublikum zusätzlich vermittelt werden. Auch die gerichtliche Sachverhaltsbehandlung ist besser zu prüfen. Insgesamt könnte die Rationalität des Verfahrens gesteigert werden. Einschränkend zu diskutieren wären aber etwa der Umgang mit Betriebsgeheimnissen, die Anonymisierung der Beteiligten und die Behandlung von Schriften der Naturalparteien. Zum gegenwärtigen Zeitpunkt ist eine Schriftsatzöffentlichkeit allerdings nicht erforderlich. Sie eröffnet jedoch eher eine neue Qualität der Gerichtsöffentlichkeit als eine verbreiterte Medienöffentlichkeit.

VII. Fazit

Die Öffentlichkeit des Verfahrens nimmt unter den Prozessgrundsätzen eine ungewöhnliche Stellung ein. Seit ihrer Revitalisierung, zunächst in den Schriften der Aufklärung und dann des liberalen Bürgertums, wird sie als Recht der Allgemeinheit auf Zugang zum Gerichtsverfahren verstanden, um dessen Kontrolle zu ermöglichen und Vertrauen zu schaffen. Diese kollektive Rechtsstellung dient primär dem Institutionenschutz und begünstigt die Prozessparteien zumeist nur mittelbar. Sie kann aber auch ganz unmittelbar in einen Konflikt etwa mit den Geheimhaltungsinteressen der Parteien geraten. Diese potenzielle Kontraststellung unterscheidet den Öffentlichkeitsgrundsatz von anderen Verfahrensgrundsätzen. Eine Verschärfung durch eine umfassendere

[101] Nikisch, *Zivilprozeßrecht,* (1950) S. 199.
[102] Kissel/Mayer, *GVG,* 10. Aufl., § 169 Rn. 52.
[103] Bernhardt, *NJW* (2015) 2775, 2777.

Medienöffentlichkeit scheint nicht angezeigt. Vorzugswürdig erscheint dagegen eine Erweiterung der individualrechtlichen Komponenten, wie sie in den europäischen Regelungen angelegt, aber noch nicht hinreichend fruchtbar gemacht sind. Trotz der vielfältigen offenen Fragen sollte auch eine Schriftsatzöffentlichkeit nicht von vornherein abgelehnt werden.

Murmann, Uve*

Die Bedeutung der Verfahrensgrundsätze am Beispiel der Öffentlichkeit im deutschen Strafprozess

Abstract

Procedural principles aim to both capture and shape the character and form of a trial by establishing and defining – partly politically, partly constitutionally required – standards. If they conflict with each other or with other interests acknowledged by law, this conflict is to be resolved taking recourse to the overall aim of criminal proceedings, that is: the restoration of justice under conditions of uncertainty.

In this context, the principle of publicity is of central importance for the acceptance of criminal trials and the functioning of punishment. However, the principle of publicity is very limited in its scope. On the one hand, requirements specific to criminal proceedings justify restrictions, especially the need for an undisturbed truth finding. On the other hand, procedural requirements that are not specific to criminal proceedings can also justify restrictions, in particular with regard to personal rights of the parties to the proceedings. Finally, the vast majority of proceedings are completely or largely hidden from public scrutiny due to special procedural designs that do not include public main hearings. In the remaining trials with main hearings, however, public scrutiny of criminal proceedings is essentially carried out by the media, which are not committed to the overall aim of criminal proceedings mentioned above, but pursue their own interests. As a result, the acceptance of criminal proceedings is based less on direct control and information on the part of the citizens, but rather on a fragile trust placed in the justice system.

Keywords: principle of public trial

* Prof. Dr. Uwe Murmann, Inhaber des Lehrstuhls für Strafrecht und Strafprozessrecht an der Georg-August-Universität Göttingen.

DOI: 10.56749/annales.elteajk.2017.lvi.2.25

I. Begriff und Bedeutung von Verfahrensgrundsätzen

Verfahrensgrundsätze wollen den Charakter und die Gestalt eines Verfahrens sowohl erfassen als auch prägen, indem sie – teils rechtspolitische, teils verfassungsrechtlich gebotene – Festlegungen treffen und auf den Begriff bringen. Sie fassen damit ein Regelungskonzept zusammen, leisten einen Beitrag zu dessen Systematisierung und wirken zugleich als Interpretationshilfen auf das positive Recht zurück.[1] Als Grundsätze, die auf mittlerer Höhe zwischen dem Zweck des Verfahrens und den Einzelnormen angesiedelt sind,[2] benennen sie materielle Hintergründe von Spannungsverhältnissen, wie sie zwischen den unterschiedlichen Verfahrensgrundsätzen und folglich auch zwischen unterschiedlichen Normen bestehen können.

Für die Reichweite und den Geltungsanspruch der Verfahrensgrundsätze sind vor allem deren etwaige verfassungsrechtliche Verankerung und daneben das Bestehen gegenläufiger Grundsätze und rechtlich anerkannte Interessen von Bedeutung.[3] Da die Verfahrensgrundsätze die Maßstäbe für eine Lösung von Konflikten mit anderen Grundsätzen nicht schon in sich tragen, bedarf es eines Kriteriums, das im Konfliktfall die Lösung dirigiert. Da sich alle Verfahrensgrundsätze auf das Ziel des Strafverfahrens insgesamt hinordnen und insoweit eine dienende Funktion haben, ist die Erfüllung dieses Ziels bei konfligierenden Verfahrensgrundsätzen der entscheidende Gesichtspunkt.[4] Eine genauere Analyse sowohl der einzelnen Grundsätze als auch die Entscheidung bei Prinzipienkonflikten verlangt also danach, sich über den Zweck des Strafverfahrens zu vergewissern.

Neben solchen Konflikten zwischen Verfahrensgrundsätzen können die auf die Erreichung des Strafverfahrenszwecks hingeordneten Verfahrensgrundsätze freilich auch mit rechtlich geschützten Interessen konfligieren, welche nicht spezifisch der Erreichung des mit dem Strafverfahren verfolgten Zwecks dienen, deren Beachtung vielmehr generell Kennzeichen legitimen staatlichen Handelns ist. Auch wenn diese Einsicht nichts daran ändert, dass auch die Beachtung solcher unspezifischen Rechte zu den Bedingungen eines rechtsstaatlichen Strafverfahrens gehört, entfaltet die Unterscheidung in Konflikte zwischen spezifisch strafprozessualen Grundsätzen einerseits und mit unspezifischen Rechtspositionen andererseits doch systematisierende und den Abwägungsvorgang leitende Kraft.

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[1] LR/Kühne, 27. Aufl., (2016) Einl. I Rn. 2; Radtke/Hohmann/Radtke, *StPO,* (2011) Einl. Rn. 10; Rieß, *FS Rebmann,* (1983) S. 381 ff.

[2] LR/Kühne, Einl. I Rn. 1; Rieß, *FS Rebmann,* (1983) S. 384, 384.

[3] Rieß, *FS Rebmann,* (1983) S. 382.

[4] Vgl. auch LR/Kühne, Einl. I Rn. 1: Prozessmaximen als „diejenigen Leitgedanken, die nach der jeweiligen Vorstellung der Rechtsgemeinschaft und des Gesetzgebers der Erreichung des Verfahrensziels am dienlichsten sind".

II. Der Grundsatz der Öffentlichkeit

1. (Historischer) Hintergrund und Bedeutung

Die Wurzeln des Öffentlichkeitsgrundsatzes liegen in der Aufklärung.[5] Ein Recht, das nicht mehr auf göttliche Autorität, sondern auf die Vernunft der Rechtsunterworfenen gegründet ist, muss seinen Gerechtigkeitsanspruch in der Anwendung auf jeden einzelnen Fall in einem transparenten Verfahren erweisen.

Aus diesem Ansatz bei der Teilhabe der Bürger am Recht erschließt sich auch die verfassungsrechtliche Herleitung des Öffentlichkeitsgrundsatzes aus dem Rechtsstaats- und dem Demokratieprinzip.[6]

Dementsprechend steht zunächst die Kontrolle der Tätigkeit der Rechtsprechung in der Hauptverhandlung im Zentrum des Öffentlichkeitsgrundsatzes.[7] Die Schutzrichtung dieser Kontrolle ist eine doppelte: Zum einen dient sie dem allgemeinen Interesse an der sachgerechten Ausübung der Rechtsprechung, zum anderen dem Schutz des Einzelnen vor Willkür und Geheimjustiz.[8]

Praktisch nehmen die Bürger ihr Anwesenheitsrecht und damit ihre Kontrollmöglichkeit freilich kaum in Anspruch. Aber schon das Wissen um das Anwesenheitsrecht schafft bei den Beteiligten wie bei der Öffentlichkeit ein Bewusstsein für die Transparenz des Verfahrens, welches das Vertrauen in die ordnungsgemäße Arbeit der Justiz stärkt.[9]

Im modernen Rechtsstaat ist das Bedürfnis nach Kontrolle der Justiz allerdings etwas in den Hintergrund getreten. Das Interesse der Öffentlichkeit hat sich in Richtung auf ein Informationsinteresse verlagert, das sich auf den Fall als solchen wie auch auf dessen rechtliche Behandlung bezieht.[10]

Befriedigt wird dieses Informationsinteresse durch die Medien, die damit in eine Doppelfunktion geraten: Einerseits sind die Vertreter der Medien selbst kontrollierende Öffentlichkeit – diese, nicht spezifische Rolle der Medien kann im Folgenden vernachlässigt werden. Andererseits prägen die Medien durch ihre Berichterstattung das Bild des Strafverfahrens in der breiten Öffentlichkeit.

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[5] Dazu Gierhake, (2013) *JZ,* 1032 ff.
[6] *BVerfGE* 133, 168, 217 f. (Rn. 88); Radtke/Hohmann/Feldmann, § 169 GVG Rn. 6.
[7] *BVerfGE* 133, 168, 217 f. (Rn. 87 ff.); *BGHSt* 27, 13, 15; Gierhake, (2013) *JZ,* 1031.
[8] Vgl. Gierhake, (2013) *JZ,* 1031 f.
[9] Vgl. Gierhake, (2013) *JZ,* 1032.
[10] Kritisch zu einer Verlagerung vom Kontroll- auf ein Informationsinteresse Radtke/Hohmann/Feldmann, § 169 GVG Rn. 2. Vgl. auch *BVerfGE* 133, 168, 218 (Rn. 89). Empirisch dürfte sich der Bedeutungszuwachs des Informationsinteresses kaum bestreiten lassen. Die rechtliche Bedeutung der Kontrollfunktion bleibt davon freilich unberührt.

Der Wandel des Öffentlichkeitsgrundsatzes von der Saal- zur Medienöffentlichkeit verändert auch die Leistungen dieses Grundsatzes. Die praktische Bedeutung wird insofern größer, als noch nie so viele Menschen über so zahlreiche Gerichtsverfahren informiert waren wie in der modernen Mediengesellschaft. Zugleich passt sich die Art der Information an die Gesetzlichkeiten medialer Berichterstattung an.[11] D.h. Informationen werden in größerer Menge und schneller verbreitet, ihre Relevanz ist oftmals geringer; dementsprechend ist das öffentliche Interesse häufig von kurzer Dauer. Dabei wird der Diskurs breiter und die Macht der Bilder gewinnt an Bedeutung. Die Berichterstattung orientiert sich in Art und Inhalt an der Nachfrage der Medienkonsumenten – und folglich an den wirtschaftlichen Interessen der Medienunternehmen. Darauf ist zurückzukommen.

2. Öffentlichkeit und Zweck des Strafverfahrens

Da das Strafverfahren nicht primär zur Befriedigung von Informationsinteressen geführt wird, sondern sich die Informationsinteressen umgekehrt auf das Strafverfahren beziehen, muss Ausgangspunkt der weiteren Überlegungen die Frage sein, wie sich die Belange der Öffentlichkeit in das Strafverfahren einfügen.

Das Strafverfahren dient der Wiederherstellung des Rechts unter Bedingungen der Unsicherheit.[12] Die in der Literatur häufig zu findende Formulierung, das Strafverfahren diene der Herstellung von Rechtsfrieden,[13] bleibt insoweit weniger klar und ist für unterschiedliche Interpretationen offen, kann aber freilich auch im Sinne des hier zugrunde gelegten Verständnisses interpretiert werden.

Ist Kennzeichen des Strafverfahrens eine Situation der Unsicherheit, so verlangt das Strafverfahren in einem ersten Schritt nach einer Verdachtsklärung, die im gerichtlichen Verfahren dem Gericht obliegt (Amtsaufklärungsgrundsatz, § 244 Abs. 2 stopp). Aus dem Schuldprinzip folgt, dass eine Verurteilung erst dann legitimierbar ist, wenn die Aufklärung der Wahrheit bis hin zur Überzeugung des Gerichts von der Schuld des Angeklagten vorangetrieben worden ist (§ 261 stopp). Dabei ist die Wahrheit nicht um jeden Preis zu ermitteln,[14] weil die Verdachtsklärung nur dann Grundlage für die

[11] Eingehend dazu Brosius/Peter, in Murmann (Hrsg.), *Strafrecht und Medien,* (2016) S. 37 ff.

[12] Murmann, *GA* (2004), 70 ff.; zustimmend Gierhake, (2013) *JZ,* 1035; Klesczewski, *Strafprozessrecht,* 2. Aufl. (2013) Rn. 1; Kröpil, (2015) *JuS,* 512 f.

[13] Grundlegend Schmidhäuser, *FS Eb. Schmidt,* (1961) S. 516 ff.; auch Duttge, (2003) 115, *ZStW,* 542 ff.; Krack, *Rehabilitierung des Beschuldigten im Strafverfahren,* (2002) S. 33; Kühl, *Unschuldsvermutung, Freispruch und Einstellung,* (1983) S. 74; B. Limbach, *Der drohende Tod als Verfahrenshindernis,* (1998) S. 53 ff., 68, https://doi.org/10.3790/978-3-428-49455-2; Rieß, *FS Schäfer,* (1980) S. 170 ff.; Weigend, *Deliktsopfer und Strafverfahren,* (1989) S. 195 ff., https://doi.org/10.3790/978-3-428-46592-7

[14] *BGHSt* 44, 243, 249.

Wiederherstellung des Rechts sein kann, wenn sie unter Wahrung rechtsstaatlicher Grundsätze der Verfahrensgerechtigkeit erfolgt.

In einem zweiten Schritt muss das Resultat der Verdachtsklärung Grundlage einer Entscheidung werden, durch die auch die materielle Gerechtigkeit verwirklicht werden soll – was praktisch bedeutet, dass der (möglicherweise) Unschuldige freigesprochen und der Schuldige zu einer angemessenen Strafe verurteilt werden soll.

Der Öffentlichkeitsgrundsatz und die mit diesem verfolgten Ziele ordnen sich in diesen Verfahrenszweck ein:

– Das gilt zunächst für die Kontrollfunktion: Die durch die Öffentlichkeit geschaffene Transparenz der Hauptverhandlung schafft Akzeptanz sowohl hinsichtlich der Verdachtsklärung als auch hinsichtlich der strafrechtlichen Reaktion auf die festgestellte Tat. Diese Akzeptanz ist eine Bedingung dafür, dass die Entscheidung ihre das Recht wiederherstellende (rechtsfriedensstiftende) Wirkung in der Rechtsgemeinschaft entfalten kann.

– Auch die Informationsfunktion dient dem Erreichen des strafprozessualen Zwecks: Der öffentlichen Information über begangene Taten und der hierauf erfolgenden strafrechtlichen Reaktion kommt unter straftheoretischen Aspekten zentrale Bedeutung zu.[15] Hier zeigt sich also eine materiellrechtliche Dimension des Öffentlichkeitsgrundsatzes. Die begangene Straftat weist – bei Individualdelikten ebenso wie bei Delikten gegen Rechtsgüter der Allgemeinheit – über das Verhältnis von Täter und Opfer hinaus.[16] Damit die Strafe ihre Funktion bei der Wiederherstellung des verletzten Rechts erfüllt, muss sie in ihrem Bedeutungsgehalt in die Rechtsgemeinschaft vermittelt werden. Das gilt für eine Vergeltungstheorie oder – begrifflich treffender – Schuldausgleichstheorie[17] ebenso wie für alle generalpräventiven Ansätze.[18]

Das Strafrecht bedarf also zu seiner materiellen Verwirklichung im demokratischen Rechtsstaat der Öffentlichkeit. Hier deutet sich schon an, dass die Rolle der Medien in diesem Vermittlungsprozess durchaus eine zwiespältige ist: Einerseits sind es im Wesentlichen die Medien, die die Informationen über das Strafverfahren und dessen Ausgang in die Öffentlichkeit transportieren. Andererseits sind die Medien in ihrer Berichterstattung nicht auf die Ziele des Strafverfahrens verpflichtet, sondern verfolgen ihre eigenen, insbesondere wirtschaftlichen Interessen. Der Öffentlichkeitsgrundsatz wird durch die Medien also einerseits effektuiert, andererseits wird der straftheoretisch

[15] Dazu Gierhake, in Murmann (Hrsg.), *Strafrecht und Medien,* (2016) S. 52 ff.
[16] Gierhake, (2013) *JZ,* 1034 f.
[17] Zu Begründung und Begrifflichkeit Murmann, *Grundkurs Strafrecht,* 6. Aufl. (2021), § 8 Rn. 22 ff.
[18] Wobei es für die generalpräventiven Ansätze auf die empirischen Wirkmechanismen ankommt, wohingegen die Vergeltungstheorie/Schuldausgleichstheorie den Vernunftgehalt der Strafe in ihrer Bedeutung für die Person (des Verurteilten wie für die Mitglieder der Rechtsgemeinschaft) thematisiert.

relevante Gehalt der an die Öffentlichkeit gerichteten Informationen von den Medien in einer Weise geformt, die dem Strafverständnis der Justiz nicht verpflichtet ist.[19]

3. Einschränkungen des Öffentlichkeitsgrundsatzes aufgrund verfahrensspezifischer Belange

Wenn man auch den Öffentlichkeitsgrundsatz nach den bisherigen Überlegungen als unerlässlich für einen rechtsstaatlichen Strafprozess halten muss, so wird man zugleich auch feststellen müssen, dass die Öffentlichkeit gewisse Gefahren für das Erreichen des Zwecks des Strafverfahrens begründet (dazu a). Faktische Beschränkungen der öffentlichen Wahrnehmbarkeit von Strafverfahren resultieren weiterhin daraus, dass die öffentliche Präsentation der Beweise unter prozessökonomischen Aspekten häufig als zu aufwändig erscheint (dazu b).

a) Einschränkungen zum Schutz der Wahrheitsermittlung

Die Öffentlichkeit des Strafverfahrens begründet tendenziell Gefahren für die Wahrheitsermittlung.[20] Die Anwesenheit anderer Personen, seien es fremde oder solche, die entweder dem Angeklagten oder einem Verletzten nahe stehen, birgt eine nicht von der Hand zu weisende Gefahr verzerrender Darstellungen. Sei es, dass Scham den Angeklagten an einer (offenen) Aussage hindert oder er sich – wie gegebenenfalls auch ein Zeuge – zu einer beschönigenden Darstellung veranlasst sieht oder auch einem Hang zur Selbstdarstellung in besonders intensiver Weise nachgibt.[21]

Damit ist eine Kehrseite des Öffentlichkeitsgrundsatzes angesprochen, die letztlich nichts daran zu ändern vermag, dass die Wertentscheidung für die öffentliche Hauptverhandlung ihre Berechtigung behält. Etwas abgemildert werden die Risiken für die Wahrheitsfindung insofern, als das Gericht verpflichtet ist, etwaige (erkennbare) Beeinflussungen des Aussageverhaltens bei seiner Beweiswürdigung zu berücksichtigen.

Verdichten sich die Gefahren für die Wahrheitsermittlung und kommt noch eine Beeinträchtigung weiterer Interessen hinzu, so kann dies aber einen Ausschluss der Öffentlichkeit rechtfertigen:

– So erlaubt § 172 Nr. 1a GVG einen Ausschluss der Öffentlichkeit, wenn „eine Gefährdung des Lebens, des Leibes oder der Freiheit eines Zeugen oder einer anderen Person zu besorgen ist" – wobei es nicht nur um den Schutz der Rechtsgüter des Zeugen geht, sondern auch eine Situation der Einschüchterung und Gefährdung umschrieben

[19] Zur Berichterstattung über Kriminalität und deren Wirkung in der Öffentlichkeit Brosius/Peter, in Murmann (Hrsg.), *Strafrecht und Medien,* (2016) S. 37 ff.
[20] Vgl. auch Roxin/Schünemann, *Strafverfahrensrecht,* 29. Aufl. (2017), § 47 Rn. 1.
[21] Kritisch zu diesem Einwand (im Hinblick auf eine Erweiterung der Medienöffentlichkeit) v. Coelln, in Murmann (Hrsg.), *Strafrecht und Medien,* (2016) S. 29 f.

ist, in der ein staatlicher Anspruch auf eine (wahre) Aussage ohne Maßnahmen zum Schutz des Zeugen nur noch schwer legitimierbar und jedenfalls praktisch nicht realisierbar erscheint.[22]

– § 172 Nr. 4 GVG erlaubt den Ausschluss der Öffentlichkeit bei der Vernehmung eines unter 18-jährigen Zeugen. Auch hier wird neben dem Schutz des Zeugen die bessere Sachaufklärung als Argument für den Ausschluss der Öffentlichkeit angeführt.[23]

Allerdings sind nicht per se Einschränkungen der Belange der Öffentlichkeit für den Fall vorgesehen, dass die Anwesenheit von Zuhörern die Wahrheitsermittlung gefährdet. So soll etwa die Erwartung, dass der Angeklagte bei ausgeschlossener Öffentlichkeit ein Geständnis ablegen wird, nicht den Ausschluss der Öffentlichkeit rechtfertigen.[24] Beispiele wie diese verdeutlichen, dass die Öffentlichkeit die vom Grundsatz der Amtsaufklärungspflicht geforderte Wahrheitsermittlung empfindlich behindern kann. Der Gesetzgeber hat in solchen Kollisionsfällen im Rahmen der Verfassung ein weites Ermessen und sich zu Recht dafür entschieden, den Ausschluss der Öffentlichkeit nicht je nach Interessenlage und Befindlichkeit der Prozessbeteiligten von deren Aussageverhalten abhängig zu machen. Denn andernfalls hätten es die Prozessbeteiligten in der Hand, über die Reichweite des Öffentlichkeitsgrundsatzes zu disponieren. Das aber wäre bei einem Grundsatz, der die überindividuelle Bedeutung des Strafverfahrens betrifft, nicht angemessen.

***b)* Einschränkungen im Interesse einer Ökonomisierung des Strafverfahrens**

Unter dem Aspekt verfahrensspezifischer Beschränkungen lassen sich auch Einschränkungen der öffentlichen Wahrnehmbarkeit von Verfahren diskutieren, die sich aus der Gestalt des Verfahrens ergeben. Es geht also um Konstellationen, in denen der Grundsatz der Öffentlichkeit formal nicht eingeschränkt wird, die Öffentlichkeit aber gleichwohl das Verfahren nicht verfolgen kann, weil eine öffentliche Hauptverhandlung nicht oder nur in eingeschränkter Form stattfindet.

Hintergrund solcher Einschränkungen ist die Ökonomisierung des Strafverfahrens. Die öffentliche Hauptverhandlung, die nur im Zusammenspiel mit den Grundsätzen der Unmittelbarkeit und Mündlichkeit ihre Funktion erfüllen kann,[25] ist aufwändig und zeitintensiv. Die Anforderungen einer funktionstüchtigen Strafrechtspflege, zu denen sich auch das Interesse an einer zügigen und ressourcenschonenden Verfahrensführung zählen lässt,[26] stehen hinter einem generellen Trend zur Zurück-

[22] LR/Wickern, 26. Aufl. (2010), § 172 GVG Rn. 10.
[23] Meyer-Goßner/Schmitt/Schmitt, 64. Aufl. (2021), § 172 GVG Rn. 14.
[24] *BGHSt* 9, 280; Meyer-Goßner/Schmitt/Schmitt, § 172 GVG Rn. 7.
[25] Radtke/Hohmann/Feldmann, § 169 GVG Rn. 5.
[26] Der Grundsatz der funktionstüchtigen Strafrechtspflege lässt sich aus dem Rechtsstaatsprinzip ableiten; *BVerfGE* 34, 238, 248 f.; 80, 367, 375; 133, 168, 199 f. (Rn. 57); *BVerfG,* NJW 2002, 51, 52; kritisch zum Begriff der „Funktionstüchtigkeit der Strafrechtspflege" Hassemer, *StV* (1982), 275; befürwortend Landau, NStZ 2007, 121 ff.

drängung der klassischen Hauptverhandlung mit der Folge, dass in zahlreichen Verfahren das Zustandekommen der abschließenden Entscheidung für die Öffentlichkeit allenfalls eingeschränkt nachvollziehbar ist.[27] Das gilt für Opportunitätseinstellungen, die – etwa nach § 153a stopp – bis hin zu mittlerer Kriminalität zulässig sind, und für das Strafbefehlsverfahren (§§ 407 ff. stopp), in dem immerhin eine zur Bewährung ausgesetzte Verurteilung zu einer Freiheitsstrafe von bis zu einem Jahr in Betracht kommt (§ 407 Abs. 2 Satz 2 StGB). Eine Einschränkung des Verfahrensstoffs für die öffentliche Wahrnehmung bringt auch das Selbstleseverfahren nach § 249 Abs. 2 stopp.[28] Einen faktischen Bedeutungsverlust erleidet der Öffentlichkeitsgrundsatz schließlich im Verständigungsverfahren, wie es seit 2009 in die deutsche stopp aufgenommen wurde.[29] Zwar sieht § 243 Abs. 4 stopp eine Unterrichtung der Öffentlichkeit über den „wesentlichen Inhalt" von Verständigungsgesprächen vor, die vor der Hauptverhandlung stattgefunden haben. Tatsächlich wird aber eine ungeschönte Unterrichtung über solche Gespräche, in denen es nicht zuletzt um Strafrabatte als „Belohnung" für den Verzicht auf Beweisanträge geht, in der Praxis nicht vorkommen. Die Erwartung des BverfG, die Öffentlichkeit werde „umfassend" über Vorgespräche unterrichtet,[30] ist realitätsfern. *Roxin/Schünemann* dagegen formulieren drastisch, dass die Anerkennung der Verständigung „das an der Wiege des Rechtsstaates stehende Kontrollinstrument der Öffentlichkeit paralysiert" habe.[31]

Insgesamt ist jedenfalls festzuhalten, dass rechtlich oder zumindest faktisch in einer beträchtlichen Zahl von Verfahren die Öffentlichkeit allenfalls eingeschränkt Kenntnis vom Verfahrensstoff nehmen kann, weil dieser der Erörterung in öffentlicher Hauptverhandlung entzogen ist. Auch wenn der Öffentlichkeitsgrundsatz insoweit nicht formal eingeschränkt wird, verschieben die besonderen Verfahrensformen das Strafverfahren in ein Halbdunkel, in dem sich die Funktionen des Öffentlichkeitsgrundsatzes nicht entfalten können. Daraus resultieren notwendig blinde Flecken, in denen die Öffentlichkeit nicht informiert und die Justiz öffentlicher Kontrolle weitgehend entzogen ist. Mit Blick auf die skizzierten Funktionen des Öffentlichkeitsgrundsatzes stellt sich die Frage, ob hier ein Akzeptanzverlust und eine Vertrauenskrise für das Strafrecht drohen.

[27] Treffend dazu – auch zur permanenten Ausdehnung des Anwendungsbereichs nicht-öffentlicher Verfahrenserledigungen – Marxen, *GA* (2013), 103 ff.
[28] Vgl. Radtke/Hohmann/Pauly, § 249 Rn. 31.
[29] Gierhake, (2013) *JZ,* 1037 f.; Murmann, (2009) *ZIS,* 530.
[30] *BVerfGE* 133, 168, 219 (Rn. 90). Das entspricht auch nicht der gesetzlichen Regelung, wo nur eine Unterrichtung über den „wesentlichen Inhalt" verlangt wird.
[31] Roxin/Schünemann, *Strafverfahrensrecht,* § 47 Rn. 5.

4. Einschränkungen des Öffentlichkeitsgrundsatzes zum Schutz strafverfahrensunspezifischer Belange

Der Öffentlichkeitsgrundsatz steht aber nicht nur in einem Spannungsverhältnis mit anderen Belangen des Strafverfahrens, sondern auch mit rechtlichen Belangen, die generell im Umgang des Staates mit seinen Bürgern zu beachten sind. Dahinter steht die Überlegung, dass im Rahmen eines Strafverfahrens u.U. auch solche Rechte von Personen, die nicht gerade (oder zumindest: auch) mit Blick auf die Belange des Strafverfahrens geschützt sind, gewissermaßen „bei Gelegenheit" betroffen sind.

Solche Verstöße müssen nicht die spezifisch dem Angeklagten geschuldete Verfahrensgerechtigkeit und die Qualität der Entscheidung in Frage stellen. Diese Einsicht ist aus der Lehre von den unselbständigen Beweisverwertungsverboten geläufig, wenn gewisse Verstöße gegen Beweiserhebungsvorschriften mit Rücksicht auf den Schutzzweck der verletzten Erhebungsnorm kein Verwertungsverbot begründen.[32] Dabei stellen sich freilich die – auch aus der Beweisverbotslehre geläufigen – Abgrenzungsprobleme; häufig wird der Schutz von Rechtspositionen jedenfalls *auch* für die Legitimation des Strafverfahrens und damit auch für die Erreichung des Verfahrenszwecks von Relevanz sein.

Die Öffentlichkeit des Strafverfahrens begründet oder intensiviert häufig Eingriffe in die Grundrechte von Verfahrensbeteiligten oder Zeugen. So liegen etwa Eingriffe in das allgemeine Persönlichkeitsrecht nahe, wenn ein Zeuge verpflichtet ist, Geheimnisse aus seinem privaten Lebensbereich preiszugeben.[33] Entsprechendes gilt, wenn sich ein Angeklagter unter dem Druck des Verfahrens zu solchen Angaben veranlasst sieht. Die Kenntnisnahme solcher Angaben durch Außenstehende als Teil der Öffentlichkeit hat für sich genommen weder Einfluss auf die Wahrheitsermittlung noch auf die Entscheidungsfindung.[34]

Das Gesetz erkennt strafverfahrensunspezifische Interessen in zunehmendem Maße als Gründe für einen Ausschluss der Öffentlichkeit an.[35] So kann die Öffentlichkeit ausgeschlossen werden, wenn das Verfahren die Unterbringung des Beschuldigten

[32] Vgl. dazu *BGHSt* 38, 214, 220; Murmann, *Prüfungswissen Strafprozessrecht,* 4. Aufl. (2019) Rn. 204, 206.

[33] Freilich lässt sich der Schutz vor der Öffentlichkeit hier auch auf die Subjektstellung des Verfahrensbeteiligten (und damit auf einen verfahrensinternen Belang) stützen, weil ein rechtsstaatliches Verfahren nur dann Akzeptanz finden kann, wenn es die Rechte der Beteiligten achtet [so Gierhake, (2013) *JZ,* 1036]. Aber damit dürfte kein Spezifikum des Strafverfahrens angesprochen sein, sondern ein allgemeiner Achtungsanspruch, dem der Staat bei jeder Tätigkeit Rechnung zu tragen hat.

[34] Freilich kann die Beeinträchtigung des Persönlichkeitsrechts im Rahmen eines öffentlichen Verfahrens auch Verhaltensweisen implizieren, die zugleich die Wahrheitsermittlung gefährden. So mag etwa ein Zeuge geneigt sein, zum Schutz seiner Privatsphäre unwahre Angaben zu machen. Aber dabei handelt es sich nur um einen Reflex des Eingriffs in das Persönlichkeitsrecht.

[35] Vgl. Marxen, (2013) *GA,* 103.

in einem psychiatrischen Krankenhaus oder einer Entziehungsanstalt zum Gegenstand hat (§ 171a GVG) oder der Ausschluss aus bestimmten anderen Gründen dem Schutz von Persönlichkeitsrechten von Prozessbeteiligten oder Zeugen dient (§ 171b GVG). Zum Schutz von Jugendlichen sind Verfahren nach dem JGG grundsätzlich nichtöffentlich (§ 48 JGG).[36] Und auch öffentliche Interessen wie der Schutz der Staatssicherheit oder der öffentlichen Ordnung können einen Ausschluss der Öffentlichkeit rechtfertigen (§ 172 Nr. 1 GVG).

Vor allem die stärkere Sensibilisierung für Belange des Opferschutzes hat in der Vergangenheit zunehmend zu Einschränkungen des Öffentlichkeitsgrundsatzes geführt.[37] Es ist Aufgabe des Gesetzgebers, die konfligierenden Grundrechte und Interessen zu einem angemessenen Ausgleich zu bringen, wobei ihm für die konkrete Lösung des Konflikts ein erheblicher Spielraum zusteht. Dabei besteht ein beträchtlicher Unterschied zu den strafverfahrensspezifischen Einschränkungen. Während es nämlich bei strafverfahrensspezifischen Einschränkungen letztlich darum geht, dem Zweck des Strafverfahrens oder der Leistungsfähigkeit der Strafjustiz möglichst optimal gerecht zu werden, kann die Rücksichtnahme auf strafverfahrensunspezifische Belange mit dem Zweck des Strafverfahrens sogar in Konflikt geraten; die Auflösung muss dann auf einer übergeordneten verfassungsrechtlichen Ebene erfolgen.

5. Erweiterungen der Öffentlichkeit im Interesse der Medien(freiheit)

Neben der Tendenz, den Grundsatz der Öffentlichkeit einzuschränken, gibt es auch gegenläufige Tendenzen in Richtung auf eine Erweiterung der durch die Medien vermittelten Öffentlichkeit.

Medienvertreter sind (auch) Repräsentanten der Öffentlichkeit und als solche in dem Rahmen, in dem Hauptverhandlungen allgemein zugänglich sind, auch berechtigt, ihnen als Zuhörer beizuwohnen.

Aber Journalisten heben sich in zweierlei Hinsicht von anderen Zuschauern ab: Erstens sind sie Multiplikatoren, die eine mittelbare Wahrnehmung der Verfahren für zahlreiche Medienkonsumenten erlauben. Zweitens ist ihre Tätigkeit verfassungsrechtlich durch die Pressefreiheit geschützt. Da öffentliche Gerichtsverhandlungen allgemein

[36] Zudem ist die Öffentlichkeit im Verfahren gegen Jugendliche auch aus straftheoretischer Sicht weniger bedeutsam, da ein Jugendlicher nicht in gleicher Weise das Recht in seinem Allgemeinheitsanspruch verletzen kann wie ein Erwachsener, sondern in erster Linie noch der Erziehung bedarf; dazu Gierhake, (2013) *JZ,* 1036.

[37] Der Bedeutungszuwachs des Persönlichkeitsrechts und die zunehmende Sensibilisierung für Opferbelange hat dazu geführt, dass der Gesetzgeber diese Möglichkeiten für einen Ausschluss der Öffentlichkeit immer wieder ausgedehnt hat; vgl. Marxen, (2013) *GA,* 103.

zugängliche Quellen darstellen, sind Pressevertreter auch berechtigt, über die Verfahren zu berichten.[38]

Mit Blick auf die herausgehobene Bedeutung von Pressevertretern für die Informationsvermittlung in die Öffentlichkeit und den Schutz der Presse wird es für zulässig gehalten, Pressevertretern gewisse Privilegien einzuräumen: Findet ein Prozess ein so großes Interesse in der Öffentlichkeit, dass die Zahl der Zuschauerplätze voraussichtlich nicht ausreicht, so ist es jedenfalls zulässig, einen Teil der Plätze für Pressevertreter zu reservieren.[39]

Die rechtspolitische Diskussion um eine Erweiterung der Medienöffentlichkeit hat 2018 zur Eröffnung der Möglichkeit von Tonübertragungen in einen Arbeitsraum für Medienvertreter geführt (§ 169 Abs. 2 S. 3 GVG).[40] In jedem Fall ist, sofern nicht alle Medienvertreter Platz finden, nach einer Entscheidung des BVerfG im bekannten NSU-Verfahren eine sachgerechte, die Chancengleichheit gewährleistende Auswahl gefordert.[41]

Im Zentrum der Diskussion steht aber die Frage nach der Zulässigkeit von Ton- und vor allem Filmaufnahmen aus dem Gerichtssaal. § 169 Abs. 1 S. 2 GVG sagt dazu: „Ton- und Fernseh-Rundfunkaufnahmen sowie Ton- und Filmaufnahmen zum Zwecke der öffentlichen Vorführung oder Veröffentlichung ihres Inhalts sind unzulässig."[42] Diese Regelung hat verfassungsrechtlicher Prüfung mit Blick auf die Einhaltung eines fairen Verfahrens, die ungestörte Wahrheits- und Rechtsfindung und den Schutz des Persönlichkeitsrechts Stand gehalten.[43] Auch hier hat die Reform von 2018 insofern zu Lockerungen geführt, als der BGH für die Verkündung seiner Entscheidungen in besonderen Fällen Ton- und Filmaufnahmen zulassen kann (§ 169 Abs. 3 GVG).[44]

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[38] *BVerfGE* 103, 44, 61 f.

[39] Radke/Hohmann/Feldmann, § 169 GVG Rn. 22.

[40] Diskutiert wird zudem die Frage, inwieweit die Verhandlung in einem größeren Raum außerhalb des Gerichtsgebäudes stattfinden kann (nicht: muss). Eine Grenze besteht hier jedenfalls dort, wo die aus dem Umfang der Öffentlichkeit resultierenden Belastungen für die Verfahrensbeteiligten nicht mehr zumutbar sind und die Sitzung zu einem „Spektakel" gerät, unter dem die Wahrheitsermittlung leidet und der Richter seine Sitzungsgewalt faktisch nicht mehr ausüben kann; vgl. Radke/Hohmann/Feldmann, § 169 GVG Rn. 19; Roxin/Schünemann, *Strafverfahrensrecht,* § 47 Rn. 4; LR/Wickern, § 169 GVG Rn. 10.

[41] *BVerfG,* NJW 2013, 1293.

[42] Vor dem BVerfG erlaubt § 17a Abs. 1 BVerfGG Ton- und Filmaufnahmen in der mündlichen Verhandlung, bis das Gericht die Anwesenheit der Beteiligten festgestellt hat und bei der öffentlichen Verkündung der Entscheidung.

[43] *BVerfGE* 103, 44, 64 ff. Schon der Schutzbereich von Informations- und Rundfunkfreiheit sei nicht eröffnet, weil es sich bei einer Gerichtsverhandlung nur insoweit um eine allgemein zugängliche Informationsquelle handle, wie der Zugang eröffnet ist, also gerade nicht bezogen auf eine Fernsehberichterstattung; Prüfungsmaßstab seien damit das Rechtsstaats- und das Demokratieprinzip; *BVerfGE* 44, 59 ff. Ablehnend dazu *v.* Coelln, in Murmann (Hrsg.), *Strafrecht und Medien,* (2016) S. 19 f.

[44] Zur Ermessensausübung BGH, NStZ 2019, 45; BGH, Beschl. v. 1.7.2021 – 1 StR 519/20; BGH, Beschl. v. 5.11.2019 – 2 StR 557/18.

Der Schutz vor Filmaufnahmen beginnt freilich erst mit dem Aufruf der Sache und endet mit der Urteilsverkündung. Für den Zeitraum unmittelbar vor Verhandlungsbeginn hat es das BVerfG mit Blick auf die Informations- und Rundfunkfreiheit (Art. 5 Abs. 1 GG)[45] für verfassungswidrig gehalten, Filmaufnahmen im Sitzungssaal (nach § 176 GVG) zu untersagen: Die „Vermittlung des Erscheinungsbildes eines Gerichtssaales und der in ihm handelnden Personen" könne „eine der Befriedigung des Informationsinteresses dienende Anschaulichkeit von Gerichtsverfahren vermitteln. Derartige Bilder, gegebenenfalls auch die sie begleitende Geräuschkulisse, sind seit langem zum typischen Inhalt der Gerichtsberichterstattung im Fernsehen geworden und prägen mittlerweile entsprechende Erwartungen der Fernsehzuschauer."[46]

Damit ist nur ein Mosaikstein einer Medienpräsenz angesprochen, die in öffentlichkeitswirksamen Verfahren eine Dominanz entfaltet, der sich die Beteiligten kaum entziehen können (mitunter freilich auch nicht entziehen wollen).[47] Journalisten befragen Angeklagte, Verteidiger, (potentielle) Zeugen und die Pressesprecher von Staatsanwaltschaften und Gerichten; Journalisten recherchieren und kommentieren; Journalisten sprechen mit (selbsternannten) Experten oder einfach mit jedem, der etwas sagen möchte. In der Öffentlichkeit wird ein Parallelverfahren auf der Grundlage medialer Berichterstattung geführt.

Die öffentliche Wahrnehmung entfernt sich damit in dem Maße von den mit dem Öffentlichkeitsgrundsatz verfolgten Zielen der Kontrolle und Information, wie die mediale Berichterstattung sich – entsprechend den schon skizzierten Eigengesetzlichkeiten – von dem Geschehen im Gerichtssaal entfernt. Die Justiz verliert die Herrschaft über das Bild des Verfahrens in der Öffentlichkeit an die Medien. Diese Tendenz verschärft sich in dem Maße, wie die Medien mit Bildern aus dem Gerichtssaal eine Realität abzubilden scheinen und damit eine Form der Wahrnehmung bedienen, die eher emotional als intellektuell orientiert ist.

Hängt die rechtsverwirklichende Kraft der Strafe auch davon ab, wie deren Verhängung von der Öffentlichkeit wahrgenommen wird, so erlangen die Medien zudem Einfluss auf die Wirkungen, die von der Strafe ausgehen.

[45] Hier sei der Schutzbereich betroffen, weil insoweit gerade keine gesetzliche Regelung bestehe, die die allgemeine Zugänglichkeit der Informationen beschränke; *BVerfGE* 103, 44, 62; *BVerfG,* NJW 2009, 350, 351; Radtke/Hohmann/Feldmann, § 169 GVG Rn. 34.

[46] *BVerfG,* NJW 2008, 977 ff.; zutreffend scharfe Kritik dazu bei Gerhard Schäfer, (2008) *JR,* 119.

[47] Eindringlich Marxen, (2013) *GA,* 100 f.

III. Resümee

Insgesamt zieht sich damit unter dem Aspekt des Öffentlichkeitsgrundsatzes ein tiefer Riss durch das Strafverfahren: Einer im Verhältnis kleinen Anzahl an Prozessen, die der Öffentlichkeit präsentiert werden, steht die Masse der Verfahren gegenüber, die aufgrund diskreter Erledigung durch Opportunitätseinstellung, Strafbefehl oder Abspracheverfahren, für die Öffentlichkeit im Dunkel bleibt. Was bleibt, ist ein Zerrbild der Justiz: Medial verzerrte Wahrnehmung öffentlichkeitswirksamer Verfahren und ein weiter Bereich, in dem für die Öffentlichkeit Vieles Spekulation bleibt.

Damit lässt sich ein durchaus vielschichtiges Resümee für die Bedeutung des Grundsatzes der Öffentlichkeit im Strafverfahren ziehen:

– Dem Grundsatz der Öffentlichkeit kommt für die Akzeptanz des Strafverfahrens und die Wirkung von Strafe eine zentrale Bedeutung zu.

– Relativierungen der Reichweite des Öffentlichkeitsgrundsatzes lassen sich strafverfahrensspezifisch, insbesondere unter dem Aspekt ungestörter Wahrheitsermittlung, legitimieren.

– Auch strafverfahrensunspezifische Relativierungen können, insbesondere mit Blick auf die Persönlichkeitsrechte der Beteiligten, ihre Berechtigung haben.

– Die praktisch weit überwiegende Zahl der Verfahren ist durch besondere Verfahrensgestaltungen einer Wahrnehmung durch die Öffentlichkeit ganz oder weitgehend entzogen.

– Hinsichtlich der verbleibenden Verfahren mit „streitiger" Hauptverhandlung erfolgt die Vermittlung an die Öffentlichkeit wesentlich durch die Medien nach deren Eigengesetzlichkeiten.

– Insgesamt steht damit die Wirklichkeit des Öffentlichkeitsgrundsatzes in einem Spannungsverhältnis zu den Leistungen, die der Öffentlichkeitsgrundsatz erbringen soll.

– Die Akzeptanz des Strafverfahrens ruht folglich weniger auf Kontrolle und unmittelbarer Information der Bürger, als vielmehr auf einem fragilen Vertrauensbonus, der der Justiz entgegengebracht wird.

Rozsnyai, Krisztina*

Der Grundsatz des effektiven gerichtlichen Rechtsschutzes als Wegweiser der ungarischen verwaltungsprozessrechtlichen Kodifikation**

Abstract

The paper puts the present codification of the rules of administrative court procedure into a historical context and draws up the line of development of a century marked by provisional solutions, that may be continued again due to actual circumstances. The second part of the paper presents the policy goals behind the actual codification works, all centered on ensuring effective judicial protection against the administration. These objectives are best characterized by the notions of seamless judicial protection, equality of arms, timeliness, and professionalization. To reach these, both the Hungarian case-law of the last decades and European tendencies were carefully analysed, already existing rules renewed or altered, as well as other nations' solutions transplanted. The main features connected to the single policy goals are shortly presented, to close the paper with the somewhat gloomy prospects due to organizational issues raised by the procedural reforms.

Keywords: access to court, administrative justice, codification, effective judicial protection, right to a fair trial

DOI: 10.56749/annales.elteajk.2017.lvi.3.39

* Dr. habil. Krisztina Rozsnyai, mag. rer. publ. (Speyer), Privatdozentin am Lehrstuhl für Verwaltungsrecht der Juristischen Fakultät der Universität ELTE Budapest. Von Anfang 2015 bis Ende 2016 verantwortlich für die verwaltungsprozessrechtliche Kodifikation im Justizministerium.

** Dieser Aufsatz ist die schriftliche Fassung des Vortrags vom 30. April 2016, gehalten im Rahmen des III. Deutsch-ungarischen Symposiums der Juristischen Fakultäten der ELTE Budapest und der Georg-August-Universität Göttingen zum Thema „Kodifikation und aktuelle Probleme der Verfahrensrechte" in Budapest.

I. Die Geschichte der ungarischen verwaltungsprozessualen Kodifikationen – eine Halblösung nach der anderen

1. Anfänge der Verwaltungsgerichtsbarkeit in Ungarn – nach einem schweren Anfang eine provisorische Lösung

Wahrscheinlich formulierte Henry Miller (1891–1980) das Bonmot „auf dieser Erde ist nichts dauerhaft – nur das Provisorium" nicht in Anbetracht der Geschichte der ungarischen verwaltungsprozessualen Kodifikationen, doch trifft es aber auf sie zu. Im Jahr 1879 ordnete der ungarische Ministerpräsident Kálmán Tisza die Vorbereitungen zur Schaffung der Verwaltungsgerichtsbarkeit an. Es war klar, dass diese längere Zeit in Anspruch nehmen würden. Da aber das Abgeordnetenhaus auf dem Gebiet der Finanzverwaltung die Sicherung des gerichtlichen Rechtsschutzes für unaufschiebbar fand, verpflichtete es die Regierung im Jahr 1880 zur Anfertigung eines Entwurfes zur Schaffung einer ständigen Finanzgerichtsbarkeit. Auch der Monarch forderte 1881 die Errichtung der Verwaltungsgerichtsbarkeit. Der Entwurf für die Finanzgerichtsbarkeit war zu diesem Zeitpunkt schon fertig und wollte das Modell der Administrativjudikatur ausbauen. Die Spruchkörper sollten aus Beamten der Finanzverwaltung, Richtern der Tafelgerichte und Laien geformt und jährlich erneuert werden. Der Entwurf erntete wegen Fehlens der Unparteilichkeit und Unabhängigkeit der Richter heftige Kritik und so musste ein neuer Entwurf angefertigt werden. Nun orientierte sich die Gesetzesvorbereitung schon an der österreichischen Regelung aus dem Jahr 1875. Diese wurde dem Entwurf sogar beigelegt und die zu übernehmenden Passagen hervorgehoben. So kam es, dass die im Jahr 1883 angenommene ungarische Regelung eine Mischlösung war. In vielen Fragen wurde der früher durch Wissenschaft und Politik für kraftlos und den ungarischen Gegebenheiten nicht passend gehaltenen österreichischen Lösung gefolgt. Anstatt kassatorischer Befugnisse wurden dem Finanzgericht jedoch – in sehr knapper Formulierung zwar – reformatorische Entscheidungsbefugnisse zugesprochen und der Rechtsweg wurde auch nur enumerativ für einen Teil der Finanzverwaltungssachen (direkte Steuern und Gebühren) eröffnet. Es wurde ein einziger Finanzgerichthof für das ganze Land errichtet, mit Richtern auf Vorschlag des Finanzministers durch den König ernannt, zur Hälfte zum Richteramt befähigte Personen, zur Hälfte für den Dienst im Finanzministerium befähigte Personen. Die Fachliteratur kritisierte die Lösung wegen der Vermischung der Eigenschaften von verschiedenen Modellen, doch hat sie einen entscheidenden Einfluss auf die aufzustellende Verwaltungsgerichtsbarkeit ausgeübt, dessen Vorbereitungsarbeiten

schon im selben Jahr begannen.[1] Der erste Entwurf der Regierung skizzierte eine Verwaltungsgerichtsbarkeit – besser gesagt eine Administrativjustiz – auf zwei Instanzen. Die erste Instanz sollte als eine Abteilung der Verwaltungskommissionen entstehen, das Oberverwaltungsgericht aus dem königlichen Finanzgerichtshof geformt werden. Die Zuständigkeit sollte weiterhin nach dem Enumerationsprinzip festgestellt werden. Dieser Entwurf verschwand aber mit dem Regierungswechsel. Schließlich verpflichtete das Abgeordnetenhaus die Regierung mit dem Gesetz 1891: XXXIII. zur Ausarbeitung eines neuen Entwurfes. Dieser wurde 1893 eingereicht, aber wegen eines Regierungswechsels erst in 1896 beraten. Die Art der Besetzung der erstinstanzlichen Gerichte (z.T. mit Beamten) und deren Leitung durch den Regierungspräsidenten wurden durch Opposition und Wissenschaft stark kritisiert. Um die Schaffung der Verwaltungsgerichtsbarkeit überhaupt zu sichern, nahm der Innenminister den Teil des Entwurfes über die erstinstanzlichen Verwaltungsgerichte zurück und ging den Kompromiss ein, dass provisorisch nur der Verwaltungsgerichtshof (VGH) aufgestellt werden sollte. Das Abgeordnetenhaus nahm den Gesetzentwurf so nun an. Das Gesetz über die Verwaltungsgerichtsbarkeit, Nr. 1896: XXVI. (weiterhin: VGG) wurde am 1. August 1896 verkündet.

Teil I des VGG regelte die Organisation des VGH. Das VGH hatte zwei Abteilungen, die finanzrechtliche und die allgemeine verwaltungsrechtliche Abteilung. Der Präsident und Vizepräsident des VGH wurden kraft ihres Amtes auch Mitglieder der zweiten Kammer (des Oberhauses) des Parlaments. Teil II beinhaltete die Regeln der Zuständigkeit nach dem Enumerativprinzip, Teil III die Verfahrensregeln.

Da die Zahl der Richter gering war, entwickelten sich schnell überlange Verfahren. Die Aufstellung erstinstanzlicher Gerichte wurde schon wenige Jahre nach Aufnahme der Arbeit von mehreren Seiten gefordert, genauso wie die Generalklausel. Trotzdem wurde das für provisorisch gedachte System nie vervollständigt, wohl wurden fortwährend Reformentwürfe und -vorschläge in der Politik und in der Wissenschaft erörtert und zum Teil auch angenommen.[2]

2. Die ungarische Verwaltungsgerichtsbarkeit nach dem II. Weltkrieg

Nach der kommunistischen Machtübernahme wurde die Verwaltungsgerichtsbarkeit 1949 aufgrund der sozialistischen Grundprinzipien der Einheit der Macht und der Einheit der Justiz abgeschafft. In einigen – wenigen – Verwaltungssachen blieb der Rechtsweg zu den ordentlichen Gerichten jedoch frei. Das Verwaltungsverfahrensgesetz (Et.)

[1] Ausf. zu der Entstehung der Verwaltungsgerichtsbarkeit I. Stipta, *Die vertikale Gewaltenteilung,* (Gondolat, Budapest, 2005).

[2] So gab es z.B. eine Reform in 1907. Im selben Jahr erschien auch die wichtige Schrift Boér E., *Közigazgatási bíráskodás [Die Verwaltungsgerichtsbarkeit],* (Grill, Budapest, 1907).

eröffnete in 1957 den Rechtsweg zum Amtsgericht in fünf Kategorien von Verwaltungssachen und erlaubte die Sonderzuweisung durch Gesetz bzw. durch Regierungs- oder Ministerialverordnung. Der Verwaltungsprozess wurde damals als eine besondere Art von Verwaltungsverfahren betrachtet und deshalb – in Betracht der Spezialregeln – durch das Verwaltungsverfahrensgesetz geregelt. Erst im Jahr 1972 wurde Kapitel XX. mit dem Titel „Die Überprüfung von Verwaltungsentscheidungen" in die Zivilprozessordnung (ZPO) eingefügt. Diese Änderung konzipierte das Verfahren des Gerichts in Verwaltungssachen also als einen besonderen Zivilprozess, welcher in die Zuständigkeit der Zivilgerichtsbarkeit fiel.

3. 1991 – Wieder eine provisorische Lösung

Das Verfassungsgericht hat noch im Jahr 1990 festgestellt, dass die enumerative Regelung der vor Gericht anfechtbaren Verwaltungsakte verfassungswidrig ist und sowohl § 72 I Et. als auch die Regierungsverordnung mit der Enumeration der anfechtbaren Verwaltungssachen vernichtet und den Gesetzgeber verpflichtet, eine rechtsstaatliche Lösung zu finden.[3] Die durch das Verfassungsgericht gegebene Zeit bis zum 31. 3. 1991 fand der Gesetzgeber aber nicht ausreichend zur Vorbereitung eines fachlich begründeten Entwurfes. Deshalb entschied man, mit dem Gesetz 1991: XXVI. über die Ausweitung des gerichtlichen Rechtsweges, provisorisch den Rechtsweg gegen „Verwaltungsbescheide" allgemein zu eröffnen. Die Ausweitung des Rechtsweges bestand ferner darin, dass er gegen gewisse Entscheidungen der kommunalen Selbstverwaltungskörperschaften[4] freigegeben und die Möglichkeit der Sonderzuweisungen für nicht behördliche Verwaltungsentscheidungen eingeräumt wurde.

Nach Verabschiedung der neuen Verfassung im Jahr 2011, dessen Art. 25 Abs. 2 für bestimmte „Gruppen von Angelegenheiten" – insbesondere für Verwaltungs- und Arbeitsrechtsstreitigkeiten – die Möglichkeit der Aufstellung von „Sondergerichten" sicherte, stieg die Hoffnung, dass die eigenständige Verwaltungsgerichtsbarkeit in Ungarn endlich wieder errichtet wird.[5] Der Gesetzgeber entschied sich aber dazu, in jedem Komitat auf unterster Ebene, den Landgerichten untergeordnet

[3] Entscheidung Nr. 32/1990. (XII. 23.) AB des ungarischen VerfG vom 23. Dezember 1990.

[4] S. ausf. zu diesen I. Hoffman, The Legal Status of the Procedure of Legal Supervision of the Hungarian Local Governments: An International and Historical Outlook, in B. Gerencsér, L. Berkes, A. Zs. Varga (eds), *Current Issues of the National and EU Administrative Procedures (the ReNEUAL Model Rules),* (Pázmány Press, Budapest, 2015) 373–384.

[5] S. dazu z.B. die Vorträge der Tagung im November 2010 organisiert durch das Verwaltungs- und Justizministerium bzw. die Péter Pázmány Katholische Universität. Vorträge abgedruckt im Tagungsband: Varga A. Zs., Fröhlich J., *Közérdekvédelem – A közigazgatási bíráskodás múltja és jövője [Schutz des Gemeinwohls – Vergangenheit und Zukunft der Verwaltungsgerichtsbarkeit],* (PPKE JÁK, Budapest, 2011).

„Verwaltungs- und Arbeitsgerichte" (VAG) zu schaffen.[6] Damit hat Ungarn eine einzigartige Lösung gefunden, die auf zwei praktische Tatsachen zurückzuführen scheint. Erstens waren die Arbeitsgerichte schon seit 1972 als Sondergerichte (in jedem Komitat ein Arbeitsgericht am Sitz des Landgerichts) auf der untersten Ebene organisiert, womit sich diese Infrastruktur als eine kostengünstige Basis für die Verwaltungsgerichtsbarkeit anbot. Zweitens waren die Arbeitsgerichte – vor allem wegen des zu geringen Anfallens von Arbeitsstreitigkeiten – schon im alten System für mehrere Verwaltungssachen zuständig. Der Überführung der Sozialversicherungsentscheidungen 1992 zu den Arbeitsgerichten folgten im Jahr 2000 Sonderzuweisungen für die Überprüfung der Verwaltungsakte der Arbeitsämter, der Behörden für Arbeitsschutz und Arbeitssicherheit. Für die Streitigkeiten der Beamten und anderer öffentlicher Bediensteten waren auch die Arbeitsgerichte zuständig. Die Möglichkeit der Zurückführung dieser Kompetenzen an die Verwaltungsgerichtsbarkeit empfand die Arbeitsgerichtsbarkeit als eine existentielle Bedrohung. Statt Schaffung eigenständiger Verwaltungsgerichte wurden daher die Verwaltungsgerichte nicht als eigenständige Gerichte aufgestellt, sondern mit den Arbeitsgerichten zu einer Fachgerichtsbarkeit zusammengeführt. Diese Fachgerichtsbarkeit wurde – wider den Vorschlägen der ungarischen Literatur zur Organisation der Verwaltungsgerichte auf regionaler Ebene[7] – neben den Amtsgerichten auf der untersten Stufe der Gerichtsorganisation angesiedelt. Zugleich wurde die ausschließliche Zuständigkeit des hauptstädtischen Tafelgerichts für die Berufungsverfahren zu einer allgemeinen Zuständigkeit der jeweiligen Landgerichte – wo meist keine Verwaltungsrichter tätig sind – umgewandelt. Revisionsgericht ist die Kurie geblieben.

Vor diesem Hintergrund hat sich die ungarische Regierung im Januar 2015 im ZPO-Konzept endlich dazu entschieden, die Regeln der Verwaltungsprozesse aus der ZPO herauszunehmen. Erst wurde ein Konzept zur Regelung erstellt, welches die Regierung im Mai 2015 angenommen hat. Danach begannen die Kodifikationsarbeiten,

[6] Mit Ausnahme der Tafelgerichte wurden bei dieser Justizreform alle Gerichte umbenannt und wieder die historischen Bezeichnungen eingeführt: Aus den Amtsgerichten wurden Kreisgerichte, aus den Komitatgerichten „Gesetzessitze" und aus dem OGH „Kurie". Die Kurie ist der einheitliche oberste Gerichtshof Ungarns. s. für die Reformen durch die neue Verfassung K. Rozsnyai, Änderungen im System des Verwaltungsrechtsschutzes in Ungarn, (2013) 65 (9) *Die Öffentliche Verwaltung,* 335–342.

[7] Schon vor der Aufstellung des Verwaltungsgerichtshofs in 1896 waren viele für die regionale Ansiedlung der erstinstanzlichen Verwaltungsgerichte. Die Regionalisierung der Verwaltungsgerichtsbarkeit wurde auch in den 1990er Jahren von der Wissenschaft gefordert, so z.B. von Trócsányi, László: A közigazgatási bíráskodás egyes elméleti és gyakorlati kérdései [Einige theoretische sowie praktische Fragen der Verwaltungsgerichtsbarkeit?] Budapest, 1990; sowie Rácz, Attila: A közigazgatás külső ellenőrzési fórumrendszerének néhány problémája közigazgatási hatósági ügyekben [Einige Probleme des externen Kontrollsystems der Verwaltung in behördlichen Verwaltungsangelegenheiten], *Magyar Közigazgatás* 1996, 82. (84.).; zuletzt F. Rozsnyai, Krisztina: A közigazgatási bíráskodás megteremtésének sarokkövei [Eckstеine der Schaffung der Verwaltungsgerichtsbarkeit], in Varga A. Zs., Fröhlich J., *Közérdekvédelem – A közigazgatási bíráskodás múltja és jövője [Schutz des Gemeinwohls – Vergangenheit und Zukunft der Verwaltungsgerichtsbarkeit],* (PPKE JÁK, Budapest, 2011). 81. (89.).

um am 31. März den Referentenentwurf zur Ressortabstimmung und der Öffentlichkeit vorzulegen. Über den Kabinettsentwurf berät die Regierung wahrscheinlich im Sommer.

II. Leitfaden der aktuellen Kodifikationsarbeiten zur Schaffung einer Verwaltungsprozessordnung

Leitfaden der Kodifikationsarbeiten war der Grundsatz des effektiven gerichtlichen Rechtsschutzes. Diesen zu verwirklichen wurden vier Richtungen identifiziert: Einerseits Sicherung von subjektivem Rechtsschutz und zugleich Gewährung objektiver Rechtmäßigkeitskontrolle, andererseits die Gewährung von lückenlosem Rechtsschutz, drittens die Gewährung eines zeitgemäßen Rechtsschutzes und viertens die Schaffung prozeduraler Waffengleichheit.

1. Schutz subjektiver Rechte und zugleich Rechtmäßigkeitskontrolle

Da der Verwaltungsprozess laut h. M. als eine besondere Verfahrensart der ZPO anzusehen ist, gibt es zur Zeit keine eigenständigen Verfahrensgrundsätze für Verwaltungsprozesse. Neben den allgemeinen Grundsätzen der Rechtspflege, wie Rechtsprechung durch Gerichte, die Unabhängigkeit der Gerichte, der Öffentlichkeitsgrundsatz, sowie das Recht auf ein faires Verfahren, bestimmen die Grundsätze des Zivilprozesses die Verwaltungsprozesse. Diese sind der Beschleunigungsgrundsatz, die Dispositionsmaxime, der Mündlichkeitsgrundsatz und der Unmittelbarkeitsgrundsatz sowie das Recht auf rechtliches Gehör und der Grundsatz der freien Beweisführung. Dies hat in der Verwaltungsgerichtsbarkeit zu der sehr strikten Handhabung der Dispositionsmaxime geführt. Das Gericht ist an die Klage gebunden und darf die Verwaltungsentscheidung nur in dessen Rahmen überprüfen *(ne ultra petita).* Dazu kommt, dass der Kläger die Rechtsvorschrift nennen muss, welchen die Verwaltungsentscheidung verletzt. Daraus folgt, dass das Gericht die Verwaltungsentscheidung nur auf solche Rechtsverletzungen prüfen darf, die in der Klage – mit Hinweis auf die konkrete Rechtsgrundlage – gerügt wurden. Die Klage kann nach Ablauf der Klagefrist auch nicht auf die in der Klage nicht berührten Teile der Entscheidung erweitert werden.

Im Jahr 2008 wurde die Bindung des Gerichts an die Klage insoweit gelockert, als durch einige neue Vorschriften der Untersuchungsgrundsatz in beschränktem Maße eingeführt wurde. So darf das Gericht bei der möglichen Nichtigkeit des Verwaltungsbescheides und bei der Gefährdung der Interessen und Rechte Minderjähriger von Amts wegen *(ex officio)* die Beweisführung anordnen, also auch ohne entsprechendes Klagebegehren die notwendige Entscheidung treffen. Dieses Prinzip gilt aber – wegen der

Formulierung der Einzelvorschriften – nur bei Anfechtungsklagen gegen behördliche Verwaltungsentscheidungen. Auch stellt seit 2008 die Vorschrift zur Umkehr der Beweislast einen partiellen Ersatz des Untersuchungsgrundsatzes in Fällen dar, wo die Behörde von Amts wegen das Verfahren eingeleitet hat und der Kläger den dort festgestellten Tatbestand bestreitet. Diese Regeln übernimmt der Entwurf mit einigen Korrektionen, denn die bisherige Nähe zur ZPO und die daraus stammende „Tradition" erlauben es weiterhin nicht, die Verwaltungsprozesse auf den Untersuchungsgrundsatz umzustellen. Deshalb wird der objektive Rechtsschutz anders durch verschiedene Regeln und Rechtsinstitute gesichert. Zum einen ist es weiterhin möglich, Beweisführung von Amts wegen anzuordnen, zum anderen muss der Richter gewisse Fehler von Amts wegen beachten – dies sind die Nichtigkeitsgründe des ungarischen Verwaltungsverfahrensgesetzes von 2004 (UngVwVfG), beziehungsweise gewisse, in Sondergesetzen festgeschriebene schwerwiegende Verfahrensfehler. Auch hat der Entwurf der Verwaltungsprozessordnung (VPO) die Möglichkeit beibehalten, die Beweislast umzukehren, wo das vorhergehende Verwaltungsverfahren von Amts wegen eingeleitet wurde und der Kläger den dort festgestellten Sachverhalt streitig macht. Dem Richter steht es auch frei, den Staatsanwalt zu benachrichtigen, falls er das Verfahren wegen Klagerücknahme oder Rechtsnachfolge ohne Urteil abschließen sollte, er aber aus Gründen des Gemeinwohlschutzes das Weiterbetreiben des Verfahrens für notwendig hält. Mit diesen Regeln, beziehungsweise der Lockerung der Klagegebundenheit und der Verschiebung in die Richtung der materiellen Kontrolle wird die Rechtmäßigkeitskontrolle stärker gewährt werden.

Der objektive Rechtsschutz soll weiterhin vor allem durch die Klagebefugnis gesichert werden. Die Klagebefugnis ist im ungarischen Verwaltungsprozessrecht dadurch ziemlich breit gefasst, dass sie bei behördlichen Verwaltungsentscheidungen an die Beteiligtenstellung im Verwaltungsverfahren gebunden ist. Beteiligter ist, wessen Recht oder rechtliches Interesse durch die Verwaltungssache berührt wird. Der Begriff des rechtlichen Interesses ist in der Rechtsprechung und in der Literatur nicht hinreichend geklärt,[8] meistens werden nur solche Interessen in Betracht genommen, die durch Rechtsvorschriften anerkannt sind. Neben diesem allgemeinen Beteiligtenbegriff hat das UngVwVfG zwei weitere Formen der Beteiligten entwickelt. Einerseits gibt es einen sog. automatischen Beteiligtenbegriff für Massenverfahren. Bei der Genehmigung von Anlagen mit Wirkungskreis kann laut § 15 III UngVwVfG durch das Sonderrecht ohne konkrete Prüfung der Betroffenheit jeder als Beteiligter anerkannt werden, der ein dingliches Recht auf eine Immobilie hat, die sich im Wirkungskreis der Anlage befindet. Andererseits ermöglicht § 15 IV des UngVwVfG gewissen Organisationen, als Quasi-Beteiligte in Verfahren teilzunehmen. In diesem Kreis können

[8] In letzter Zeit kommt z.B. die Frage, ob wirtschaftliche Interessen eine Klagebefugnis begründen können, manchmal – vor allem in Zusammenhang mit dem Europäischen Recht im Regulierungsrecht – auf. S. dazu die Vorabentscheidung des EuGH auf Ersuchen der Kurie, Urt. v. 19. März 2015., Rs. C-510/13.

Verwaltungsorgane, die in der Sache weder als Behörde noch als Sachbehörde mitwirken, die Beteiligtenstellung erhalten, falls die Verwaltungssache ihren Aufgabenkreis berührt. Von dieser Ermächtigung machen meistens die Gemeinden Gebrauch, um in Vertretung der Bewohner gegen größere Vorhaben vorzugehen.

Die Verbandsklage basiert auf der Quasi-Beteiligtenstellung von Zivilorganisationen. Diese können laut § 15 V UngVwVfG dann als Beteiligte auftreten, wenn das Sonderrecht ihnen diese Möglichkeit einräumt. Dies ist zur Zeit der Fall in Umwelt-, Natur- und Tierschutzsachen sowie im Verbraucherschutz, Nichtraucherschutz und im Behindertenrecht.[9]

Außer den Beteiligten kann Klage durch die weiteren Teilnehmer des Verfahrens (Zeugen, Übersetzer, Sachverständige, etc.) gegen die an sie adressierten Beschlüsse, sowie gegen die sie betreffenden Bestimmungen des Bescheides, erhoben werden.

Der Staatsanwalt kann in gewissen Fällen zum Schutze des Gemeinwohls gegen behördliche Entscheidungen Klage einreichen. Falls er auf eine rechtswidrige behördliche Verwaltungsentscheidung oder Unterlassung aufmerksam wird, kann er die Aufsichtsbehörde auffordern, die Rechtswidrigkeit zu beheben und falls diese Aufforderung keinen Erfolg hat, kann der Staatsanwalt ein Gerichtsverfahren einleiten. Dieses Konzept wird mit kleineren Korrektionen weiterhin beibehalten.

2. Gewährung lückenlosen Rechtschutzes

Wirksamen Rechtschutz gibt es nur, wenn der Rechtsweg hinreichend weit gefasst ist. Zur Zeit können in Ungarn im Allgemeinen nur behördliche Verwaltungsbescheide und gewisse Verfahrensentscheidungen angefochten werden. Für alle anderen Verwaltungsakte braucht es eine Sonderrechtswegzuweisung. Um lückenlosen Rechtsschutz zu garantieren, muss der Rechtsweg ausgeweitet werden. Dies ist eine der schwierigsten Aufgaben der Kodifikation, um das richtige Maß der Abstraktion zu finden. Das Abstraktionsniveau der deutschen oder etwa der französischen Regelung wäre sicherlich zu schwer zu meistern, man darf nicht vergessen, dass diese ja auf langen Jahrzehnten der Rechtsentwicklung beruhen. Trotzdem bedarf es einer Generalklausel: Der Rechtsweg steht offen gegen die Tätigkeit der Verwaltung. Diese hat drei Elemente: Einerseits muss ein Verwaltungshandeln mit Rechtswirkung vorliegen. Andererseits muss diese Handlung von einem Verwaltungsorgan ausgeführt oder unterlassen werden. Drittens muss die Handlung durch Verwaltungsrecht geregelt sein. Falls diese drei Kriterien existieren, wird der Rechtsweg eröffnet – natürlich nur, wenn es ein Rechtsschutzbedürfnis gibt.

[9] S. ausf. K. Rozsnyai, Von Aarhus nach Budapest: Einwirkungen der Aarhus-Konvention auf das ungarische Verwaltungsverfahrens- und Verwaltungsprozessrecht, (2015) 68 (6) *Die Öffentliche Verwaltung,* 228. (230.).

Um die Lückenlosigkeit weiter abzusichern, wird aushilfsweise noch jede Streitigkeit, die einem verwaltungsrechtlichen Rechtsverhältnis entstammt, dem verwaltungsgerichtlichen Rechtsweg zugewiesen. Hier werden exemplarisch die Rechtsverhältnisse aus Verwaltungsverträgen und im öffentlichen Dienst hervorgehoben.

Die Richterschaft ist dieser neuen Regelung gegenüber sehr skeptisch und würde gerne an der Enumeration festhalten. Mit dieser Technik kann man aber keinen lückenlosen Rechtsschutz schaffen. Um die Rechtsprechung zu orientieren, enthalten die Bestimmungen über den Rechtsweg nichtsdestotrotz eine exemplifikatorische Liste von Verwaltungstätigkeiten. Neben Verwaltungsentscheidungen und Verfügungen werden z.B. verwaltungsinterne Normen, sowie Entscheidungen von öffentlichen Körperschaften und Anstalten hervorgehoben.

3. Prozessuale Waffengleichheit

Zum einen kommt der richterlichen Aufklärungspflicht und der substantiellen Prozessführung große Bedeutung zu. Der Richter hat darauf hinzuwirken, dass notwendige Anträge gestellt werden, Fehler und Mängel der Schriftsätze behoben werden sowie die Sach- und Rechtslage mit den Parteien gründlich erörtert wird. Der Gesetzgeber will die Rolle des Richters in Zivilprozessen auch in diese Richtung ändern, welchem die verwaltungsprozessuale Kodifikation gerne folgt, da es in der Praxis jetzt schon Verwaltungsrichter gibt, die in diesem Sinn die Verwaltungsprozesse führen. Dieser Prozessführungsmodus balanciert auch das Fehlen des Untersuchungsgrundsatzes etwas aus und trägt so zur Effektivität des Rechtschutzes bei. Die herrschende Meinung der Richterschaft sieht hierin zwar schon die Verletzung der Unparteilichkeit, aber gewiss wird sich die Auffassung anhand der neuen Erfahrungen allmählich ändern.

Um Waffengleichheit zu schaffen, gibt es auch in der Regelung der Pflichten der Parteien Unterschiede zur ZPO. Gewisse Pflichten des Klägers werden auf den Richter übertragen, um auf Probleme in der aktuellen Regelung zu reagieren. So müssen Probleme im Zusammenhang mit der Bestimmung des Angeklagten nicht durch den Kläger behoben werden. Der richtige Beklagte wird demnach durch das Gericht in den Prozess gestellt, falls der Prozess nicht gegen alle zu Beklagenden eingeleitet wurde, oder nicht das richtige Verwaltungsorgan als Beklagter durch den ohne Rechtsbeistand verfahrenden Kläger bezeichnet wurde. Auch wird bei Änderungen der Zuständigkeiten bzw. der Verwaltungsorganisation das Gericht den Rechtsnachfolger des Beklagten in den Prozess stellen. Die Änderung der Rechtsvorschriften über Zuständigkeiten und Organisation, welche die Prozesslegitimation betreffen, muss der Angeklagte selbst dem Gericht melden. Mängel der Klageschrift in dieser Hinsicht können vom Richter geheilt werden, falls der Kläger ohne Rechtsbeistand verfährt. Die Umkehr der Beweislast kann auch als ein Weg der Schaffung von Waffengleichheit gesehen werden.

4. Zeitgemäßer Rechtsschutz

Zeitgemäßer Rechtschutz hat zumindest drei Aspekte: Zum einen muss es vorläufigen Rechtsschutz geben, zum anderen muss das Verfahren so konzentriert wie möglich beendet werden und falls möglich, die endgültige Beilegung des Rechtsstreits erreichen und drittens muss auch Rechtschutz nach dem Urteil zur Verfügung stehen, also die Durchsetzung, Vollstreckung der gerichtlichen Entscheidung auch wirklich erfolgen.

***a)* Vorläufiger Rechtsschutz**

Da die Regeln der Verwaltungsprozesse auf die Anfechtungsklage zugeschnitten sind, ist die Aussetzung der Vollstreckung zurzeit die einzige Form des Eilrechtsschutzes. Dieses Instrument ist umso wichtiger, da die Einreichung der Klage seit 2005 keine aufschiebende Wirkung hat. In der Klage – und auch später im Prozess – kann die Partei das Gericht um die Aussetzung der Vollstreckung ersuchen. Die Vollstreckung kann – ausgenommen die Sofortvollstreckung – nach Kenntnisnahme von diesem Antrag nicht ausgeführt werden, der Antrag auf vorläufigen Rechtsschutz hat also aufschiebende Wirkung – für 15 Tage zumindest. Die Klage, die bei der erstinstanzlichen Behörde eingereicht wird, muss im Eilverfahren an das Gericht weitergeleitet werden, welches binnen 15 Tagen zu entscheiden hat. Falls der Antrag begründet ist, hat das Gericht Vollzugsinteresse und Aufschiebungsinteresse abzuwägen. Der Kläger muss zur Statthaftigkeit des Antrags sein Aufschiebungsinteresse begründen und dazu Beweise vorlegen. Die andere Partei soll auch gehört werden. Gegen die Entscheidung des Gerichts ist eine Berufung statthaft. Da der Antrag auf Aussetzung nicht nur einmal gestellt werden kann, gibt es gegen die Abweisung des wiederholten, auf unveränderter Sach- und Rechtslage basierten Antrags keinen Rechtsbehelf.

Die ZPO kennt als allgemeine Wege des einstweiligen Rechtschutzes die einstweilige Maßnahme und die vorgebrachte Beweisführung. Da für diese weiteren Formen Kapitel XX. ZPO keine Regelung enthält, ist nach herrschender Meinung der Rechtsprechung die einzige Form des einstweiligen Rechtschutzes die Aussetzung des Vollzugs, die die anderen Formen – wegen ihrer Ungeeignetheit – ersetzt. Es gibt einige Sonderregeln, die aber in speziellen Situationen einstweilige Maßnahmen möglich machen, so z.B. die vorläufige Entpflichtung des Bürgermeisters oder die Anordnung der Aufnahme in eine Anstalt, ansonsten sind die Anträge auf einstweilige Maßnahmen unzulässig.[10] Bei der vorgebrachten Beweisführung ist die Lage einfacher, da § 332/B ZPO diese erwähnt, in der Praxis kommt sie aber wohl aus den schon geschilderten Gründen fast nie vor.

[10] Die Durchsetzung von Unionsrecht könnte hiervon freilich eine Ausnahme sein.

***b)* Konzentration des Prozesses und möglichst endgültige Regelung der Sache**

Die Konzentrationsmaxime wird nun auch in das ungarische Zivilprozessrecht ausdrücklich eingeführt, der Entwurf der VPO nimmt auf sie ausdrücklich Bezug, als Aufgabe des Gerichts, das Verfahren konzentriert durchzuführen. Diesem Ziel dienen einerseits viele Vorschriften, die Termine für das Gericht vorschreiben. Präklusionsregeln dienen auch dem Ziel der schnellen Durchführung des Verfahrens: Beweise, die im Verwaltungsverfahren nicht vorgebracht wurden, können vor Gericht nur vorgebracht werden, falls die Unterlassung der Partei unverschuldet ist. Das Gericht kann schon bei der Vorbereitung des Prozesses Beweisführung anordnen und auch auf den Experten des Verwaltungsverfahrens kann leichter zurückgegriffen werden, als heute: Der im Verwaltungsverfahren bestellte Experte ist dem durch das Gericht bestellten Experten gleichgestellt. So muss das Gericht keine neuen Experten bestellen, um Unklarheiten des Verwaltungsverfahrens zu klären, sondern kann die Unstimmigkeiten des Gutachtens bzw. dessen Ergänzung leichter – und vor allem schneller – erreichen.

Grundsätzlich ist die Reformation im ungarischen Verwaltungsprozess jetzt eine Ausnahme und in der ZPO vor allem in Fällen möglich, wo das Gericht zivilrechtliche oder an diese anlehnende Rechtsverhältnisse ordnet. Es gibt aber mehrere Dutzend Sondergesetze, die eine Möglichkeit der Abänderung vorsehen – davon macht das Gericht allerdings selten Gebrauch.

Es ist ein wichtiges rechtspolitisches Ziel, dass das Gericht falls möglich nicht nur den Rechtsstreit beilegt, sondern auch das Rechtsverhältnis abschließend regelt. Darum soll die Möglichkeit der Reformation dem Gericht im Allgemeinen zustehen, um in Fällen, in denen die notwendigen Tatsachen zur Verfügung stehen, der Tatbestand geklärt ist und die Natur der Sache dies zulässt, das Gericht den Verwaltungsakt abändert. Um den Grundsatz der Gewaltenteilung zu wahren, bleibt es dem Gericht überlassen, es zu beurteilen, wo die Natur der Sache die Reformation zulässt – sicherlich nicht dort, wo dadurch die wahren Befugnisse der Verwaltung durch das Gericht entscheidend übernommen werden würden. Dies ist aber von Fall zu Fall zu prüfen, es kann dafür keine allgemeine Regel aufgestellt werden. Dem Entwurf nach lässt die Natur der Sache die Reformation bei normativen Verwaltungsakten, bei Ermessensentscheidungen, die eine Leistung zu Lasten des Staatshaushaltes feststellen sowie bei Entscheidungen, die auf Billigkeit beruhen, nicht zu. Der Sondergesetzgeber ist auch befugt, die Grenzen der Reformation festzulegen oder gar auszuschließen.

Um die Möglichkeit der Reformation in der Praxis attraktiver zu machen, hat das Gericht – in Anlehnung an die Lösung der deutschen VwGO – laut VPO-Entwurf die Möglichkeit, die konkrete Summe der Leistung bzw. Verpflichtung durch die Verwaltung ausrechnen zu lassen. Dies ist bei Steuern oder etwa Renten sehr nützlich und hat auch einen deutlichen Beschleunigungseffekt gegenüber der Anordnung der Wiederholung des Verfahrens.

***c)* Maßnahmen zur Durchsetzung der verwaltungsgerichtlichen Urteile**

Was den Rechtsschutz nach dem Urteil betrifft, sind hier viele Probleme in der Praxis zu beheben. Die Verwaltungsbehörden neigen in gewissen Fällen dazu, gerichtlichen Urteilen kein Gehorsam zu leisten. In diesen Fällen kann der Kläger nur wiederholt gegen den neuen Bescheid klagen oder wegen der Unterlassung der Durchführung des wiederholten Verfahrens ein weiteres Verfahren vor Gericht einleiten. Um diese Probleme zu beheben, bietet der Entwurf verschiedene Mittel. Zum einen kann das Gericht ein Zwangsgeld erlassen. Daneben kann es selbst zwar nicht entscheiden – was in vielen Fällen auch keine wahre Alternative bieten würde – aber eine andere Verwaltungsbehörde zum Erlass des Verwaltungsakts statt dem beklagten Verwaltungsorgan bevollmächtigen. Bei Klagen in Zusammenhang mit der Staatsaufsicht kann desgleichen der Aufsichtsbehörde gestattet werden, die kommunale Aufgabe zu verwirklichen und das Gericht kann auch mit einer einstweiligen Verfügung die Situation regeln, bis die Verwaltungsbehörde dem Urteil nicht nachkommt.

III. Fazit

Für die Kodifikation der Verwaltungsprozessordnung stand etwa ein Jahr zur Verfügung. Dies reichte natürlich überhaupt nicht, nicht einmal zur Klärung der wichtigsten Fragen. Verwaltungsprozessuale Regeln haben eine sehr starke Ordnungsfunktion, da sie sich über alle Bereiche des allgemeinen Verwaltungsrechts erstrecken und so praktisch als deren Überbau funktionieren.[11] Organisationsrechtliche Fragen werden ebenso aufgeworfen, wie Fragen der Verwaltungsverantwortung, aber auch Grundlagen des ganzen Staatsrechts mit den Fragen hinsichtlich der Gewaltenteilung und des sehr ausgeprägten Systems der „checks and balances", die das Verwaltungsprozessrecht in dieser Hinsicht verwirklicht. Es reicht etwa auf aktuelle Fragen der EuGH-Rechtsprechung hinzuweisen, damit jedem klar wird, welche wichtigen und weitreichenden – auch gesellschaftspolitischen – Fragen durch das Verwaltungsprozessrecht und die verwaltungsgerichtliche Rechtsprechung beantwortet werden müssen. Materielle Präklusion, Heilung bzw. Unbeachtlichkeit von Verfahrensfehlern, Nachschieben von Gründen im Verwaltungsprozess sind Themen, die dieses Problemfeld intensiv gestalten.[12] Auf diese Fragen musste auch die ungarische Kodifikation in dieser kurzen Zeitspanne Antworten

[11] S. dazu ausf. E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee,* 2. Aufl., (Springer, Berlin, Heidelberg, New York, 2006).

[12] S. zur materiellen Präklusion z.B. EuGH, Urt. v. 15.10.2015, in der Rs. Europäische Kommission/Bundesrepublik Deutschland, C-137/14, ECLI:EU:C:2015:683; oder zur Unbeachtlichkeit von Verfahrensfehlern z.B. EuGH, Urt. v. 7. 11. 2013, in der Rs. Gemeinde Altrip u. a./Land Rheinland-Pfalz, C-72/12, ECLI:EU:C:2013:712.

liefern und grundlegende Fragen des allgemeinen Verwaltungsrechts richtig in Tiefe behandeln – ob und wie das gelungen ist, wird sich natürlich nur in der Praxis erweisen.

Neben dieser Schwierigkeit gab es weitere Hürden. Dass die VPO zeitlich vor der ZPO fertiggestellt werden sollte, erschwerte die Kodifikation enorm. Viele hätten es gerne gesehen, dass die VPO die Verwaltungsprozesse ganz unabhängig von der ZPO, ohne Rückverweise regelt: dies war eben wegen der parallelen Kodifikation der ZPO überhaupt nicht möglich. Es wäre aber aus regelungsökonomischen Gründen auch nicht sinnvoll gewesen: Vorschriften, welche nicht die Eigenart der Verwaltungsgerichtsbarkeit widerspiegeln, sondern für gerichtliche Verfahren allgemein gelten, sollen nicht verdoppelt werden. Um aber den Kreis dieser Regeln mit Sicherheit zu definieren, braucht es eine abgeschlossene zivilprozessuale Kodifikation – diese Grundlage war im Laufe der Kodifikation leider nicht gegeben.

Die anderen Hindernisse und Schwierigkeiten, wie etwa die parallele Rekodifikation des Verwaltungsverfahrensrechts seien jetzt dahingestellt. Man kann nur hoffen, dass diese verwaltungsprozessuale Kodifikation mit der Tradition bricht, und keine Halblösung zum Ergebnis haben wird. Die größte Gefahr bedeutet in dieser Hinsicht wieder – wie schon vor 120 Jahren – die Frage der Gerichtsorganisation. Um diese zu ändern, braucht es im Parlament eine Zweidrittelmehrheit.[13] Ob diese zustande kommen kann, ist aber noch offen.

[13] Das Gerichtsverfassungsgesetz und das Gesetz über die Rechtsstellung der Richter sind sog. Kardinalgesetze, zu deren Abänderung und Abberufung die Zweidrittelmehrheit der anwesenden Abgeordneten erforderlich ist. Zu dieser Kategorie siehe A. Jakab, P. Sonnevend, Kontinuität mit Mängeln. Das neue ungarische Grundgesetz, (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 79. (95f.).

Tóth, András*

EU Competition Law Aspects of Public Services**

Abstract

The aim of this article is to distinguish between economic and non-economic public services, as the latter are not subject to EU competition law and Member States are free to regulate them themselves. EU competition law is applicable to public services having an economic nature, with a certain degree of derogation available under Article 106 TFEU.[1] It should be noted that Article 106 TFEU also provided the legal basis of market liberalisation.

Keywords: competition law, EU law, national regulation, public services, provision of public services

I. Introduction

Two Articles of the TFEU comprise the core of EU competition law. Article 101 TFEU prohibits anti-competitive agreements, while Article 102 TFEU prohibits the abuse of a dominant position. However, both of these Articles are only applicable to entities qualifying as undertakings as defined by EU competition law. According to the European Court of Justice, an undertaking 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[2]

EU competition law is applicable to an economic activity, regardless of whether the legal status of the entity in question is public or private. Consequently, a public service can be subject to EU competition law if it is economic in nature. In contrast, EU competition law is not applicable to a public service if it is not economic in character. In such cases as the latter, Member States are free to regulate public services. Otherwise, Member States must refrain from hindering the applicability of EU competition law to public services having an economic nature according to the *effet utile* principle and its *lex specialis,* Article 106 TFEU. Before discussing these rules, I would like to provide

* Tóth, András PhD, Chairman of the Competition Council and Vice-President of the Hungarian Competition Authority, Associate Professor at Károli University, Budapest, Hungary.

** The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Hungarian Competition Authority.

1 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1.

2 Case C-41/90 – *Klaus Höfner and Fritz Elser v Macrotron GmbH,* [1991] ECR I-01979, para 21.

DOI: 10.56749/annales.elteajk.2017.lvi.4.53

a few examples of the economic nature of an activity. According to the EU Courts 'any activity consisting in offering goods and services on a given market is an economic activity'.[3]

It is irrelevant whether the activity is carried out by a public or a private entity. Public entities can be regarded as undertakings in the meaning of EU competition law, as elaborated in the German *Höfner case*.[4] In this case, a public agency had been entrusted to provide employment procurement services, which had an economic nature according to the EU Court. The opposite can also be true: a private entity entrusted with the enforcement of public interests can be deemed as acting on behalf of the State and as not having an economic nature.[5] According to the case-law, an activity cannot be regarded as an economic activity if the 'activity in question is based on the principle of national solidarity. For example, the benefits paid are statutory benefits bearing no relation to the amount of contributions'.[6]

However, accountants[7] and members of the bar who 'offer, for a fee, services [...] In addition, they bear the financial risks'[8] must be regarded as an undertaking under EU competition law. In contrast, rules adopted by an association of undertakings remain State measures and are therefore not covered by the Treaty rules applicable to undertakings, if the association exercises the regulatory powers of a public authority granted by the State.[9]

In sum, EU competition law is not applicable to a public service lacking an economic nature e.g. the social security system, health care or education. In such a case, the Member State is free to 'provide and organise non-economic services of general interest' according to Protocol 26 TFEU. However, EU competition law remains applicable to public services having an economic character. Moreover, according to the effet utile principle and its lex specialis, Article 106 TFEU, the Member State must refrain from hindering the applicability of EU competition law to public service providers – such as publicly owned companies or companies enjoying exclusive or special rights granted by the Member State. This prohibition stems from the fact that 'if undertakings are required by national legislation to engage in anti-competitive conduct, they cannot be held accountable for infringements'.[10] The Member State shall be held responsible for ensuring the correct application of EU competition law on its territory,

[3] Case C-309/99 – *Wouters and Others,* [2002] ECR I1577, para 47.
[4] Case C-41/90.
[5] Case 118/85 – *Commission v Italy,* [1987] ECR 2599, para 8.
[6] Cases C-159 – 160/91 – *Poucet et Pistre v. Assurances Générales de France,* [1993] ECR I-637, paras 18–19.
[7] Case C-1/12 – *Ordem dos Técnicos Oficiais de Contas* (Court, 28 February 2013), para 37.
[8] Case C-309/99, para 48.
[9] Ibid, para 68.
[10] Joined cases C-359/95 P and C-379/95 P – *Commission and France v Ladbroke Racing,* [1997] ECR I-6265, para 33.

given the fact that competition law is one of the major pillars of the European Union's Economic Constitution.[11]

II. The *effet utile* principle and Article 106 TFEU as *lex specialis*

The *effet utile* principle can be derived from the Member State loyalty clause of TEU and the common goals of the EU, the latter of which encompass the use of EU competition law to secure the proper functioning of the single market of the EU.[12] The *effet utile* principle means that 'Member States cannot introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings'.[13] In the *Van Eycke case* the EU Court stated that a state

> renders ineffective the competition rules applicable to undertakings if: *i)* [it] requires or *(ii)* favours – the adoption of agreements, decisions or concerted practices contrary to Article 101 of TFEU or *(iii)* reinforces their effects, or *(iv)* delegates to private economic operators responsibility for taking decisions affecting the economic sphere.[14]

Article 106 TFEU is *lex specialis* of the *effet utile* principle for two reasons. First, it prohibits a Member State from *rendering ineffective the competition rules applicable especially to publicly owned companies or companies enjoying exclusive/special rights granted by the Member State*. Second, the EU Commission can directly act against the Member State by adopting decisions pursuant to Article 106 TFEU. Furthermore, the Commission may sue Member States for breaching the *effet utile* principle. Accordingly, EU competition law is applicable to public services having an economic nature. Additionally, the Member State can be held liable for *rendering ineffective the competition rules applicable to it*.

[11] Article 119(1) TFEU.

[12] Consolidated version of the TFEU. The member state obligation to respect the EU competition law is driven from Article 4(3) TEU, which stipulates that the Member States shall refrain from any measure which could jeopardise the attainment of the Union's objectives. According to Article 3(3) TEU, the Union's aim is to establish an internal market. According to the Protocol No. 27 on the internal market and competition, the internal market includes a system to ensure that competition is not distorted.

[13] Case 267/86 – *Pascal Van Eycke v ASPA NV.,* [1988] ECR 1988-04769, para 16.

[14] Ibid, para 16.

However, paragraph (2) of Article 106 TFEU grants immunity from the application of EU competition law to public services providing services of general economic interest (SGEI). Article 106(2) TFEU states that

> undertakings entrusted with the operation of services of general economic interest shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

This derogation rule can be regarded as the balancing factor between the applicability of EU competition law and the EU interest in maintaining the operation of SGEI.

According to Article 36 of the Charter of Fundamental Rights of the European Union,

> The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.[15]

According to Article 14 of TFEU,

> the Union and the Member States, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions.

According to Article 2 of Protocol 26 of TFEU, Member States enjoy a wide range of discretion 'in providing and organising services of general economic interest as closely as possible to the needs of the users'.

According to the General Court, there is 'no clear and precise regulatory definition of the concept of a "service of general economic interest" mission and no established legal concept'.[16] According to the case-law, the SGEI must be clearly assigned to provide services having universal character.

However, the clear assignment and the universal nature cannot result in full derogation from the applicability of EU competition law. The case-law adopted a compensatory approach, which means that the aim of the derogation is to maintain the

[15] Charter of Fundamental Rights of the European Union OJ 2012/C 326/2.
[16] Case T-289/03 – *BUPA and Others v Commission,* [2008] ECR II-00081, para 165.

> economic equilibrium of the service of general economic interest. Member States must set out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised

– as the EU Court emphasised in its recent judgment in *Slovenska Posta* in 2015.[17] According to the interpretation of Article 106(2), cross subsidy should be allowed in order to maintain the 'economic equilibrium of the service of general economic interest by covering the cost of the SGEI from non-SGEI profitable services'.[18]

III. Derogation from Article 106(1) TFEU

The State Aid approach resulted from the compensation approach, according to which the derogation under Article 106(2) TFEU means the allowance of granting state aid to SGEI to perform their tasks, according to the EU Court, there is no state aid at all if four criteria were met, as elaborated in the *Altmark case*[19] (because the advantage cannot be ascertained):

– the undertaking which provides SGEI is obliged to provide a public service *(upon clear authority);*

– the state reimburses the losses deriving from provision of SGEI calculated upon a *methodology fixed in advance;*

– the granted subsidy does not exceed the expenses of the SGEI (i.e. the subsidy is *not extra compensation*);

– the methodology shall only model the expenses of an effective undertaking if the public service provider was *not chosen in the course of an open tender.*

Inasmuch as any of the above criteria is not met, the *reference to the exception of the SGEI provided under Article 106(2) TFEU is still available*; however, in this case the state subsidy shall be notified, but there is *no need to comply with the economic effectiveness requirements* (fourth element of the above Altmark criteria).

[17] Case T-556/08 – *Slovenská pošta v Commission* (General Court, 25 March 2015).
[18] Case C-320/91 – *Criminal proceedings against Paul Corbeau,* [1993] I-2533, para 19.
[19] Case C-280/00 – *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht,* [2003] ECR I-07747.

IV. Exclusive rights

Article 106 TFEU raises the question of the acceptance of exclusive rights in EU law. According to the case-law, granting exclusive rights is not in itself a breach of Article 106 TFEU.

> A Member State is in breach of the prohibitions laid down by Article 106 if it adopts any regulation that creates a situation in which a public undertaking can afford to abuse its dominant position. It is not necessary that any abuse actually occurs. Inequality of opportunity between economic operators or the extension of a dominant position without any objective justification constitutes an infringement of Article 106 TFEU.[20]

Recently, a Bulgarian case[21] raised the question as to whether granting an exclusive right to pay retirement pensions by money order could be regarded as state aid. According to the CJEU, the first question was whether the payment of retirement pensions was part of the functioning of the public social security service. Accordingly, the relevant question was whether it should be regarded as an economic activity. The Court held that the payment of retirement pensions could be considered as separate from the national pensions system. Therefore, the second question was whether an exclusive right granted to pay retirement pensions by money order should be regarded as amounting to an advantage within the meaning of Article 107 TFEU. This judgment overruled the *Altmark case*. At this point, the Court called upon the *Altmark criteria* and emphasised that there is no advantage, consequently, nor state aid in question, if the service is considered such an SGEI, for which the given remuneration is compensation for the fulfilment of its public service obligation. The Court required the national courts to assess whether the granted exclusive right as compensation exceeded what was necessary to cover the costs of the payment by money order of retirement pensions.

V. EU competition law and liberalisation of public services in the EU

Eventually, Article 106 TFEU became the legal basis of market liberalisation as, through Article 106(3) TFEU, the Commission is empowered to issue directives ensuring the application of Article 106 TFEU. It should be noted that this is the only original law-making power of the Commission under which the Commission can adopt directives

[20] Case C-462/99 – *Connect Austria,* [2003] I-05197, para 80; Case C-49/07 *MOTOE*, [2008] I-04863, para 49.
[21] Case C-185/14 – *EasyPay and Finance Engineering* (Court, 22 October 2015).

without cooperation with the Parliament and the Council. However, historically the Commission used directives issued pursuant to Article 106(3) TFEU only to liberalise the telecommunication sector following a political compromise.[22]

In order to foster liberalisation, the Commission adopted the concept of universal services to clarify what kind of services could be exempted from the application of EU competition law pursuant to Article 106(2) TFEU. The concept of universal services eased the tension between the creation of competition and securing the public services in the liberalised sectors by allowing Member States to grant state aid to public services in the liberalised sectors. The concept of universal services limited the Member States' possibility to refer to the derogation clause in Article 106 TFEU. Furthermore, it helped to secure the provision of public services in the EU since universal services should be accessible to all – irrespective of geographic location – at a specified quality and at affordable prices.[23]

The European model of the liberalisation expressly takes into the consideration the complementary application of competition law. The competition law enforcement has served as a deepening factor of the liberalisation process several times in the past. We can find an example where the competition authority eliminated the regulatory errors in its procedures, as occurred in the *Deutsche Telekom margin squeeze case* (COMP/C-1/37.451), in which a margin squeeze evolved between the regulated prices. The Commission might have found it necessary to initiate proceedings against *Orange Polska* to increase the strength of the deterrence from the abuse that threatened the market opening process. The Commission fined the undertaking two years after that the company undertook, in the course of a national regulatory procedure, to terminate its restrictive practice (COMP/39.525.).

VI. Conclusion

To summarise, it is important to make a distinction between economic and non-economic public services because the latter category is not subject to EU competition law and the Member States are free to regulate it. EU competition law is applicable to public

[22] Despite the fact that the Commission has the right to adopt a directive under Article 106(3) independently of the Council and the Parliament, the Commission does not disregard these two institutions during the process, since, when adopting regulations under other provisions of the Treaty, they will have the final word. These circumstances led to political compromise between the Commission and the Council in 1989, as was declared in the 1995 Competition Law Report (49). The same political compromise is missing in other industrial sectors, for which reason the Commission did not use Article 106(3) TFEU for the commencement of liberalisation.

[23] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, Official Journal L 108, 24/04/2002 P. 0051 – 0077, Article 3(1).

services having an economic nature, with derogation permitted pursuant to Article 106 TFEU. Article 106 TFEU also serves as the legal basis of market liberalisation. Moreover, the Commission fostered the liberalisation process by adopting the concept of universal services and making competition enforcement in order to deepen the liberalisation process.

Bartha, Ildikó[*]

University Autonomy in the European Multi-Level Governance System – More or Less?[**]

Abstract

Although the need to increase the autonomy of institutes of higher education is generally recognised, there is a growing tendency for governments to interfere with university autonomy and academic freedom in certain European states in the last decade. The article is about these changing trends from a comparative, cross-country perspective focusing on certain striking examples. Our analysis shows that it is possible to find some 'common denominators' but there is no uniform trend towards university autonomy in Europe. Though higher education is a key matter for Europe, national interests and competences remain decisive in this area and the role EU governance instruments in safeguarding university autonomy still remain questionable.

Keywords: university autonomy, autonomy indicators, higher education governance, European Union, spillover effect, Hungary

I. Introduction

University autonomy is under challenge for several reasons nowadays. Recent years have witnessed many factors influencing the level of institutes of higher education's (IHE) autonomy[1] and governance system, including demographic trends, the effect of the financial and economic crisis or new missions that universities and research institutions are expected to fulfil. Although the need to increase university autonomy is generally

[*] Bartha, Ildikó PhD, Associate Professor of Law and Political Sciences, University of Debrecen, Senior Research Fellow, MTA–DE Public Service Research Group, Hungary.

[**] This work was supported by the Hungarian Academy of Sciences under Grant No. 05216, in the framework of the project "Reassessment of State Roles in Regulation of Services" implemented by the MTA–DE Public Service Research Group.

[1] The terms 'university' and 'IHE' are used interchangeably in this paper as in other literatures on the subject: A. Gideon, *Higher Education Institutions in the EU: Between Competition and Public Service* (T. M. C. Asser Press, The Hague, 2017); S. Garben, Case C-73/08, Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française, Judgment of the Court (Grand Chamber) of 13 April 2010, (2010) 47 (5) *Common Market Law Review,* 1493–1510, https://doi.org/10.54648/COLA2010062

DOI: 10.56749/annales.elteajk.2017.lvi.5.61

recognised, there is a growing tendency over the last decade for governments in certain European states to interfere with university autonomy and academic freedom.

The article seeks to explore these changing trends from a comparative, cross-country perspective, focusing on certain striking examples. We argue that, beyond formal indicators (independent decision of universities, free admission etc.), the level of de facto university autonomy is intensively affected by other 'secondary' or even indirect factors. These may be general policy priorities of the central government, competition between universities, non HE-related sector-political measures or other administrative, political and societal factors.

Though the study primarily focuses on public universities, the position of private institutes of higher education will also be examined where necessary. The analysis extends to those relations and interactions between different levels in the EU multi-level governance system that are relevant to explain and understand the tendencies in the four dimensions of university autonomy. In this context, we also ask whether the relevant European institutions have appropriate instruments to enforce Member State's compliance with the requirements of academic freedom and university autonomy.

II. Why university autonomy?

'Higher education without academic freedom – the ability of staff to pursue research and teach without fear of being censored or disciplined – is not higher education at all.' – an expert argues.[2] The principles of academic freedom and institutional autonomy were first declared (in written form) by the Magna Charta Universitatum of 1988 as a guideline for good governance and self-understanding of universities in the future. Based on the century-long traditions on the interpretation of European universities' identity, it has been confirmed that

> The university is an autonomous institution at the heart of societies differently organised because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching. To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power.

[2] M. Andrews, *University autonomy: not the only principle we should defend.* 23 July 2015, https://www.timeshighereducation.com/opinion/university-autonomy-not-the-only-principle-we-should-defend (Last accessed: 8 June 2017).

Though the importance of university autonomy is still beyond doubt, the narrative of its several dimensions are much more differentiated than at the time when it was declared by the Magna Charta. The role of higher education institutions has transformed into a more complex set of functions over the last few decades; current understanding of university autonomy has therefore also changed. The impact of recent economic, political and societal factors – such as the development of international trade and political relations, impact of the global financial crises, social tensions etc. – is remarkable in this regard. All these factors made expectations towards modern institutes of higher education more heterogeneous today than thirty years earlier. Therefore, a proper understanding of university autonomy can only be obtained through a holistic view of the complex inter-relationships between stakeholders and policies. As emphasised by the vice-chair of the Association of University Administrators, 'Self-governance is a must for the sector, but we must use it to engage with wider society's concerns [...]'.[3]

III. Dimensions and indicators of university autonomy

in the following section the state of play of university autonomy in Europe will be explored, as well as recent trends of changes and developments in this regard. Our analysis mainly based on data published in the third Autonomy Scorecard of the European University Association (EUA) of April 2017 comparing the higher education system of 29 European countries.[4,5] The Scorecard is based on 30 different core indicators in four key dimensions of autonomy, i.e. organisational autonomy;[6] financial autonomy;[7] staffing autonomy[8] and academic autonomy.[9]

[3] Ibid.
[4] E. B. Pruvot and T. Estermann, *University Autonomy in Europe III. The Scorecard 2017* (European University Association, 2017), http://www.eua.be/Libraries/publications/University-Autonomy-in-Europe-2017 (Last accessed: 8 June 2017), in the following 'Scorecard' or 'EUA report'.
[5] The first study 'University Autonomy I' released in 2009 and compared 34 European countries in the four key areas of autonomy.
[6] Pruvot and Estermann, *University Autonomy in Europe III.* 14–20., 41–43., 53–59.
[7] Ibid, 21–27., 44–46., 53–59.
[8] Ibid, 28–32., 47–49., 53–59.
[9] Ibid, 33–39., 50–52., 53–59.

Table 1. Autonomy indicators and their weighting factors

Indicator		Weighting factor
Organisational autonomy	Selection procedure for the executive head	14%
	Selection criteria for the executive head	14%
	Dismissal of the executive head	12%
	Term of office of the executive head	9%
	Inclusion of external members in university governing bodies	12%
	Selection of external members in university governing bodies	12%
	Capacity to decide on academic structures	15%
	Capacity to create legal entities	12%
Financial autonomy	Length of public funding	14%
	Type of public funding	13%
	Ability to keep surplus	14%
	Ability to borrow money	9%
	Ability to own buildings	12%
	Ability to charge tuition fees for national/EU students	17%
	Ability to charge tuition fees for non-EU students	21%
Staffing autonomy	Capacity to decide on recruitment procedures (senior academic staff)	13%
	Capacity to decide on recruitment procedures (senior administrative staff)	13%
	Capacity to decide on salaries (senior academic staff)	12%
	Capacity to decide on salaries (senior administrative staff)	12%
	Capacity to decide on dismissals (senior academic staff)	12%
	Capacity to decide on dismissals (senior administrative staff)	12%
	Capacity to decide on promotions (senior academic staff)	13%
	Capacity to decide on promotions (senior administrative staff)	12%
Academic autonomy	Capacity to decide on overall student numbers	14%
	Capacity to select students	14%
	Capacity to introduce and terminate programmes	16%
	Capacity to choose the language of instruction	13%
	Capacity to select QA mechanisms	15%
	Capacity to select QA providers	11%
	Capacity to design content of degree programmes	16%

Source: Pruvot and Estermann, *University Autonomy in Europe III.*

1. Organisational autonomy

Organizational autonomy refers to the ability to decide on university structures and their status, procedures and criteria for selecting the bodies and decision-making factors, as well as the ability to decide on the involvement of outsiders in the work of the university and the ability to create distinct legal bodies.[10]

The Scorecard shows that governance reforms in the last decade changed the status of institutes of higher education in several countries in a positive way, usually towards a greater freedom from the state (see in particular France, Italy, Sweden). In most cases, there is a parallel tendency of increased participation by external members in the university governing bodies (see HE reforms in France in 2013 or in Lithuania in 2016, for instance). Most universities are also free to determine their internal academic structures and can create legal entities.[11] In many countries, institutions gain more autonomy if they carry out certain additional activities through such distinct legal entities.

Though progress in the field of organisational autonomy is noticeable, it is also pointed out in the Scorecard that there is no general positive trend in Europe towards allowing more autonomy for universities. There are also a series of setbacks, with different kinds of meaning for higher education in general. The example of Hungary is mentioned as 'an isolated case',[12] which shows that there can be direct interventions by the state aimed at re-asserting greater control over university activities. This is mainly because of the creation of the 'chancellor' position in Hungarian universities (existing since July 2014), which fundamentally alters the capacity of institutions to organise themselves. The position includes responsibilities for financial and staffing matters, while the rector remains responsible for academic matters. (The rector, for instance, must seek the chancellor's approval for any decision on staff salaries.) The chancellor is directly appointed by the Prime Minister.[13]

[10] A. Cotelnic, A. Niculita, P. Todos, R. Turcan, L. Bugaian and D. Pojar, Looking for (Re)Defining University Autonomy, (2015) 15 (1) *The USV Annals of Economics and Public Administration,* 74–91, 75.

[11] All countries allow universities to create non-profit entities; about two-thirds extend this prerogative (without constraints) to for-profit legal entities.

[12] Pruvot and Estermann, *University Autonomy in Europe III.* 54.

[13] For a detailed analysis on the chancellor's position, see G. Kováts, Recent Developments in the Autonomy and Governance of Higher Education Institutions in Hungary: the Introduction of the "Chancellor System", in J. Berács, J. Iwinska, G. Kováts and L. Matei (eds), *Central European Higher Education Cooperation. Conference Proceedings* (Corvinus University of Budapest, Center for International Higher Education Studies and Central European University, Budapest, 2015, 26–39) 31–37.

2. Financial autonomy

Financial autonomy provides financing means, ability and mechanisms for attracting and allocating funds and the opportunity to borrow money (under normal market conditions). It also provides the right to own buildings and to decide on tuition fees and charges for the provision of other services.[14]

The characteristics of the funding system have an influence on many aspects of university autonomy. In most European countries, universities are largely funded by state resources, with the associated expectation that they fulfil a series of societal missions. There exists a great variety across Europe as to funding models for higher education.

In almost all countries, universities receive their core public funding through block grants.[15] However, internal allocation possibilities across categories (such as salaries, research expenditures, and operational costs) are very often limited by law. Line-item budgets[16] are exceptionally (this funding system exists, in its original form, only in Serbia). Hungary is expressly mentioned in the EUA Report[17] as an extreme case where, in addition to the lack of internal shifting possibilities, any decision with financial implications must receive the approval of the chancellor (who is, as mentioned, directly appointed by the Prime Minister). This post has definitely changed the ability of the university to decide on internal funding allocation since 2014. While governing bodies may include representatives of public authorities in other systems as well (as in Belgium or Luxembourg), with important responsibilities for finances, the degree of control in Hungary's case is not comparable, with a veto right on all decisions with financial implications.[18]

As regards tuition fees (or registration fees), trends differ to a large extent throughout Europe. As compared to previous years, the general rule remains that universities are not able to control tuition fees for Bachelor students (which is the main student population); however, in certain countries (England, Ireland and Portugal), universities get more freedom to set fees at Master level. There are three main models in Europe: 1) fees may be freely determined by the university itself, 2) a public authority may decide on fees, or 3) a public authority and the universities may cooperate in setting fees. In sum, the autonomy of universities to determine tuition fees has not

[14] Cotelnic et al., Looking for (Re)Defining University Autonomy. 75.
[15] Block grants are understood as financial grants that cover several categories of expenditure, such as teaching, operational costs and/or research activities.
[16] In a line-item budget, the ministry or parliament pre-allocate university funding to cost items and activities.
[17] Pruvot and Estermann, *University Autonomy in Europe III.* 54.
[18] Ibid, 58.

been reduced in the last decade. Here again, the case of Hungary is exceptional, as this is the only European country between 2010 and 2016 where the ability of universities to decide on fee levels was curtailed. There is also a general European trend that universities are more autonomous in setting fees for international students than for national ones.

The impact of the financial crisis is visible. In the period of a few years after the crises begun, budget reductions, very often as part of the austerity measures aiming at recovery, was a tendency in most European countries. In a few countries, critical underfunding situations created the formal autonomy of universities to carry over surpluses or even to borrow money Short-term reactions to the crisis often led to drastic public funding cuts, putting strong pressure on universities.

3. Staffing autonomy

Staffing (or human resources) autonomy manages the responsibilities on procedures for staff recruitment, remuneration and promotion.[19] As far as this autonomy dimension is concerned, there is a great variety of rules and restrictions applying to recruitment and salary-setting. There is a general trend of moving away from the civil servant model in most European countries; no or a minority of staff have civil servant status in Northern Europe, in Denmark, Estonia, Finland, Lithuania, Latvia, Sweden, the UK, Austria and Luxembourg. This tendency also leads to developments in university autonomy regarding recruitment and salary-setting. Nevertheless, only in a small minority of European countries (Estonia, Luxembourg, Poland, Sweden and Switzerland) are universities entirely free to set salaries or negotiate salary bands with other parties. In the remaining countries, salaries or salary bands, are regulated externally (i.e. by legislation or other external authorities). There are significant differences in recruitment procedures across Europe, ranging from a large degree of independence in the recruitment of staff to formalised procedures that necessitate the approval of an external authority. In Hungary, the chancellor's authorisation is also needed for recruitment, salaries and promotions.

[19] Cotelnic et al., Looking for (Re)Defining University Autonomy. 75.

4. Academic autonomy

Academic autonomy refers to the educational offer, educational plans and teaching methods, the ability to select admission mechanisms, make decisions in various areas, determine objectives and research methods, and be able to select the institutions for quality assessment.[20] There is a continued transition process in a number of European countries, contributing to enhanced academic autonomy. This is a move away from programme accreditation by national public authorities towards institutional external quality assurance. Changes in this field took place in Hungary. Since 2015 universities are permitted to select accreditation bodies internationally for Bachelor's and Master's programmes. Courses can be accredited either by the Hungarian Accreditation Committee or by any organisation member of ENQA, the European Association for Quality Assurance in Higher Education.

There are three basic models of regulations on the overall number of students. In the first one, the national Higher Education system operates on the basis of free admission for everyone holding the basic qualifications. However, in some of the European countries the number of academic fields where a *numerus clausus* applies, is increasing. In the second (opposite) model, it is the competence of the university to decide on the number of study places. In between these two models, half of the countries apply mixed approaches, where there is a certain degree of negotiation or split in the decision-making competences between universities and the state. Even where universities can freely decide on student numbers, there may be specific limitations, such as nationally set requirements on the staff/student ratio (as in Italy), or ceilings for some fields such as medicine, dentistry or engineering (as in Sweden). Even in free admission systems, such as in France, the Netherlands and Switzerland, these (and similar) fields may have a *numerus clausus.* The question will be discussed, using the examples of Austria and Belgium, in detail below.

5. Interim conclusion

The above analysis led us to conclude that there is no uniform trend towards university autonomy in Europe. Higher education systems which feature rather high in some dimensions are 'weaker' in other areas. The priority given to one or the other dimension of autonomy also depends on the legal, political or economic context, such as the financial situation of the country at issue. It is possible, however, to find some 'common denominators'. One (if not the most important) is that a challenging economic context (the financial and economic crises for all) negatively impacts on university autonomy, at

[20] Ibid.

least on its financial dimension. There is also a trend towards large-scale concentration and 'rationalisation' of the academic offer at regional or national level, often explained as an effort to improve the overall efficiency of the HE system, which also risks to running against the organisational and academic autonomy of universities.[21]

Anyway, it is apparent from the Scorecard that a reliable comparison of university autonomy across borders is highly challenging. The concept of autonomy is understood very differently across Europe; associated perceptions and terminology tend to vary quite significantly. This is due not only to differing legal frameworks but also to the historical and cultural settings that define university autonomy in each country. Therefore, applying the formal indicators for defining the level of university autonomy proved to be very difficult in some cases.[22]

The Scorecard further confirmed that, beyond formal indicators, other elements may also influence university autonomy. The level of de facto university autonomy is intensively affected by indirect factors, as well (sometimes in a more sensitive way than by the 'official' indicators). These may be, for instance, changes in the conditions of competitions between higher educational institutions due to general policy priorities of the central government or the results of other administrative, political and societal factors. Such indirect indicators often seem to be the HE-related 'side-effects' of larger structural reforms in the national legal and political system. Conversely, formal indicators do not always work (or not as expected) in reality. (This is the case, for instance where the quality assurance system of a country grants, by law, quite enough freedoms for IHEs to introduce new programmes, but other provisions prevent these freedoms by granting 'exclusive rights' for certain universities as regards the teaching and research in specific academic fields. Or they are simply exempted from the general accreditation obligations.) Pruvot and Estermann also refer to the difficulties in monitoring as an 'enormous challenge' due to ongoing reforms of legal framework in some countries, since 'small changes in legislation can alter the picture markedly; conversely, large-scale reforms might not significantly affect the Scorecard indicator'.[23]

[21] In our context, 'concentration' must be distinguished from 'centralization'. This is the case for instance in Hungary, where HE courses in public administration have gradually been monopolised, so only one university (University of Public Service) is authorised by law to introduce degree programs in this field. For a proper understanding of the process, it must be seen together with the Hungarian government's recent measures aiming at a systematic change of public administration and public service, as well as with the more general trend from 2010 towards greater public control over public services [for an analysis of the latter, see T. M. Horváth, From Municipalisation to Centralism: Changes in the Hungarian Local Public Service Delivery, in I. Kopric, G. Marcou and H. Wollmann (eds), *Public and Social Services in Europe. From Public and Municipal to Private Sector Provision* (Palgrave Macmillan, Basingstoke, 2016, 185–200) 190–196].

[22] Pruvot and Estermann, *University Autonomy in Europe III.* 11.

[23] Ibid, 11.

Table 2. Autonomy ranking in Europe

Rank	Organisational autonomy		Financial autonomy		Staffing autonomy		Academic autonomy	
	Country	Score	Country	Score	Country	Score	Country	Score
1.	United Kingdom	100%	Luxembourg	91%	Estonia	100%	Estonia	98%
2.	Denmark	94%	Latvia	90%	Sweden	97%	Finland	90%
3.	Finland	93%	United Kingdom	89%	United Kingdom	96%	Ireland	89%
4.	French-speaking community of Be.	90%	Estonia	77%	Switzerland	95%	Luxembourg	89%
5.	Estonia	88%	The Netherlands	77%	Luxembourg	94%	United Kingdom	89%
6.	Lithuania	88%	Flanders (BE)	76%	Finland	92%	Hesse (DE)	88%
7.	Portugal	80%	Italy	70%	Latvia	89%	North Rhine-Westphalia (DE)	88%
8.	Austria	78%	Portugal	70%	Denmark	86%	Brandenburg (DE)	87%
9.	Norway	78%	Slovakia	70%	Poland	84%	Norway	83%
10.	Hesse (DE)	77%	Denmark	69%	Lithuania	83%	Iceland	78%
11.	Ireland	73%	Finland	67%	Flanders (BE)	76%	Denmark	75%
12.	Flanders (BE)	70%	Switzerland	65%	Austria	73%	Austria	72%
13.	The Netherlands	69%	Ireland	63%	The Netherlands	73%	Switzerland	72%
14.	North Rhine-Westphalia (DE)	68%	Lithuania	61%	Iceland	68%	Poland	68%
15.	Poland	67%	Croatia	60%	Hesse (DE)	63%	Sweden	66%
16.	Italy	65%	Iceland	60%	North Rhine-Westphalia (DE)	63%	Hungary	58%
17.	Slovenia	65%	Austria	59%	Norway	63%	Spain	57%
18.	Croatia	62%	Slovenia	57%	Portugal	62%	Italy	56%
19.	Sweden	61%	Sweden	56%	Slovakia	61%	Slovakia	56%
20.	France	59%	Spain	55%	Brandenburg (DE)	58%	Portugal	54%
21.	Brandenburg (DE)	58%	Poland	54%	Serbia	58%	Croatia	50%
22.	Latvia	57%	French-speaking community of Be.	52%	Hungary	50%	The Netherlands	48%
23.	Hungary	56%	Serbia	46%	Spain	48%	Latvia	46%
24.	Spain	55%	France	45%	French-speaking community of Be.	44%	Serbia	46%
25.	Switzerland	55%	Brandenburg (DE)	44%	Italy	44%	Slovenia	44%
26.	Serbia	51%	North Rhine-Westphalia (DE)		Slovenia	44%	Lithuania	42%
27.	Iceland	49%	Norway	43%	France	43%	France	37%
28.	Slovakia	42%	Hungary	39%	Ireland	43%	Flanders (BE)	35%
29.	Luxembourg	34%	Hesse (DE)	35%	Croatia	37%	French-speaking community of Be.	32%

Source: Pruvot and Estermann, *University Autonomy in Europe III.*

IV. Higher education and European integration

By the end of the first half of the 20th century, European universities traditionally served the public (national) interest by teaching and conducting research rather than commercially exploitable aims. They were financed mainly by the state.[24] Most European higher education institutions still remain 'national' today, despite the principle that academic research and education is 'universal', not restricted by national frontiers.[25] The Magna Charta confirms that a 'university is the trustee of the European humanist tradition; its constant care is to attain universal knowledge; to fulfil its vocation it transcends geographical and political frontiers, and affirms the vital need for different cultures to know and influence each other'. It is also emphasised that 'far-reaching co-operation between all European nations and believing that people and States should become more than ever aware of the part that universities will be called upon to play in a changing and increasingly international society'.

The above mission obviously raises the question of what role supranational integrations have in spreading this 'transnational knowledge'. After early (more or less successful) attempts,[26] the first significant step towards international cooperation was the Bologna Declaration in 1999, which officially launched the Bologna process. Its overall aim was to create a system of academic degrees that are easily recognisable and comparable; to promote the mobility of students, teachers and researchers; and to establish a European Higher Education Area by 2010, including the achievement of a common three-cycle study structure (undergraduate, master and doctoral level), the usage of ECTS and the introduction of an international quality assurance system. This policy process is a voluntary undertaking by each signing country to reform its own education system, which does not give rise to legally binding obligations imposed on national governments or universities.

The Bologna Declaration represents a different view to university autonomy as compared to the classical meaning under Magna Charta: instead of declaring it as a guiding principle (itself), the former document's approach is rather instrumental providing that 'Universities' independence and autonomy *ensure* that higher education and research systems continuously adapt to changing needs, society's demands and advances in scientific knowledge' [emphasis added].

[24] Gideon, Higher Education Institutions... 7.
[25] J. Tóth, Nemzetközi mércék az egyetemi autonómiában [International Benchmarks of University Autonomy], (2017) 10 (2) *Közjogi Szemle [Public Law Review],* (21–24) 21.
[26] A. Barblan, Academic Co-operation and Mobility in Europe: How it Was and How it Will Be, (2001) 27 (1–2) *Higher Education in Europe,* 31–58, https://doi.org/10.1080/0379772022000003206

Although the Bologna Process (with 48 participating countries today) was initiated by individual countries, its driving force across the continent is now the European Union.[27] This is the case despite the fact that the 'project' is not the part of EU education policy in a formal way and remained out of the institutional and decision-making framework of the European Union. Currently, all EU Member States and the European Commission are involved in the Process.

In the early stage of EU integration, the EU (EC) did not have any expressly declared competence in the field of education. Initially, the European Economic Community (EEC) was founded as a (pure) regional economic integration, and economic law, at least on the surface, does not have anything to do with higher education which is, by its traditional nature, a non-economic activity.

Nevertheless, a functional spillover from the free movement provisions of EU internal market (common market) law occurred early on.[28,29] This is because the operation of the internal market may definitely be influenced by Member States' IHE regulations if they fall within the application of the fundamental economic freedom(s).

The role of the EU judicial body (Court of Justice of the European Union, CJEU or ECJ) is especially important in supporting this functional spillover. The case-law made clear that internal market provisions and general principles of EU law should not be altered by the exercise of national regulatory power or administrative practice in the field of education. With the extensive interpretation of 'vocational training' as an important instrument to promote free movement of persons throughout the EU,[30] the ECJ already built a bridge between universities and the 'economic pillars' of the European integration. In its *Gravier* judgment, the Court made clear that

[27] S. Moutsios, Academic Autonomy and the Bologna Process, *Working Papers on University Reform,* 2012), http://edu.au.dk/fileadmin/www.dpu.dk/forskningsprogrammer/epoke/WP_19.pdf (Last accessed: 8 June 2017), 3.

[28] Gideon, Higher Education Institutions... 25, 38.

[29] A similar functional spillover can be seen in the field of health services. For a more detailed analysis of the health sector in this sense, see I. Hoffman, National Interest and European Law in the Legislation and Juridical Practice on Health Care Services – In the Light of the Reforms of the Hungarian Health Care System, (2015) 13 (1) *Central European Public Administration Review,* (135–158) 137–147, https://doi.org/10.17573/ipar.2015.1.07; L. Nistor, *Public Services and the European Union: Healthcare, Health Insurance and Education Services* (Springer, The Hague, 2011) 285–325.

[30] 'Access to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired.' (C-293/83 *Gravier,* ECLI:EU:C:1985:69, para. 24).

> any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education.[31]

The equal treatment rule thus also applies here. Therefore, the imposition of a charge or a registration fee as a condition of access to vocational training on students who are nationals of other Member States where the same fee is not imposed on nationals of the host Member State constitutes discrimination on grounds of nationality contrary to Article 18 TFEU.[32]

The Court also confirmed the requirement of equal treatment arising from the free movement of persons (as a part of the freedom to provide services, freedom of establishment and worker's rights) with regard to the professional recognition of diplomas and other qualifications. Therefore, it was necessary to adopt harmonisation measures at EU level in this field in order to guarantee access to regulated professions.[33]

Higher education activities are considered to be 'services' within the meaning of Article 56 TFEU[34] where they are provided for remuneration.[35] However, it is often difficult to decide if this is really the case or not. Actually, it depends on whether the education activity in question can be qualified as an 'economic activity'.[36] The concept of non-economic services is, however, not clearly defined in EU law,[37] and, due to political choice or economic developments, the classification of a given activity can change over

[31] *Gravier* para. 30; see also the judgments of the ECJ in cases 24/86 *Blaizot v Université de Liège others* ECLI:EU:C: 1988:43 and 242/87 *Commission v Council [ERASMUS]* (ECLI:EU:C: 1989:217).

[32] *Gravier* para. 26. Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN (Last accessed: 8 June 2017).

[33] Gideon, Higher Education Institutions... 25, 38.

[34] Under Article 56 TFEU, '[...] restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

[35] Article 57 TFEU.

[36] As the ECJ explains, 'services' include in particular activities of an industrial or commercial character and 'The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.' [Judgment in case 263/86 *Humbel* (ECLI:EU:C: 1988:451) paras 16 and 17].

[37] As regards the application of internal market rules, any service provided under remuneration is to be considered as an economic activity, even if the service is not paid for by those who directly benefit from and independently of the legal statute of the entity providing the service or the nature of the service [see ECJ judgments in cases C-172/98 and C-157/99; P. Bauby and M. Similie, The European Union's State aid rules and the financing of SGEIs' tasks in I. Kopric, G. Marcou and H. Wollmann (eds), *Evaluating Reforms of Local Public and Social Services in Europe: More Evidence for Better Results* (Palgrave Macmillan, 2016, Basingstoke, 191–206), https://doi.org/10.1007/978-3-319-61091-7_12].

time.[38] Thus, a large 'grey area' exists between these two categories (SGEI-NESGI), in particular in the field of health, education, social services and housing.[39] This is also true for higher education, since the scope of 'university mission' has become increasingly complex until today (including the growing number of 'borderline cases' between commercially available education and that provided as a public service).

Early on, the Court did not consider education activities which are part of the national education system to be a service provided for remuneration under Articles 56 and 57 TFEU.[40] However, if education is provided by institutions which are financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit the above provisions.[41] In addition, as a result of the ongoing commercialisation of higher education activities at the national level, the Court declared educational activities provided by universities (even by public universities) to be services in the meaning of Article 56 in a number of cases.[42]

The Maastricht Treaty of 1992 (entered into force in 1993) increased the EU's role in higher education matters by enacting general education, including higher education, as a new policy area into the Treaty structure (now Articles 165 and 166 TFEU). However, this EU competence is still limited and does not enable its institutions to harmonise national education systems.[43] It only extends to carrying out measures to support, coordinate or supplement Member States' actions. Accordingly, current Article 165(1) TFEU on education, vocational training, youth and sport provides that

> The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity (see also Article 6 TFEU in this sense).

[38] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02 para. 12.
[39] Bauby and Similie, The European Union's State aid rules...
[40] First, because 'the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields'. Second, the system in question is, as a general rule, funded from the public purse and not by students. (*Humbel*, para. 18).
[41] C-109/92 *Wirth,* ECLI:EU:C: 1993:916, para. 17; Gideon, Higher Education Institutions... 38–39.
[42] Gideon, Higher Education Institutions... 39.
[43] See Article 166(4) TFEU 'In order to contribute to the achievement of the objectives [of EU education policy] the European Parliament and the Council [...] shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States [...]' and '[...] the Council, on a proposal from the Commission, shall adopt recommendations'.

Despite the limited EU competences, the above mentioned spillover effect of fundamental freedoms and general EU law principles are still operating. This is what gives an impetus for the CJEU to apply Articles 165 and 166 TFEU (combined with the 'overspilling' Treaty provisions) in defining the scope of 'cross-border rights' to access to higher education. The role of Article 18(1) TFEU prohibiting discrimination on grounds of nationality is especially important in this respect. EU-law based rights in the field of education are also supported by laying down the foundations of EU citizenship in the Treaty of Maastricht. Article 21(1) TFEU generally recognises the free movement rights of EU citizens (for non-economic residents, as well), including students who have the ambition to study in another country.

The question of university autonomy in the EU legal and regulatory framework received a large international focus in the light of a recent case concerning the position of the privately-funded Central European University (CEU) in Hungary. The CEU case will be analysed in detail below. Before doing that, through presenting examples in CJEU case-law, we examine the enforcement mechanisms available for higher education issues at EU level.

The CJEU has several times had an occasion to rule on the EU law compatibility of national higher education laws under the above provisions. Three judgments[44] will be discussed here; though not expressly mentioning 'university autonomy' in the reasoning, all of them deliver an important message on EU law's understanding of this concept.

In case C-147/03 *Commission v Belgium,* the Commission initiated an infringement procedure against the Kingdom of Belgium considering that national legislation,[45] applied to courses in medical studies, dental and veterinary science, and agricultural engineering in Belgium, infringed the above-mentioned Treaty articles. The contested provisions prescribed that nationals of other Member States possessing qualifications awarded on successful completion of secondary studies at a home Member State must take and pass an aptitude test. The ECJ, in line with the Commission's argumentation, held that, because of this additional requirement to access to higher education, Belgian nationals and nationals of other Member States were treated differently, which resulted in discrimination on the grounds on nationality. The ECJ therefore concluded that Belgium 'failed to fulfil its obligations under Article 18 TFEU, read in conjunction with Articles 165 and 166 TFEU'.

[44] In details, see: Garben, Case C-73/08...; E. Dagilyte, *The Right to Education and Free Movement of Persons: Whose Right is it and how does the EU Protect it?* (Manuscript, 2011).

[45] 1971 decree governing the academic recognition of qualifications and diplomas awarded on completion of secondary studies and access to higher education and university education in the French Community.

In case C-65/03, *Commission v Austria,* the Law on University Studies (the *Universitäts-Studiengesetz,* where special requirements for foreign EU students were established, was questioned. The contested national law required that '[i]n addition to possession of a general university entrance qualification, students must demonstrate that they meet the specific entrance requirements for the relevant course of study, including entitlement to immediate admission, applicable in the State which issued the general qualification'. The Court held that Austrian law constituted indirect discrimination on the grounds of nationality, since such rules resulted in a higher proportion of Austrian students than EU students in Austrian universities. The fact that these provisions applied to all students did not matter, as the effect of them was discriminatory. The Court concluded that this indirect discrimination could not be justified either on safeguarding the homogeneity of the Austrian higher or university education system, or preventing abuse of EU law, nor because of Austria's obligations under international law.

The above judgments clearly show that, despite the lack of *de facto* legislative competence in higher education matters, on the basis of its fundamental legal values incorporated into Treaty texts, the EU definitely has instruments to give rise to those HE issues which are in line with the aim of European integration. Nevertheless, strong national interests in higher education affairs may prevent the effective enforceability of such far-reaching decisions, as was demonstrated by the afterlife of these infringement procedures. Both Austria and Belgium decided not to comply with the Court's ruling: they passed new legislation in response to the judgments. In June 2006, the French Community (in Belgium) adopted a new decree capping the number of foreign students (mainly French citizens) at 30% in in nine medical or paramedical courses dominated by non-nationals.[46] On the day the judgment in *Commission v Austria* was delivered, Austria ended unlimited access to free medical education, too: 75% of the places in Austrian medical schools would be reserved for students who had finished their secondary education in Austria; 20% of the places were left for EU students; and 5% for third-country-nationals (TCNs).

The Commission opined that these measures were discriminatory and initiated new infringement procedures against Austria and Belgium. Ten months later, however, it suddenly decided to suspend both proceedings.[47] The Commission argued, on the record, that there was prima facie evidence that, without the restrictive measure, a potential shortage of health professionals could lead to problems in the territorial coverage and quality of the Austrian and Belgian health systems. Off the record,

[46] *Le décret régulant le nombre d'étudiants dans certains cursus de premier cycle de l'enseignement supérieur* (Decree regulating the number of students in certain programmes in the first two years of undergraduate studies in higher education, 16 June 2006).

[47] Garben, Case C-73/08... 1497.

a bargain[48] behind the Lisbon Treaty negotiations was supposed to be why the Commission altered its stance.[49]

In the third case, *Bressol & Chaverot,* French students, as well as teaching and administrative staff of institutes of higher education in the French Community (more than 60 individuals altogether), challenged the above-mentioned Belgian decree of 2006 before the Belgian Constitutional Court seeking annulment of that measure. The applicants argued that the quota provided by the Belgian provisions infringed the principle of non-discrimination by treating resident and non-resident students differently, for no valid reason.

To 'save' the contested decree, the Belgian Government argued that the legislation at issue was necessary for ensuring the quality and continuing provision of medical and paramedical care within the French Community.[50] The large numbers of non-resident students were likely to bring about a shortage of qualified medical personnel throughout the territory, which would undermine the system of public health within the French Community.

The CJEU confirmed, first, that the national legislation at issue affects, by its very nature, nationals of Member States other than Belgium more than Belgian nationals and such an indirect discrimination is, as a general rule, precluded by Articles 18 and 21 TFEU. However, in line with the argumentation of the Belgian government, the Court found that the protection of health and, for that purpose, maintaining a balanced high-quality medical service open to all could constitute a legitimate objective capable of justifying the contested measure.[51] All in all, the Court came to the final conclusion that the Belgian legislation at issue did not infringe EU Treaty provisions on EU citizens' rights and non-discrimination.

National legislations like those examined in the above cases can obviously influence the freedom of institutes of higher education to decide on their student intake. As decision-making on student number is an integral part of 'academic autonomy', the conclusion can be drawn that fundamental EU law principles and ECJ case-law, on their interpretation in a higher education context, might definitely have an influence on the

[48] The suspension of the infringement procedure alleged to be the reason why Austria gave up (a few days before the Lisbon summit) its demand for a special treaty protocol, which would have allowed it to set a cap on the number of foreign university students to be taken in [Garben, Case C-73/08... 1497–1498; B. Goldirova, EU seeks to close its institutional wrangling, EU Observer (18 Oct. 2007), https://euobserver.com/institutional/24991 (Last accessed:8 June 2017)]

[49] Garben, Case C-73/08... 1497–1498; Goldirova, EU seeks...

[50] First, according to the Belgian Government, the restriction was needed to keep the quality of teaching in the medical and paramedical courses where a certain number of students was exceeded, as the capacity of the higher education establishments, the available staff and the possibilities of practical training were not unlimited. Second, the non-resident students, after their studies, very often return to their country of origin to exercise their profession there and the number of resident graduates remains too low in some specialties.

[51] Garben, Case C-73/08... 1502.

state of play of university autonomy in Europe – even though the collective message of the above three judgments is not optimistic from the perspective of academic freedom. Because of strong national interests in this matter, higher education basically remains in Member States' hands. Articles 165 and 166 TFEU, and EU law obligations in other fields do not seem to prevent Member States from taking measures against university autonomy and the freedom of access to higher education. Although, as Corbett and Gordon argue,

> Many of the major political events in the EU's history have had a spillover effect, enhancing EU involvement in higher education in the process, the bottom line remains: an education system as a whole is an expression of national sovereignty as emphasised in Article 165.[52,53]

V. Is university autonomy enforceable?

The need for academic freedom, for which university autonomy is a precondition, is also expressed (explicitly or implicitly) in the relevant documents of the European Union. Article 13 of the Charter of Fundamental Rights provides that 'The arts and scientific research shall be free of constraint' and 'Academic freedom shall be respected', The content of that provision is rooted in the freedom of expression as a specific form of that freedom in a higher education context,[54] which is also the part of the EU general legal principles.

Despite the express declaration, it remains questionable whether the European Union has the appropriate means to enforce compliance with that general principle. First, it is clear from the above picture that economic (or equal treatment-based) pillars of the EU 'toolkit' are stronger than the 'real' higher education policy instruments which do not impose legally binding obligations on Member States. Conversely, the binding force of fundamental freedoms and the non-discrimination principle, which

[52] In 1971, for instance, a process began whereby education ministers sought Commission support under the Council of Ministers' protection. In 1985–86, the Single Market impetus shaped the political climate and a pilot scheme for university collaboration and mobility was transformed into the Erasmus programme. The Lisbon Agenda of 2000, with its introduction of the open method of coordination, contributed to a further marked increase in educational policy coordination [A. Corbett and C. Gordon, Can Europe stand up for academic freedom? The Bologna Process, Hungary, and the Central European University. Published in *Europablog,* 2017, http://blogs.lse.ac.uk/europpblog/2017/04/18/can-europe-stand-up-for-academic-freedom/ (Last accessed: 8 June 2017)].

[53] Corbett and Gordon, Can Europe stand up...

[54] M. Király, Egyetemek és egyetemi autonómia Európában [Universities and University Autonomy in Europe], (2017) 10 (2) *Közjogi Szemle [Public Law Review],* (4–6) 5.

definitely have an influence on certain aspects of national higher education governance, are beyond doubt. However, their impact on university autonomy was only indirect by now, as was illustrated by the above presented cases (Gravier and the three infringement procedures). Moreover, the potential difficulties in the judicial enforcement mechanism (see below) also have to be taken into consideration when appreciating the effectiveness of EU law instruments. Finally, the EU approach to university autonomy is rather functional (similarly to that of the Bologna Declaration), as it is clearly expressed by the Commission's communication on the role of the universities in the Europe of knowledge:

> After remaining a comparatively isolated universe for a very long period, both in relation to society and to the rest of the world, with funding guaranteed and a status protected by respect for their autonomy, European universities have gone through the second half of the 20th century without really calling into question the role or the nature of what they should be contributing to society.[55]

Nevertheless, the spring of 2017 gave a new opportunity for testing whether a EU response may be effective enough to ensure the protection of EU basic values in the field of higher education. On 10th April, the Hungarian parliament adopted an amendment to the National Higher Education Act which became known as 'Lex CEU' after the university that seems to be most directly targeted. CEU (Central European University) has a dual legal entity – an American entity registered in New York and a Hungarian entity, which has allowed it to award both Hungarian and US-accredited degrees. This private university is one of the most prominent institutes of higher education in Hungary and has been operating in Budapest since 1991.

The new law is particularly troubling from two aspects. First, it makes the operation of any international university in the country subject to an intergovernmental agreement between Hungary and the other country of accreditation (in which both governments give their consent to things such as the curriculum the university teaches and admissions policies). Another problematic point in the 'Lex CEU' is that it requires institutions operating in Hungary to have a campus in their home country.

The announcement of the 'Lex CEU' (combined with the political message of the case and the extremely quick legislation process, avoiding consultation with the actors concerned) gave rise to a loud protest worldwide and also triggered the available mechanisms to enforce adherence to values and legal principles, which seemed to have

[55] European Commission, Communication from the Commission – The role of the universities in the Europe of knowledge, 2003, COM(2003)58 final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0058&from=EN (Last accessed: 8 June 2017).

been infringed by the Hungarian law. The European Commission decided to use 'all available means under the Treaties to uphold the EU's shared values'.

On the basis of an in-depth legal assessment of the Hungarian Higher Education Act, the European Commission sent on 27 April a letter of formal notice to the Hungarian Government under Article 258 TFEU (infringement procedure, see above).[56] According to this letter, the amendment of Hungarian Higher Education Law is not compatible with the freedom to provide services and the freedom of establishment and also infringes the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the EU, as well as with the Union's legal obligations under international trade law. In its reasoned opinion (this is the second step of the infringement procedure), the Commission repeated these legal concerns. In the six decades of European integration, this is the first time when the law of a Member State is challenged directly due to the infringement of academic freedom.

Despite that, it is still questionable whether an infringement procedure may be effective enough to enforce university autonomy. We don't think that such a 'rank' in the reasoned opinion itself would significantly change the Court's attitude to EU competences and national autonomy in the field of higher education. It nevertheless seems to be promising that the Commission, besides academic freedom, invoked other reasons for incompatibility, such as fundamental internal market freedoms, and that may be fruitful for private universities such as CEU.[57] There are, however, more general concerns regarding infringement procedures. First, such procedures very often terminate even before reaching the judicial level (the CJEU). Or, if they do not, the time by which any decision is made often proved too late for those whose interest was concerned. Second, infringement actions are usually too narrow to address the structural problem posed by persistently non-compliant Member States.[58] Triggering

[56] The letter of formal notice is the first step in the administrative phase of the so-called infringement procedure under Article 258 TFEU. This provision authorises the European Commission to launch such a procedure when it considers that a Member State has failed to fulfil an obligation under the EU Treaties.

[57] The Court of Justice of the EU has consistently held that courses offered by educational establishments essentially financed by private funds constitute economic activities in the meaning of the Treaty. Education activities and courses financed essentially out of private funds are also covered by Directive 2006/123/EC, regardless of whether the establishments offering courses are profit-making or not and irrespective of whether the financing is provided principally by the pupils or their parents.

[58] G. Halmai, Much Ado About Nothing? Legal and Political Schooling for the Hungarian Government, published in *Verfassungsblog,* 2017, http://verfassungsblog.de/much-ado-about-nothing-legal-and-political-schooling-for-the-hungarian-government-on/ (Last accessed: 8 June 2017).

'Article 7 procedure' also arose as a possible solution. Article 7 TEU[59] provides a non-judicial mechanism to enforce EU values. In May 2017, the European Parliament adopted a resolution asking EU Member States to launch Article 7 against Hungary, since the adoption of the contested higher education law amendment (together with other issues such as the regulations against asylum-seekers and NGOs) could lead to 'a serious deterioration of the rule of law'. As a result of applying Article 7, certain rights of a Member State can be suspended, including voting rights in the Council (which is, together with the European Parliament, the main decision-making institution in the EU). Though an EU Member State has never been so close to being sanctioned by 'the EU's nuclear bomb', in reality, there is very little chance of Article 7 actually coming into effect. Suspending rights is only the final step of the procedure and requires a unanimous decision of the Council, which does not seem to be realistic considering the political cooperation between specific Member States (see Hungary's veto in the rule of law procedure against Poland and the same can be expected vice versa).

VI. Conclusions

University autonomy is widely considered as an important prerequisite for modern universities to be able to deliver their public service missions efficiently. This is very complex nowadays, since beyond the classical education and research tasks it also involves new functions that universities and research institutions are expected to fulfil.

Our analysis shows that there is no uniform trend towards university autonomy in Europe. Due to differing legal frameworks, historical, and cultural settings, the concept itself is understood very differently across Europe, which did not make easier to carry out a reliable comparison between the European countries. It was also proved that, beyond formal autonomy indicators, other 'secondary' or indirect factors also have a decisive role in determining the level of de facto university autonomy in a country. Despite all that, it is possible to find some 'common denominators'. It can generally be established that the challenging economic context (the impact of the financial and

[59] Under Article 7(1), the Council may determine that there is a clear risk of a serious breach of EU values by a Member State and is intended to prevent an actual breach by addressing specific recommendations to the Member State in question. This can be triggered by one third of Member States, by Parliament or by the Commission. The Council has to adopt a decision by a four-fifths majority after having received Parliament's consent, which also requires a two-thirds majority of the votes cast and an absolute majority of MEPs.
The next phase is Article 7(2), by which an actual breach of EU values can be determined by the Council on a proposal by a third of Member States or the Commission. The Council needs to decide by unanimity and the Parliament needs to give its consent. Article 7(3) launches sanctions, such as the suspension of voting rights in the Council.

economic crises for all) negatively affects university autonomy, at least its financial dimension. There is also a trend towards large-scale concentration and 'rationalisation' of the academic offer at regional or national level, often explained as an effort to improve the overall efficiency of the HE system, which also risks running against the organisational and academic autonomy of universities.

As regards general trends covering all dimensions of university autonomy, two main groups of European states can be distinguished: a 'regulatory' model and an 'interventional' ('authoritarian') model. In the former group, more 'indirect' steering mechanisms or less restrictive regulatory instruments prevail over direct state intervention (typically in Western European countries). In the second case, various means of direct state influence and a high level of government control play a central role (see for instance the case of Hungary).

In this paper, we also examined the role of EU governance instruments in safeguarding academic freedom and university autonomy. Because of strong national interests in this matter, higher education basically remains in Member States' hands. Soft law measures of EU education policy are not able to prevent the countries from taking measures against academic freedom and university autonomy. Although EU law instruments in other fields, such as fundamental freedoms and the non-discrimination principle, due to their spillover effect, definitely have an influence on certain aspects of national higher education governance, their impact on university autonomy was only indirect until now. Even if this is not the case (as above in the 'lex CEU' infringement procedure), it still remains a question whether the available enforcement mechanisms are effective enough to save these common European values.

Hoffman, István*

The Structure of the Personal Social Services in Hungary**

Abstract

The article reviews the changes in the service provision system, especially in the structure of Hungarian social care. First, the theoretical and international backgrounds of the topic are shown. Second, the article presents the transformation of the Hungarian social care over the last decades. Here, a trend towards concentration and centralisation can be observed. Third, the mixed nature of the Hungarian municipal social care system is analysed, a system that has been strongly centralised over the last five years. The effects of centralisation are analysed as well; the article shows that the changes in funding have the most significant impact on the spatial structure of service provision.

Keywords: social care, municipal social care, funding, centralisation, concentration, spatial structure

I. Introduction: hypothesis and research method

In Hungary, the system of social care has changed radically in the last decade. The system was originally based on a strong but fragmented municipal system. The main goal of the transformation of the system in the last decade has been to maintain the grassroots model of Hungarian social care. Second, the reforms have tried to minimise the negative effects of economies of scale. This article will examine the regulatory methods and the related budgetary support system applied to this aim. Thus, while the primary method of the research is jurisprudential, the effects of regulation and the practical outcome of the new support system will also be analysed as well.

The paper will first review the main models of social care. This comparative review is very useful, because different administrative systems and paradigms have different concepts of the spatial structure of these services. After a short comparative review, the jurisprudential and budgetary analysis will then show the transformation

* Hoffman, István, dr. habil. PhD, Associate Professor, ELTE University Budapest, Faculty of Law.

** This article was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

DOI: 10.56749/annales.elteajk.2017.lvi.6.83

of the social care system and the paradigm-shift in these services after 2011/12. Finally, this article will examine the effects and impacts of the partly centralised model.

II. Social care and local governments

The role of the municipalities in the field of personal social services is significant in welfare states. Whether social care is partly or fully based on these local entities, several models have evolved.[1]

The models can be characterised on different aspects, because these systems are impacted by the welfare model of the given country, by the municipal model and by the country's spatial structure as well.[2]

The characterisation of these models in my analysis is based mainly on *the role of the municipalities* and on the *spatial structure of service provision*. In this way, *decentralised and centralised models* can be distinguished.

1. Decentralised model

The decentralised model is based on the main service provision role of the *municipalities*. In this model, the local governments are mainly responsible for the social care services; the agencies of central government have just limited tasks.

Two main types of the decentralised model can be distinguished: the first one is the local community-centred model, which is based on the prominent role of the 1st tier municipalities, and the regional centred model, in which the most important services are organised and provided by the regional (2nd tier government). Inter-municipal cooperation is mainly a correctional tool for the fragmented spatial structure and is very important in the community-centred model.

a) Local community-centred model

Social care is primarily organised by the local (1st tier) municipalities in the countries where this model dominates. These local social services mainly provide basic social care (e.g. home care, catering). In this model, the role of the regional (2nd tier) municipalities is just additional, they organise services which cannot be provided by the local communities (especially several special, residential, in-patient social care services).

[1] Lőrincz L., *A közigazgatás alapintézményei* (HVG-ORAC, Budapest, 2005) 191–194.
[2] Hoffman I., A személyes jellegű szociális szolgáltatások igazgatása, in Horváth, T. M. and Bartha, I. (eds), *Közszolgáltatások megszervezése és politikái. Merre tartanak?* (Dialóg Campus, Budapest–Pécs, 2016, 329–342) 330–332.

Although this type of service provision is based on the dominant role of the local (1st tier) municipalities, two subtypes result from the different spatial and municipal system of the given countries.

Large, concentrated municipalities with broad service provision responsibilities: the Nordic model – The *Nordic (Scandinavian)* countries can be classified as examples of the local community-based model. In Sweden, the Social Services Act[3] makes clear that only the 1st tier local governments are responsible for the provision of social services.[4] *Finland* developed a model similar to the Swedish one.[5]

Denmark and Norway have a mixed model, because the communities (1st tier municipalities) are responsible for basic social care and the majority of the residential (in-patient) social care services, but regional (2nd tier) municipalities have relevant competences because the residential services of child protection and helping alcohol and drug addicts are provided by these municipalities.

Community-centred model with the additional responsibilities of the regional municipalities and inter-municipal cooperation – The majority of European countries follow this model and so countries with different municipal and welfare models belongs to this. In these states – considering their mainly Bismarckian welfare model – the social services provided by the municipalities are typically means-tested and these services have a complementary role.

Some countries with a *Latin (French) local government type* can be included in this model as well, for example *Italy* and *Belgium*. In *Italy*, the settlement-level municipalities *(comune)* are primarily responsible for the provision of social services, including elderly care, child and youth protection and helping people with a disability. The regional municipalities *(regione)* have a regulatory and coordinating role in the field of these services. Because of the wide range of municipal tasks, Italian public law developed legal institutions for minimising the negative effects of economy of scale problems. These legal institutions are typically – exceptionally compulsory – inter-municipal associations. This was strengthened by the reform of the *legge Delrio* (2014), by which establishing different types of inter-municipal service provider associations has been encouraged.[6]

[3] SFS (Social Services Act) 2001: 453.

[4] S. Strönholm, *An introduction to Swedish law* (Norstedts, Stockholm, 1981) 93; S. Thakur et al., *Sweden's welfare state. Can the bumblebee keep flying?* (International Monetary Found, Washington D. C., 2003) 8.

[5] H. Niemelä and K. Salminen, *Social security in Finland* (Finnish Centre for Pensions, Helsinki, 2006) 17–18.

[6] L. Vandelli, *Città metropolitane, province, unioni, e fusioni di communi. La legge Delrio, 7 aprile 2014, n. 56 commentata comma per comma* (Maggioli, Santarcangelo di Romagna, 2014) 125–145.

In *Belgium,* the community governments are primarily responsible for the provision of social care. The municipal social services are organised by the public centres for social welfare *(openbare centra voor maatschapelijk welzijn/centres publics d'aide sociale),* regardless of the region to which the municipalities belong.[7] The centres are professionally independent from the municipalities, but their budgets are approved by the local councils.[8] Although the number of Belgian local municipalities *(gemeente/commune)* was significantly reduced during the 1970s, the inter-municipal associations have been institutionalised by Belgian administrative law in order to correct for the disparity in size between the settlements. The Belgian regions, which can be considered as member states of a federation, are responsible for the higher-cost services.[9]

In *Slovakia*, the local municipalities are responsible for the non-residential (basic) social care and the regional municipalities, the districts *(kraj),* are responsible for residential social services and for the services of child protection.[10] The *Czech Republic* has chosen a similar model. *Poland* has a special position among the Visegrád countries considering its larger area and greater population. The Polish local government system is a three-tier system. The 1st tier municipalities (communities – *gminy*) are responsible for non-residential social care and child protection services. The provision of expensive residential services belongs to the competences of the 2nd tier municipalities, to the districts *(powiaty)*. The Voivodships, as 3rd tier municipalities, do not have any competences in the field of social services. The inter-municipal associations do not have significant role in the Polish municipal system because of the concentration of the municipalities.[11]

***b)* Regional municipality-centred model**

The social care system of the *United Kingdom* can be characterised as a regional municipality-centred one. The – professionally independent – local social authorities of the county councils and unitary councils are responsible for the provision of social

[7] H. Bocken and W. de Bondt, *Introduction to Belgian law* (Kluwer Law International, The Hague, 2001) 70.

[8] Y. Aerts and H. Siegmund, Belgium, in H. G. Wehling (ed.), *Kommunalpolitik in Europa* (Verlag V. Kohlhammer, Berlin–Stuttgart–Köln, 1994, 102–114) 110.

[9] Bocken and de Bondt, *Introduction to Belgian law,* 70–71.

[10] V. Nižňanský, *Verejná správá na Slovensku* (Government of Slovakia, Bratislava, 2005) 56; L. Malikova, Regionalization of Governance: Testing the Capacity Reform, in H. Baldersheim and J. Batora (eds), *The Governance of Small States in Turbulent Times: The Exemplary Cases of Norway and Slovakia* (Barbara Budrich Publishers, Opladen, 2012, 208–228) 210, https://doi.org/10.2307/j.ctvdf01dj.14

[11] H. Wollmann and T. Lankina, Local Government in Poland and Hungary: from post-communist reforms towards EU-accession, in H. Baldersheim et al. (eds), *Local Democracy in Post-Communist Europe* (Leske + Budrich, Opladen, 2003, 91–122) 106, https://doi.org/10.1007/978-3-663-10677-7_4

services.[12] The reforms encouraged by the New Public Management in the 1980s and 1990s altered the role of the local governments significantly: they became organisers instead of being providers.[13] The private sector has played an increasingly important role in the change, as *compulsory competitive tendering (CCT)* was introduced for the selection of social care providers. As the result of the reforms, local governments became the 'managers' of the services instead of their providers.[14] The reforms of the Labour Party Government of the Millennium did not significantly alter this model.[15]

2. Centralised model

Germany can be considered as the prime example of the centralised model. Article 3 of Book XII on personal social assistance of the Social Code *(Sozialgesetzbuch – SGB)* states that personal social assistance is provided by the designated municipal bodies and the designated administrative bodies above the local tier. As a principle, the local administrative bodies responsible for the social care are the German *Landkreise* (the county-like districts of Germany,[16] and the unitary councils *(kreisfreie Städte)* – if the provincial social law *(Landessozialrecht)* does not make an exception.[17] The provinces *(Länder)* can designate the bodies responsible for regional *(überörtlich)* services. The provinces *(Bundesländer)* are empowered by Article 99 of Book XII of the SGB to designate the local municipalities *(Gemeinde)* and the – typically obligatory – inter-municipal associations *(Gemeindeverbände)* to provide several basic personal social services. Book XII also determines that – if a provincial act did not have another provision – the administrative level above the German counties *(Kreise)* (the so-called *überörtlich* level) is responsible for care for disabled and blind people, for nursing and care services and for the statutory defined social services in the event of crises.[18] As such, the provinces, the Member States of the German Federation, have the most important role in the field of personal social services.[19]

[12] A. Arden, J. Manning and S. Collins, *Local Government Constitutional and Administrative Law* (Sweet & Maxwell, London, 1999) 103–104.
[13] B. Jones and K. Thompson, Administrative Law in the United Kingdom, in R. Seerden and F. Stroink (eds), *Administrative Law of the European Union, Its Member States and the United States. A Comparative Analysis* (Intersentia, Antwerpen–Groningen, 2007, 199–258) 232.
[14] D. Wilson and C. Game, *Local Government in the United Kingdom* (Palgrave Macmillan, Basingstoke – New York, 2011[5]) 135–136.
[15] J. Healy, The Care of Elder People: Australia and the United Kingdom, (2002) 36 (1) *Social Policy and Administration,* (1–19) 6–8, https://doi.org/10.1111/1467-9515.00266
[16] U. Steiner (Hrsg.): *Besonderes Verwaltungsrecht* (C. F. Müller, Heidelberg, 2006) 147–148.
[17] R. Waltermann, *Sozialrecht* (C. F. Müller, Heidelberg, 2009) 129.
[18] E. Eichenhofer, *Sozialrecht* (Mohr Siebeck, Tübingen, 2007) 298.
[19] B. Baron von Maydell, F. Ruland and F. Becker, *Sozialrechtshandbuch* (Nomos, Baden-Baden, 2008[4]) 401.

Bavaria has chosen a specific solution, which – as the largest German province – has not developed a two, but a three-tier local government system: the seven districts *(Bezirke)* are self-government units.[20] In this way, social assistance tasks have been shared between the under-intermediate level counties *(Kreis)* and unitary councils *(kreisfreie Städte)* and the upper-intermediate level district *(Bezirke)* municipalities.

It is shown by the short international outlook that the local level has very important role in the provision of personal social services. Even the local municipalities of the countries operating the centralised model could have responsibilities in this field. It is clear that the spatial structure of these welfare services are deeply impacted by the spatial structure of the given country, especially the spatial structure of the municipalities.

After the review of the main models of the spatial structure of personal social services, the Hungarian system will be reviewed, but first the frameworks of the Hungarian system will be analysed.

III. Social care in Hungary

This part of my chapter is based on a jurisprudential analysis. First, I will review the framework of the Hungarian social care system, especially the changes and the role of the municipalities in the Hungarian public service provision system. After that I shall briefly review the changes to the social care services in Hungary and finally, I will summarise the reform of the personal social service system. This analysis shows the main features of the recent spatial structure system.

1. Hungary: a country with a fragmented municipal system

Hungary has a fragmented spatial structure. The majority of Hungarian municipalities had fewer than 1,000 inhabitants in 2010.[21]

[20] M. Reiners, *Verwaltungsstrukturreformen in den deutschen Bundesländern. Radikale Reformen auf der Ebene der Staatlichen Mittelinstanz* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2008) 154.
[21] See Table 1.

Table 1. Population of the Hungarian municipalities (1990–2010)[22]

Inhabitants	Year		
	1990	2000	2010
0–499	965	1,033	1,086
500–999	709	688	672
1,000–1,999	646	657	635
2,000–4,999	479	483	482
5,000–9,999	130	138	133
10,000–19,999	80	76	83
20,000–49,999	40	39	41
50,000–99,999	12	12	11
100,000–	9	9	9
Source	3,070	3,135	3,152

The provision of local public services – included personal social services – in Hungary has been based on this condition, and (inter-communal) cooperation has a significant role.

***a)* Personal social services before 1945**

In the 19th century, when the modern Hungarian public administration evolved, the social services had only limited significance. Only the framework of services for the poor and child protection were established. This fragmented and residual system was based on the communities, which had limited self-governance under the supervision of the county municipalities.[23]

***b)* Social services of the Soviet-type administration**

After World War II, a Soviet administrative system evolved in Hungary and the administration radically changed after 1950. The self-governance of the communities, towns and counties was terminated, and the former intercommunal associations were liquidated[24] as well. Social administration was an empty space in Hungarian public administration. First, social benefits were 'taboo' in the Soviet-type system, because it was

[22] E. Szigeti, A közigazgatás területi változásai, in T. M. Horváth (ed.), *Kilengések. Közszolgáltatási változások* (Dialóg Campus, Budapest – Pécs, 2013) 282.
[23] Hoffman I., *Önkormányzati közszolgáltatások szervezése és igazgatása* (ELTE Eötvös Kiadó, Budapest, 2009) 89–90.
[24] Ibid, 105–109.

an axiom of the Communist regime that poverty was liquidated by Socialism. As such, only personal social services and social insurance remained public administration tasks.[25] This model changed after the reforms of 1968; the significance of personal social services increased. Although merging communities was an important element of the public service provision reforms, intercommunal associations were reborn. A dual system evolved: the local councils (1st tier) were responsible for basic social care and the county councils (2nd tier) were responsible for residential (in-patient) social care. The main elements of this system were large institutions, by which residential social care was primarily provided. During the 1980s, the frameworks of the social administration were stabilised.

***c)* Democratic Transition and the rebirth of the social administration system**

In 1990 a new, local government system was established by the Amendment of the Constitution and by Act LXV of 1990 on the Local Self-Governments (hereinafter: Ötv.). This system was a two-tier but local-level centred system. The first tier was the local (community) level. According to the Ötv., villages, large villages, towns, county towns and Budapest as the capital city were considered local-level governments (municipalities). The second tier was the county level. The county local governments had an intermediate service-provider role, but county-level service delivery could largely be overtaken by the municipalities. The local-centred nature of the Hungarian local government system was strengthened by the system of voluntary inter-municipal associations.[26]

In 1993, Act III of 1993 on Social Administration and Social Benefit was passed. Municipal social benefits and personal social services were regulated by this act. A new, model, centred at local level, evolved. The local municipalities – the communities and the towns – were responsible for basic social services and the counties and the towns with county rank were responsible for residential social care. The local municipalities could take over the provision of residential social care. The main provider was thus the local level and the counties – as regional municipalities – had practically supplementary tasks: residential social care was provided by them if the local municipalities could not organise the provision of these services.[27]

***d)* Institutionalisation and dysfunctional phenomena**

Although the act on social administration and benefits was passed in 1993, the institutionalisation of the new service system required years. As I have mentioned earlier, the provision of personal social services was based on the great pre-1990 institutions.[28] As such, the system of local basic services evolved in several steps.

[25] Krémer B., *Bevezetés a szociálpolitikába* (Napvilág, Budapest, 2009) 126.
[26] Verebélyi I. (ed.), *Az önkormányzati rendszer magyarázata* (KJK-Kerszöv, Budapest, 1999) 30–36.
[27] Velkey G., Központi állam és a helyi önkormányzatok, in Ferge Zs. (ed.), *Magyar társadalom- és szociálpolitika 1990–2015* (Osiris, Budapest, 2017, 125–160) 128–133.
[28] Ibid, 126–128.

The period of institutionalising these services practically ended around the Millennium, therefore, after 2000, the dysfunctional phenomena of the new system could be analysed. These dysfunctions were connected with the general dysfunctions of the new municipal system. After 1990, a local tier-centred and fragmented local government system evolved in Hungary, according to which model the major responsibilities belonged to the communities and towns. This fragmented spatial structure was strengthened by democratic changes, as a counterpart to former Communist times, when compulsory inter-municipal associations (the common village councils presented above) addressed inefficiency problems due to lack of scale. This compulsory form was unpopular among Hungarian municipalities, so it disappeared with the democratic changes, giving an opportunity to a trend towards disintegration in the transition period.[29]

Attempts to solve this fragmentation and the related size inefficiency problem by inter-municipal cooperation were based on voluntary cooperation. The new types of associations could not stop the disintegration because of their purely voluntary nature and the poor financial support provided by the central budget. As a result, the number of service provider associations was only 120 in 1992. The joined municipal administrations decreased in these years: the number of common municipal clerks was 529 in 1991, 499 in 1994, and only 260 administrative inter-municipal associations existed by 1994.[30] The lack of intercommunal cooperation, the fragmented spatial structure, and the weak, subsidiary intermediate level public service provider role of the county local governments resulted in significant service delivery dysfunctions. The local self-governments – especially the small villages, which were the majority of Hungarian municipalities – were not unable to perform a significant part of their municipal tasks. In 2005, the most basic social services – social catering and social home care – were not performed by 725 municipalities, by almost a quarter of the municipalities in Hungary.[31] Such municipal social services were mandatory tasks, so they should have been performed and their performance was supported by the central budget. Their share of central grants was very limited; in 2006, 50.4% of municipal expenditure on basic social services was financed by central grants,[32] so the small communities, which had only limited own revenues could barely perform their tasks.

Although there were service deficiencies in the field of basic social services, residential social care was relatively well organised as the heritage of the former service provision system. The service deficiencies in basic care resulted in a dysfunctional

[29] Hoffman, *Önkormányzati közszolgáltatások szervezése és igazgatása*, 130–132.
[30] Hoffman I., A helyi önkormányzatok társulási rendszerének főbb vonásai, (2011) 4 (1) *Új Magyar Közigazgatás*, (24–34) 30–31.
[31] Rácz K., Szociális feladatellátás a kistelepüléseken és a többcélú kistérségi társulásokban, in Kovács K. and Somlyódyné Pfeil E. (eds), *Függőben. Közszolgáltatás-szervezés a kistelepülések világában* (KSZK ROP 3.1.1. Programigazgatóság, Budapest, 2008, 183–209) 191.
[32] Ibid, 189.

phenomenon: people who required basic care were provided with residential care because basic home-based social care was not available for them.[33] Another problematic element was the care need test: this test was generally performed by the institutions, by the providers, therefore it was not an independent one and the remedies against the decisions were limited.[34]

A consensus therefore evolved among the Hungarian experts by the Millennium: reforms were required.

2. The social care reforms

a) The first step: new forms of municipal cooperation (2005–2007)

The first step of the reforms was connected to municipal reforms. First, at the end of the 1990s, the institutions of the various inter-municipal associations were regulated, and new, additional state subsidies were introduced to accelerate the formation of voluntary inter-municipal associations after 1997.[35] As a result of these changes, the number of inter-municipal associations radically increased.[36]

Table 2. Number of inter-municipal associations responsible for public service provision between 1992 and 2005

Year	Number of the inter-municipal associations responsible for public service provision
1992	120
1994	116
1997	489
1998	748
1999	880
2003	1,274
2005	1,586

Source: Belügyminisztérium, *A helyi önkormányzati rendszer tizenöt éve. 1990–2005. 15 év a magyar demokrácia szolgálatában* (BM Duna Palota és Kiadó, Budapest, 2005) 205.

[33] Krémer B. and Hoffman I., Amit a SZOLID Projekt mutat. Dilemmák és nehézségek a szociális ellátások, szolgáltatások és az igazgatási reformelképzelések terén, (2005) 16 (3) *Esély*, (29–63) 35.
[34] Ibid, 50–51.
[35] I. Balázs, L'intercommunalité en Hongrie, in M. C. Steckel-Assouère (ed.), *Regards croisés sur les mutations de l'intercommunalité* (L'Harmattan, Paris, 2014, 425–435) 428.
[36] See Table 2.

In 2004, the legislator introduced a new type of inter-municipal association – the multi-purpose micro-regional association, based on the French inter-municipal association form 'SIVOM'. The central government significantly supported service delivery through associations: in 2004, the share of the special subsidies for them was 1.19% of the whole central government subsidies for local governments, and in 2011 it already reached 2.91%.[37]

***b)* Partial reforms of personal social services**

In 2007 a partial social service reform was passed by the Hungarian Parliament. The reform act amended the act on social administration and benefits. The decentralised, local level-centred model remained but the partial reform tried to solve several problematic elements of the service delivery system. The funding of the services was partly transferred: the share of central funding in the field of the basic social services was increased, which resulted in a rapid increase in the number of recipients of basic social services. For example, in 2007, 45 989 persons were received social home care, but 48 120 persons benefited in 2008 and 63 392 in 2009.[38] The service delivery tasks of the inter-municipal associations were encouraged by the funding reform as well. The share of the grant for joint service provision was increased.

The care need test was amended as well. A new model was established: the care need test was performed by an independent commission which was organised by the chief public servants of the town municipalities (by the town clerks – *jegyző*). The detailed conditions of the test were regulated by a ministerial decree and that tried to make the test objective.[39]

***c)* The effects of the constitutional and municipal reforms. The age of centralisation after 2011**

The former municipal regulation was changed radically, the former decentralised model was transformed by the new Constitution – the Fundamental Law of Hungary – and by the new Municipal Code – Act CLXXXIX of 2011 on the Local Self-Governments of Hungary (hereinafter Mötv.). The local service performance role of the municipalities has been weakened, and the scope of their tasks has become narrower. Due to this remodelling, the concentration of municipal local services has partially lost its significance. The regulation of voluntary tasks has been changed as well. A simple model has been chosen by the central government to reduce the fragmentation of the public service system: the most problematic service provisions were centralized and now they are performed by the local agencies of central government. In this way, local government

[37] Hoffman, A helyi önkormányzatok társulási rendszerének főbb vonásai, 31.
[38] KSH, Éves társadalomstatisztikai adatok 2000–2016.
[39] Rácz, Szociális feladatellátás a kistelepüléseken..., 193–194.

tasks have been significantly reduced, which is reflected in the size of local government expenditure: before the reforms, in 2010, the total local government expenditure was 12.8% of the GDP, while in 2016 it was only 8.1%.[40]

Table 3. Total local government expenditure in Hungary (as a % of GDP) 2002–2015

Year	2002	2006	2010	2011	2012	2013	2014	2015
Total local government expenditure (as a % of GDP)	12.9%	13.0%	12.8%	11.6%	9.4%	7.6%	7.9%	8.1%

Source: Eurostat, *Total Government Expenditures*, http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do;jsessionid=9ea7d07e30dcd247b519937c4d909261df02fe3369b7.e34MbxeSahmMa40LbNiMbxaMchmTe0?tab=table&plugin=1&pcode=tec00023&language=en (Last accessed: 17 June 2017)

The main tasks of education, inpatient care, residential social care and residential child protection are performed by the agencies of the central government.[41] The county municipalities lost their tasks in the field of social services (included the services of child protection). Although the basic social services are provided by the local level municipalities and several forms of residential care for the elderly can be performed by these communities, the majority of the provision of residential care was nationalised. The majority of the providers of residential social care and the child protection institutes are thus maintained by the county agencies of the Directorate General of Social and Child Protection, which is an agency of the Ministry of Human Capacities.[42]

The transformation of the role of the central administration can be observed in the change of total expenditure of the budgetary chapter – practically the sectors – directed by the Ministry of Human (formerly National) Capacities.[43]

[40] See Table 3.

[41] The main tasks of the education, inpatient care, residential social care and residential child protection are performed by these agencies. The maintenance of the state-run schools belongs to the responsibilities of the Klebelsberg Maintainer Center which is a central agency with district and county level bodies. The residential social care and children protection institutes are maintained by the county agencies of the Directorate General of the Social and Children Protection. The inpatient health care institutions are maintained by the National Healthcare Service Center. Thus the local governments are mainly responsible for the settlement operation, for the maintenance of the kindergartens, for basic social care, for basic services of child protection, and for cultural services. See I. Balázs and I. Hoffman, Can (Re)Centralization Be a Modern Governance in Rural Areas?, (2017) 13 (1) *Transylvanian Review of Administrative Sciences*, (5–20) 12–13, https://doi.org/10.24193/tras.2017.0001

[42] Fazekas J., Fazekas M., Hoffman I., Rozsnyai K. and Szalai É., *Közigazgatási jog. Általános rész I* (ELTE Eötvös Kiadó, Budapest, 20152) 269–270.

[43] See Table 4.

Table 4. Total expenditure (in million HUF) of the budgetary chapter directed by the Ministry of Human Capacities

Year	Total expenditure (in million HUF) of the budgetary chapter directed by the Ministry of Human (formerly National) Resources
2011	1,535,370.6
2012	1,949,650.5
2013	2,700,363.9
2014	2,895,624.8
2015	3,049,902.2
2016	3,011,947.7

Source: Act CLXIX of 2010 on the budget of the Republic of Hungary, Act CLXXXVIII of 2011, Act CCIV of 2012, Act CCXXX of 2013, Act C of 2014 and Act C of 2016 on the central budget of Hungary.
Inflation rate was 3.9% in 2011, 5.7% in 2012, 1.7% in 2013, and -0.9% in 2014 based on the data of the Hungarian Central Statistical Office.

Although the central budget support for the municipalities has been reduced, in 2012, the funding of basic social care was increased, especially the funding of social home care. The funding of municipal social services was strengthened by the new municipal finance model, which was based on actual expenses.

***d)* Reform in recent years**

The last reform of the Hungarian municipal social system was in 2015. The reform was focused primarily on social benefits. In the new model, the central budget support for municipal social cash benefits was greatly reduced; several municipal cash benefits were nationalised. The most important transformation of the reforms was the amendment of the financing of social benefits and services. In the new model, most of these benefits and services are mainly financed by the local business tax. State aid is only a supplementary source for funding these services. As such, the basic services are, in practice, real municipal services and the central government has only a compensative role.

The regulation of the social services in Hungary changed significantly over the last decade. The changes were connected to municipal and public service reforms. Although the majority of residential social care was nationalised, social services have remained the most important municipal ones.

These changes impacted the spatial structure of the Hungarian social service system as well. In the next point I will review this impact.

IV. Spatial structure of personal social services in Hungary

1. Hypothesis

As I have mentioned earlier, the reforms in the last decade tried to solve the economy of scale problem of Hungarian personal social services, which were based on the fragmentation of the Hungarian municipal system. Because of this, the provision of the high cost services, personal services, was nationalised.

Second, the new provision of the basic services was encouraged by the new financing methods, especially in rural areas. The service provision of the smaller municipalities has been supported by increased financing, support from inter-municipal cooperation and the new block grant.

Two hypotheses could thus be formulated. The *first hypothesis* is that access to social services has been improved by the new financial mechanism. The *second hypothesis* is based on the strong nationalisation of residential care. I therefore postulate that the spatial structure of residential social services has been most impacted by the nationalisation.

2. Analysis and findings

To examine these hypotheses, I analysed the number of recipients and the share of recipients of two basic social services (social meals and social home care). As I mentioned earlier, they were not provided by almost a quarter of Hungarian communities in 2005. If we look at the number of recipients of social catering it could be observed that the number of the recipients has increased significantly between 2008 and 2011, when the funding reforms occurred. The share of the recipients decreased modestly after 2012, when the central budget support decreased and the municipal own revenues were preferred. Similar changes occurred in the number and share of the recipients of the social home care.[44]

If we look at the regional data, it can be observed that the number and share of recipients increased more in all regions but the most significant growth can be observed in those regions where the spatial structure is not very fragmented and medium-sized villages (with 2,000 to 4,000 inhabitants) are dominant.[45] Thus, primarily, their

[44] See Table 5, 6 and Figure 1.

[45] P. Szabó and M. Farkas, Different types of regions in Central and Eastern Europe based on spatial structure analysis, in T. Černěnko, L. Sekelský and V. Szitásiová (eds), *5th Winter Seminar of Regional Science* (Society for Regional Science and Policy, Bratislava, 2015, 1–13) 8–10.

access to these services has been strengthened. The modest decrease in the number of recipients shows that service provision is sensitive to any decrease in central budget support.

Table 5. Recipients of social catering in Hungary (as a share of the population, in %)

NUTS 2 region / Year	Central Hungary	Central Trans-danubia	Western Trans-danubia	Southern Trans-danubia	Northern Hungary	Northern Great Plain	Southern Great Plain	Hungary
2008	0.59	0.9	1.2	1.43	1.66	1.38	1.13	1.08
2011	0.72	1.35	1.57	1.98	2.15	2.18	2.03	1.55
2012	0.79	1.34	1.51	1.93	2.28	2.53	2.28	1.67
2015	0.63	1.31	1.49	1.89	2.41	2.89	2.76	1.73

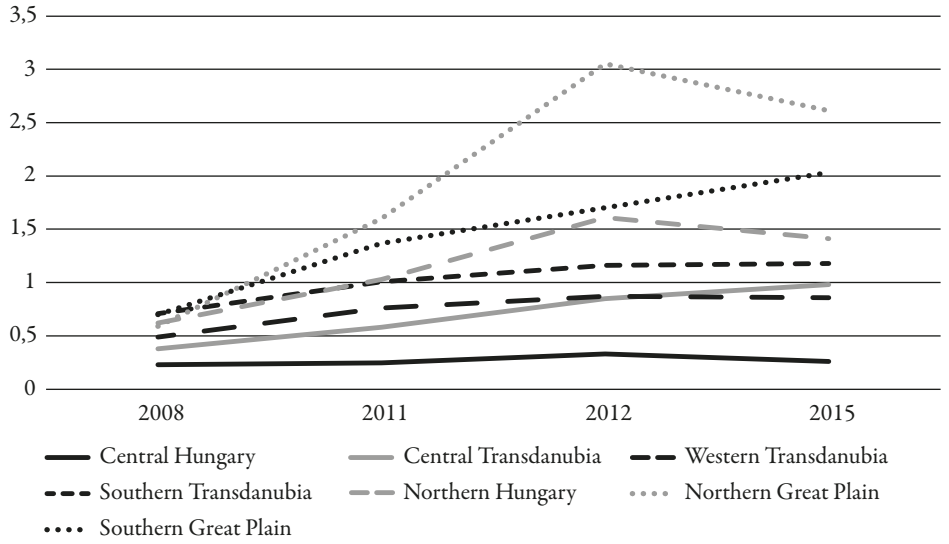
Source: Központi Statisztikai Hivatal, *Éves társadalomstatisztikai adatok 2000–2016,* http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_fsi002b.html?down=644 (Last accessed: 17 June 2017)

Table 6. Number of recipients of social home care in NUTS-2 regions of Hungary

	Year			
Regions	**2008**	**2011**	**2012**	**2015**
Central Hungary	6,683	7,548	9,914	7,753
Central Transdanubia	4,144	6,426	9,260	10,397
Western Transdanubia	4,897	7,598	8,525	8,485
Southern Transdanubia	6,779	9,508	10,753	10,600
Northern Hungary	7,490	12,252	19,312	16,568
Northern Great Plain	8,746	23,716	45,537	38,657
Southern Great Plain	9,181	17,893	21,980	25,921

Source: KSH, *Éves társadalomstatisztikai adatok 2000–2016.*

Figure 1. Social home care – share of recipients (in % of the population)



Source: KSH, *Éves társadalomstatisztikai adatok 2000–2016.*

Hence, *hypothesis 2* has been validated by the statistical data: the provision of services is very sensitive to financing, especially to central budget support. The spatial structure of the services refers the degree of need better after the reforms in 2008. The system was impacted by the municipal reform to a limited extent; the preference for own revenues in particular has had a modest effect on the structure of the basic services.

If we look at *residential social care*, only a modest change can be observed. Although the service system became moderately balanced, the regional differences partially decreased, but the whole system has not been transformed.[46]

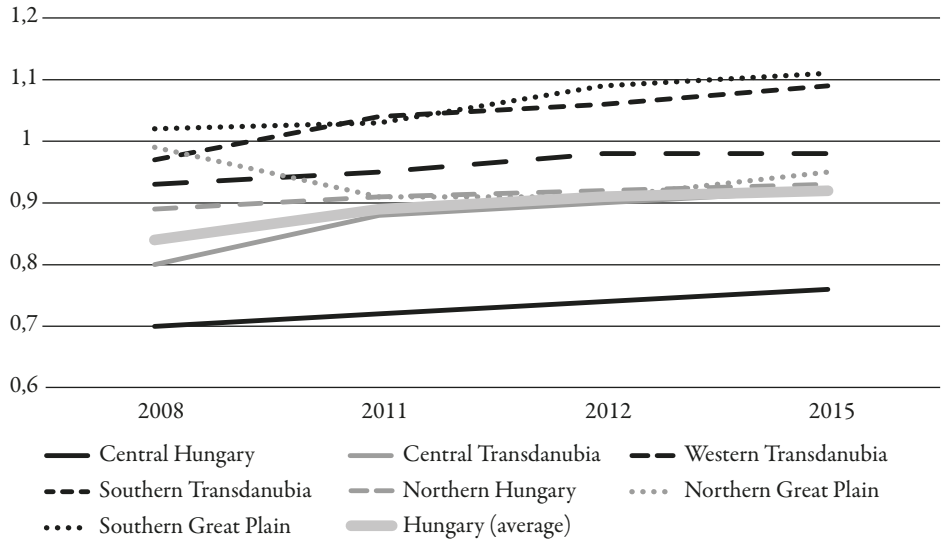
[46] See Table 7 and Figure 2.

Table 7. Number of recipients of residential social care

	Year			
NUTS – 2 regions	**2008**	**2011**	**2012**	**2015**
Central Hungary	20,640	21,417	21,847	22,630
Central Transdanubia	883	9,607	9,770	9,836
Western Transdanubia	9,304	9,477	9,721	9,630
Southern Transdanubia	9,201	9,818	9,853	9,858
Northern Hungary	10,239	10,904	11,111	10,797
Northern Great Plain	14,786	13,542	13,692	14,077
Southern Great Plain	13,441	14,121	14,106	14,152

Source: KSH, *Éves társadalomstatisztikai adatok 2000–2016.*

Figure 2. Share of the recipients of residential social care (in % of the population)



Source: KSH, *Éves társadalomstatisztikai adatok 2000–2016.*

Thus *hypothesis 1* has been just partially confirmed: nationalisation had just a modest impact on the residential social care system. It can be observed that the service provision is strongly impacted by the transformation of its financing, and then the transformation of the organisation and management of these services.

V. Conclusions

If we look at the structure of Hungarian personal social services, it could be stated that the community (1st tier municipality) centred system has remained, although the majority of residential care service providers were nationalised after 2012. The main actors in the system are the local municipalities. The role of the municipal own revenues increased in the funding of the social care because of the reforms after 2015.

Although the reason for the nationalisation of residential care was to balance the unequal and fragmented service provision system, this transformation impacted the system of social services only moderately. This effect was far more limited that had been expected by the experts. Although the system became a little more balanced, the former inequalities and fragmentation have remained.

If we look at the Hungarian reforms, it can be observed that the most effective reforms are those on funding; the organisational reforms have just limited effect and impact.

Magarò, Patrizia*

Changes in Italian Regional and Local Government: The Case of Education

Abstract

This paper makes some reflections on the education provided by Italian schools. The problems analysed are largely due to the fact that this public service is delivered through a dispersed decision-making process involving many institutional bodies other than the State, in a galaxy of responsibilities and competences, without the necessary coordination. This has a negative impact on the operation of the school system, weakening its effectiveness and slowing down its overall development.

Keywords: regions, provinces, municipalities, education, schools, autonomy, fiscal federalism, Italy

I. Public services in Italy; between territorial decentralisation and economic crisis

Over the last ten years, the Italian Parliament has paid particular attention to public services with economic relevance, especially to the 'local' ones, and to their management. A complex process of reform started in 2008, aimed at promoting competition, freedom of establishment and respect for the EU rules on providing services.

More recently, the Parliament has delegated power to Government to review the regulation of local public services of general economic interest, in the context of the public administration reform undertaken in 2015.[1] The Consolidated Law on these services (which is under approval) introduces 'general and systematic provisions' for the local public services sector, by revising the current chaotic and fragmentary regulatory framework.[2]

The legislation on the management of 'public utilities' (e.g. water service, waste management, gas distribution) has always been characterised by the difficult search for a satisfactory compromise between two opposite visions of public intervention. On the

* Magarò, Patrizia PhD, Professor, University of Genoa, Department of Law.

1 Law no. 124 2015. *Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche.*

2 G. Citroni, A. Lippi and S. Profeti, Local public services in Italy: Still fragmentation, in H. Wollman, I. Koprić and G. Marćou (eds), *Public and Social Services in Europe. From Public and Municipal to Provate Sector Provision* (Palgrave Macmillan UK, London, 2016, 103–117) 103, https://doi.org/10.1057/978-1-137-57499-2_8

DOI: 10.56749/annales.elteajk.2017.lvi.7.101

one hand, there is a traditional political-cultural approach contrary to the liberalisation of public services and supporting their direct management by monopolistic local public companies (so-called 'municipal socialism'). On the other hand, the drive to create a more competitive market has progressively increased – also on the basis of the European rules – admitting only a framework legislation and the supervision of truly independent regulatory and control authorities, in order to provide better quality local services at more reasonable costs for society and users.

Another important innovation characterising the Italian local public services policy in recent years is its link with spending review initiatives. Strongly restrictive decisions on public finances, undertaken to deal with the effects of the serious economic crisis, have particularly affected the broad sector of publicly-controlled companies, the role and functions of which have been largely reformed in order to reduce their number and make their work more transparent. Public participation companies, which have been widely used by territorial authorities, have often produced situations of indebtedness, mismanagement, waste and inefficiencies, repeatedly highlighted by the Court of Auditors.

However, a structured intervention has so far not affected the 'non-economic' public services, the nature of which is essentially national (as they are related to needs felt by the whole community) but at the same time they have a natural multilevel dimension, in a country characterised by deep political decentralisation. The concrete provision on these services implies, in fact, a coordinated exercise of competences, conferred not only to the State but also to the existing territorial authorities.

Health care, social assistance and education (pillars of the welfare State of European tradition) are the most important public services having such a characteristic. Their critical aspects depend today only in part on the effects of the economic crisis and of the national policies undertaken over the last decade to contain public deficits, but they also seem linked to some unresolved knots of Italian regionalism and to the complex dynamics of territorial decentralisation.

In the light of these prospects, this contribution intends to carry out some reflections on the education public service provided by schools, which has been heavily affected by the cuts made in recent years, leading Italy to the lowest positions among member States of the OECD and the European Union with regard to the percentage of public spending on education.[3] In the past twenty years, the continuous decline in investment in this field has contributed significantly to aggravating the various problems affecting education in Italy for a long time.

[3] OECD Indicators, in *Education at a Glance* (OECD Publishing, Paris, 2016), https://doi.org/10.1787/eag-2016-en (Last accessed: 14 July 2017) 222. See also *Eurostat press release,* 22 March 2016, http://ec.europa.eu/eurostat/documents/2995521/7214399/2-22032016-BP-EN.pdf/596b9daa-b9d6-415d-b85a-b41174488728 (Last accessed: 14 July 2017) 22.

The problems of this public service, however, are also due to the fact – as we will demonstrate in the following pages – that education is delivered through a 'widespread' decision making-process involving many institutional bodies other than the State in a 'galaxy' of responsibilities and competences, without the necessary coordination. This has a negative impact on the operating of the school system, weakening its effectiveness and slowing down its overall development.

As we will see, education has lost its original 'national' connotation, due to increasingly assuming, over the last two decades, a 'decentralised' character and a 'multilevel' articulation, as the result of the progressive involvement in this sector of the territorial authorities, as well as of the educational institutions. Nevertheless, this process has been achieved in a fragmented and haphazard regulatory framework, through reforms often lacking in coherence and overall strategic vision.

In order to understand the changes in education policies, it should first be noted that the Italian Constitution devotes articles 33 and 34 to education, which is considered one of the objectives pursued by the State to improve and enhance the living conditions of citizens, promoting the overall growth of society.

Education is configured as a 'public service':[4] the State's duty is both to 'lay down general rules for education' and to provide this service to citizens through the establishment of 'State schools of all branches and grades'.

Cultural promotion is carried out by guaranteeing freedom of teaching, free access to school education without discrimination, free compulsory education[5] and recognising the right of pupils lacking financial resources to receive education.

There is no State monopoly on education, as the right of private individuals or organisations to set up school institutions (and to obtain parity recognition, according to the legal requirements) is guaranteed.[6]

However, it is up to the State to specify the content of education and the outline of the complex organization specifically aimed at providing this service to citizens.

In this respect, the Constitution of 1948 does not seem to mark a significant discontinuity with regard to the pre-republican period, in which education was intended to be a primary State function, the school system had essentially a national character and schools operated as peripheral administrations of the Ministry for Public Education.

[4] C. Marzuoli, Istruzione: libertà e servizio pubblico, in C. Marzuoli (ed.), *Istruzione e servizio pubblico* (Il Mulino, Bologna, 2003) 11.

[5] Education is compulsory for ten years (from the age of 6 to 16). After the eight-year first cycle of education, the final two years of compulsory education can be undertaken at a State upper secondary school or in a three or four-year vocational education and training course, under the specific competence of the regions

[6] This study does not cover the aspects related to Universities and to private education; in the latter respect, we limit ourselves to observe that private schools must not lead to any costs for the State. Publicly subsidised schools *(scuole paritarie)* can issue certifications with the same legal value as those of State schools.

II. On education and territorial decentralisation in Italy

The Italian educational system continued to be characterised by an accentuated national centralization until almost the end of the 1990s, unlike the prevailing trends in Europe. Processes of deep transformation of the public education service have long been in place in many EU countries, to better address new socio-cultural demands and to ensure an adequate quality of study. This has also led to a progressive deconcentration of ministerial administrative structures, to the recognition of significant spaces of autonomy to schools and of a stronger role in education to territorial authorities.

Traditional Italian local authorities – municipalities and provinces – already existing in the Kingdom of Italy, kept on assuming, in the new republican legal order, instrumental administrative competences in education-related matters (it was up to them to bear the costs of building maintenance and operating schools).

Focusing on school education – which represents the subject of this study – it is worth mentioning that this public service should have been put in a deeply changed territorial organisational system, based on promoting autonomy and decentralisation (according to Article 5 of the Constitution) and on the presence of a new, important level of government, in addition to the traditional local authorities.

The 1948 Italian Constitution, with an innovative solution in the comparative panorama, provided in fact for the creation of an intermediate territorial authority, the 'region', which was recognized with a legislative power, only in some matters strictly listed and in accordance with the fundamental principles laid down in State legislation (in line with the logic of the so-called 'shared' legislative power).[7]

The Constituent Assembly considered it preferable not to include relevant aspects of education in the matters indicated in Article 117, deciding that regions should have only had competence in educational assistance, as well as in vocational education and training (which does not provide a diploma, but only a 'qualification'), in order to promote access to work, in close connection with territorial development policies. Moreover, Article 118 of the Constitution granted administrative competences to regions, which had to exercise them by means of delegation to municipalities and provinces.

[7] In this study we are taking only ordinary regions into account, but it should be remembered that in Italy there are five regions with a special form of autonomy, the competencies of which have been regulated through constitutional laws. With regard to education, different powers have been foreseen in the statutes of special autonomous regions, which were created in the period between 1946 and 1950 (Sicily, Sardinia, Aosta Valley, Trentino Alto-Adige and, in 1963, Friuli Venezia Giulia). Sicily and the provinces of Trent and Bolzano have been granted broad autonomy concerning primary schools, whereas Aosta Valley and the two provinces of Trentino Alto-Adige also have competences in the field of language, related to didactic programmes as well.

Regions were concretely established only in 1970 (with a delay of more than twenty years after the entry into force of the Constitution) and, in the first phase of their activity, they did not contribute to public education system in a very significant manner. For this reason, the traditional vision of education as a primary State function and the configuration of the school system as an essential part of central and peripheral national administration seemed to be confirmed.

A significant turnaround took place in the second half of the 1990s, in a context marked by profound political and institutional changes, when a season of wide reforms of the State administration began, giving concrete effect to the principles of autonomy and decentralisation, formally enshrined in the Constitution but in practice never fully implemented.

The redefinition of the role of peripheral authorities was made between 1997 and 1998, through several legislative delegations to the Government which, without modifying the Constitution, should have allowed the implementation of a kind of 'administrative federalism', with the transfer of administrative functions from the State to local authorities (in the perspective of overcoming the excessive centralisation of the bureaucratic machine), with the reorganisation of the national and peripheral apparatus, forms of deregulation and normative simplification.

The aim was to implement an ambitious reform of the State structure, in accordance with the principle of subsidiarity. Shifting the exercise of the functions to the periphery and limiting the role of the State to some specifically enumerated tasks concerning national interests, the architecture of the administrative system was reversed. The centralised logic – also in education – was abandoned, replaced by a vision considering region and local authorities as the most appropriate subjects for carrying out regulatory tasks in numerous fields.

In the framework of the administrative reforms, educational institutions were granted legal personality. Thanks to a conferral of autonomy (administrative, didactic, and in the field of research),[8] educational institutions are no longer part of the State (as State schools) nor of the regions the schools for vocational education) and they became the backbone of the educational system, able to relate more effectively, as autonomous legal bodies, to territorial authorities and to the world of production.

Going beyond the idea that the State should be considered the only subject with competences in the educational public sector, a 'polycentric' system started to become clear, in which territorial authorities are asked to assume responsibilities of public relevance and general interest, on the basis of the principle of subsidiarity.

The administrative powers of local authorities have been progressively extended. Municipalities and provinces continue to provide construction, operating utilities and

[8] Law no. 59 art. 21 1997. *Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della Pubblica Amministrazione e per la semplificazione amministrativa.*

maintenance of buildings, but the implementing rules of 'administrative federalism' have assigned them additional competences, previously carried out by the State, in the field of education.[9]

Provinces (in relation to secondary education) and municipalities (for the other grades)[10] have assumed several tasks concerning creation, aggregation and suppression of schools, according to the programming tools. They have to develop an organisational plan for the network of educational institutions, oversee school bodies at territorial level and suspend classes in serious and urgent cases. Furthermore, local authorities, also in agreement with school institutions, engage in initiatives related to adult education, and provide educational and professional guidance services as well as organisational support services (transport, school canteen), paying particular attention to students with disabilities and developing measures for preventing early-school leaving and promoting health education.

Regions have been mainly endowed with administrative functions concerning the planning of integrated vocational education and training, as well as of educational networks (within the limits of the available human and financial resources), on the basis of provincial plans and of local authority proposals. Moreover, it is up to the regions to plan school building interventions, to fix the school calendar, and to grant contributions (which may be added to those set out at national level) to private schools.

The State has residual functions related to the determination of criteria and parameters for the organisation of the educational system, to its evaluation, to the determination and allocation of financial resources charged to the national budget, and to the recruitment and assignment of staff. The State has competences in supporting school activities and with regard to relations with regional administrations, local authorities, universities and training agencies.

The public service of education must therefore be provided through a coordinated exercise of functions by all territorial authorities of the Republic (regions, municipalities and provinces, together with metropolitan cities, as we will see later), in a system which has found a new constitutional enshrinement, by means of the major revision of 2001.

A new season of Italian regionalism started with the entry into force of constitutional law no. 3 of 2001, which amended the entire Title V of the second part of the 1948 text, devoted to the territorial organization of the Republic. Following federalist suggestions, regions, municipalities, provinces and metropolitan cities were recognised as constitutive elements of the Republic, along with the State, and a new articulation of powers regarding the different territorial levels of government was defined.

In respect of the legislative function, the new Article 117 of the Constitution expressly mentions the matters of 'exclusive' competence of the State and, in a

[9] Legislative Decree no. 11 1998. *Conferimento di funzioni e compiti amministrativi dello Stato e agli enti locali, in attuazione del capo I della legge 15 marzo 1997,* n. 59.

[10] Law no. 23 1996. *Norme per l'edilizia scolastica*.

subsequent list, those in which regions – as in the past – can legislate, in accordance with general rules laid down by national laws (in the framework of 'shared' competence). A residual legislative power is reserved for regions (and State intervention is formally precluded).

Compared with the previous constitutional framework, which – as mentioned above – did not foresee any regional competence in education and a mere shared competence with regard to vocational education and training, as well as for school assistance, the reform introduced some significant innovations.

'Education' is a matter which shall be considered through different types of competences.

The State has exclusive legislative power only for the definition of 'general provisions on education' (Article 117, point *n*); namely, national laws have to establish the limits and the content of the autonomy of school institutions, the fundamental objectives of the educational process, the general organisation of education (which means compulsory schooling, State exams and the recognition of diplomas and educational qualifications within the EU).

In addition, the 'determination of the basic level of benefits relating to civil and social rights to be guaranteed throughout the national territory' (Article 117, point *m*) is exclusively up to the State.

Since the right to education is included among these entitlements, the State determines the minimum benefits that the school system 'managed' by regions must ensure (i.e. establishing the quantitative and qualitative standards of the organisation, and activities and costs of the educational process).

National laws must finally establish the 'fundamental principles' to be followed by regions in the shared matter of 'education', respecting the school autonomy.

Moreover, when considering that 'vocational education and training' as well as 'educational assistance' have become 'exclusive' regional competences (as they are residual, according to Article 117, paragraph 3), it cannot be denied that the innovations introduced by the reform seem remarkable and appropriate to allow sub-national authorities to intervene more incisively in their respective territories.

Regarding administrative functions, the new Article 118 of the Constitution establishes that they are normally attributed to municipalities, unless they are recognised at a higher territorial level, up to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation.

In this way, constitutional coverage has been given to the comprehensive – and not completely straightforward – strategy of intervention begun in 1997, aimed at redefining administrative competences including in the field of education.

Finally, it should be noted that the constitutional reform of 2001 enshrined a new system of public education, in which the promotion of institutional pluralism concerns both territorial authorities and educational institutions.

In fact, the autonomy originally recognised by the Constitution only for universities was extended to schools, as a guarantee of these latter *vis-à-vis* the State and territorial authorities.

Following this configuration of the education public service in the new institutional framework, the transition from a State school to a 'spread and integrated model', actively involving regions and local authorities, would have been achieved. The network organisation is characterised by a polycentric but systematic structure, 'ruled by the principle of unity in differentiation'.[11] In fact, it is up to State to identify and assert national interests, but adequate spaces of autonomy must be granted at the same time to regions, local authorities and – of course – to educational institutions.

III. Some problematic aspects of the public service education

The aim of both promoting institutional pluralism and allowing the full implementation of the principle of autonomy explains the downsizing of the State role in education and the extension of that of regions. These latter authorities have been called to perform a planning and organisational function, acting as 'operation control centres' of the different activities carried out by several subjects (municipalities, provinces, schools, regional directorates of the Minister for Education), operating in their respective territories, in the framework of the educational process.

In the past few years, however, some tendencies, in a certain sense opposite to the spirit of the reform, have progressively emerged, pushing towards what has been described as 'the comeback of centralisation',[12] which has partly called into question the new distribution of responsibilities among the State, regions and local authorities.

Before turning our attention to such a problematic development, it should be noted that a critical aspect of education in Italy (compared with the experience of other countries) continues to be that of overlegislation layered over the years, which is very complicated, patchy and not easy to read. Moreover, a recent law (which was highly criticised) reforming the educational system has contributed to this normative hypertrophy.[13]

[11] A. M. Sandulli, Istruzione, in S. Cassese (ed.), *Dizionario di diritto pubblico* (Giuffrè, Milano, 2006) 3312.

[12] A. M. Sandulli, *Il Sistema nazionale di istruzione* (Il Mulino, Bologna, 2003) 89; E. Longo, *Fine di una materia. Spunti ricostruttivi e note critiche sul fragile decentramento dell'istruzione* (ISSiRFA, May 2015), http://www.issirfa.cnr.it/erik-longo-fine-di-una-materia-spunti-ricostruttivi-e-note-critiche-sul-fragile-decentramento-dell-istruzione-maggio-2015.html (Last accessed: 14 July 2017).

[13] Law no. 107 2015. *Riforma del Sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti*.

The multiplicity of national rules almost never express a long-term strategic vision of education and they are often drafted without adequate cooperation with all territorial authorities and full respect for their autonomy (as well as for that of school institutions), thus allowing the central government to maintain a strong role in educational processes.

This was certainly triggered by the complexity of the constitutional provisions on education, which soon revealed the difficulty of a precise delimitation of the field of intervention reserved for the State and the regions. This issue has contributed to increasing the already high level of litigation before the Constitutional Court.

The constitutional judge had to bring the fragmented competences on education into a framework characterised by 'a complex intertwining in the same matter of general rules, fundamental principles, regional laws and administrative acts'.[14] Regional autonomy has not always been strengthened, as the Constitutional Court has often given priority to the guarantee of national interests (which cannot be 'split' into a plurality of regional disciplines). The constitutional jurisprudence did not really slow down the State's tendency to undermine regional competences progressively (including those that should be regarded as 'exclusive' to the subnational authorities, such as education, vocational training and school assistance).

In the years following the reform, the national legislator has profoundly changed the education system and, with the aim of containing public spending, has intervened several times on planning and recruiting teaching staff, rarely considering regions as necessary interlocutors, despite their having specific responsibilities in the field of education.

In order to integrate regional vocational training in ensuring that young people complete their compulsory schooling, State legislation has further weakened the autonomy of sub-national authorities.

Legal disputes before the Constitutional Court have increased even more. The constitutional judge has frequently pointed out the importance of identifying an appropriate institutional forum for coordinating the exercise of State and regional legislative powers.

The main reason for so many disputes between the two institutional levels is the persistent absence of an effective forum for consultation, composition and harmonization of the various interests involved. The existence of such a forum would be really necessary to allow the effective implementation of the legislation at the different territorial levels and notably to preventing disputes which can only be resolved afterwards, before the Constitutional Court.

The existence of a constructive relationship between State and regions cannot be declared in the current Italian Parliament, despite many efforts made, in 2006

[14] Italian Constitutional Court Decision no. 13 2004.

and 2016, to amend the Constitution. The Senate is still waiting to be transformed definitively into a real Chamber of territorial representation, overcoming the atypical Italian 'perfect bicameralism'.

A true dialogue between the different levels of government cannot take place effectively, not even within the existing intergovernmental Conferences (one between the State and the regions and the other one between the State and the local authorities), because this form of relationship does not allow regions to become appropriately involved in national legislative processes and to contribute to the other State functions.

The poor implementation of the principle of loyal cooperation has further weakened the role of regions, but it should be remembered that these latter have only been able to operate in smaller legislative spaces compared to those formally set out in the new Title V of the second part of the Constitution.

The possibility introduced in 2001 by Article 116, c. 3 of the Constitution has not even been applied so far. This provision makes it possible for the regions to have 'additional forms and special conditions of autonomy', concerning matters falling within the shared legislative competence and some field of State exclusive competence specifically listed, among which is education. The mechanism should open the Italian constitutional system up to the so-called 'asymmetric regionalism' (following the Spanish model). However, the financial support for any new regional activity seems to be the real problem, as it is not clear whether the costs should be entirely covered by territorial authorities, or if regions can rely on higher State economic transfers.

The financial aspect has indeed a key importance in the concrete provision of education services.

Regions have exercised their powers by adopting sometimes relatively innovative choices (that have not always resisted the Constitutional Court's intervention), also by trying in certain cases to involve local authorities and the school institutions in their respective territory themselves.

Regional laws often went further than the traditional matters of school assistance and guaranteeing right to of education, promoting interventions for the supply of goods and services in order to facilitate access to educational activities (by providing textbooks, canteen, transport and residential services or scholarships). Some regions have offered 'school vouchers' for total or partial coverage of tuition fees.

The efficient exercise of the new competences related to planning the development of the educational system and its territorial organisation has been quite difficult, since it required a transfer of adequate financial resources from the State.

In this respect, it must be noted that the implementation of the constitutional reform of 2001 should also have affected the so-called 'fiscal federalism', which was intended to reshape the economic relations between State and territorial authorities, as well as to overcome the resulting financial system, by giving a greater revenue and spending autonomy to municipalities, provinces, metropolitan cities and regions.

This process started in 2009,[15] but it is still in progress, because of the overlapping multiple normative interventions, the implementation of which has not been facilitated by the economic crisis. In order to tackle this latter, the Governments that have followed have assumed decisions related to public finance characterised by a centralistic logic, reducing the economic resources for territorial authorities and bringing some contradictory elements into the so-called 'federalist process'.

As part of the public debt reduction measures, the State has drastically cut funding allocated to schools, frustrating in practice the innovative potential of the education system. In addition, financial transfers due to territorial authorities have not been provided, undermining the exercise of the competences envisaged in the Constitution or attributed to them later, by means of the decentralisation of social policies. It should also be recalled that budgetary constraints have also penalised the best-performing territorial authorities.

This has strongly affected the overall planning capacity of regions, preventing these authorities from meeting the different educational needs in an effective manner.

Social and territorial inequalities have increased. What is particularly marked is the disadvantage of the southern regions and the islands, where there is the highest concentration of families suffering social exclusion and the child poverty rate is much higher than in the rest of the country (40% of children in poverty live in the South, 44.7% on the Islands, 10% in the Northwest, and 13.2% in the Centre). If we consider other information, such as belonging to an ethnic minority or being of foreign origin (which require further specific educational services, aimed at promoting linguistic knowledge and integration), it appears that students without Italian citizenship (9% of all pupils) are mainly concentrated in large and small urban areas of central-northern Italy and the effort to integrate them, culturally and socially, has not yet been sufficient.

Staff management is one of the most important elements of planning and it still remains firmly in the hands of the national legislator. All school staff are in fact employed by the State, which allocates teachers and personnel of different typologies to schools through the regional educational offices (peripheral structures of the Minister of Education, University and Research). This prevents regions from developing more flexible didactic recruitment models, streamlining school institution network, scheduling the educational offer and responding more effectively to increasing and evolving demands.

[15] Law no. 42 2009. *Delega al Governo in materia di federalismo fiscale, in attuazione dell'articolo 199 della Costituzione.*

IV. On the territorial governance of the education system

Overcoming the centralised management of the Italian education system, which we have just been outlining, is the outcome of a still incomplete process, which is moving forward slowly, partly because of resistance from the national administration, as well as of the paralysing disputes between State and the regions, relating to the exercise of their respective competences.

With regard to this last aspect, it should be remembered that in 2006, a political confrontation between the State and regions started, in order to fully implement the constitutional rules on education; a draft agreement was reached in 2010,[16] which however has so far not been signed by both the Ministry responsible for Education and the Ministry for Economic Affairs.

A (re)definition, agreed with the State, of regional autonomy also seems necessary in relation to vocational training. This sector should in fact be considered as an exclusive competence of the regions, but these latter have failed to develop genuinely innovative models, due to the many constraints imposed by national legislation.

It is difficult to argue that regions have really been able to build a 'territorial education system': this would require efficient school network (and vocational training) planning, which in turn implies the development of comprehensive integration of labour policies, European programmes and school support interventions. Moreover, a real 'educational federalism' needs adequate forms of coordination of responsibilities and cooperation among all the stakeholders involved in planning and managing the public service in question.

After all, with the purpose of creating the necessary conditions for ensuring this development, the national legislation should have accompanied the transfer of competencies to the periphery – since the start in the 1990s of the decentralisation of administrative functions – with the allocation of adequate financial resources to territorial authorities.

It should be remembered in this regard that the regional and local finance system for a long time had an essentially derived nature, as the territorial authorities were limited to managing special-purpose State transfers, which were fixed each year at national level. Such a system did not allow territorial autonomies to put effective financial planning in place and did not encourage them to become more responsible and best-performing as regards budgetary management.

[16] A. Poggi, L'accordo Stato-Regioni in materia di istruzione e le prospettive del federalismo fiscale per la scuola, (2010) 33 (3) *Programma Education FGA Working Paper,* http://win.gildavenezia.it/docs/Archivio/2010/magg2010/Poggi_federalismo-fiscale_scuola.pdf (Last accessed: 14 July 2017).

The financial autonomy of local and regional authorities has strengthened over time, but the dynamics of so-called 'fiscal federalism', aiming at implementing Article 119 of the Constitution only started in 2009. The task of redefining relations between centre and periphery was given to Government through a wide legislative delegation, in order to overcome the derivative financial system and attribute a greater revenue and spending autonomy to territorial authorities.

In view of the limited space available, we cannot analyse in detail the elements characterising the regional and local fiscal system; we will limit ourselves to remembering that this latter is now based (after the abolition of the traditional State transfers) on the tax revenue of territorial authorities and resources received from the State as elements of financial equalisation, which should enable autonomous regional and local bodies to support all expenses related to their competences, or at least of those that are considered as 'fundamental' by national legislation.

Fiscal federalism has been, however, an ongoing process, the intermittent implementation of which has been affected by the worsening of the economy. The many regional and local financial reform rules have repeatedly been amended; they have often not been introduced in order to improve the system's functionality, but just for the need for fiscal consolidation, in the light of European constraints. This has significantly reduced the scale of reform, introducing some substantive elements of 'centralisation' related to control over revenue and spending decisions.

The complex financial equalisation system (put into operation in 2015, in an economic context still marked by the effects of the crisis and different than that in which the fiscal federalism law was approved) is now being completed – the conclusion of this process is planned for 2021 – and it is clear that it has not been able to guarantee up until now that all territorial authorities will receive adequate financial resources.

The Italian Court of Auditors has recently highlighted the challenges of 'a still incomplete system, both in the definition of an appropriate mechanism of fiscal accountability and in the allocation of resources'.

The finance system of regional and local authorities is still far from the expectations of efficiency and autonomy; more importantly, the fiscal capacity and the equalisation flows do not allow territorial authorities to cover all the costs of fundamental functions. This situation calls for some further reflections related to the specific subject of our study.

Local authorities play a strategic role in the provision of education services; furthermore, they can relate more directly to schools.

As a consequence of the limited economic resources and public finance constraints, the provision of services no longer seems to be strictly associated with citizens' rights, but it appears to be more related to budgetary needs.

This is reflected by the growing number of municipalities – especially in southern Italy and on the islands – which have been forced to reduce services significantly

(or to increase prices considerably) for young children, foreign pupils, students with disabilities or to cut back school canteen services, the provision of free schoolbooks, etc.

As we have already noted, the equalisation system for ensuring the essential levels of benefits and reducing territorial inequalities has yet to be consolidated. It should however be remembered that the efficiency and cost-effectiveness of public services do not seem to be helped by the problem of Italian municipal fragmentation.[17] On average, municipalities in Italy have 8,048 inhabitants and are small in size; these territorial authorities had to adapt in recent decades to the not always linear reforms of their competencies and being forced to reconfigure how they provide public services. Small municipalities in particular find it difficult to programme and manage their fundamental functions.

Inter-communal coordination is still feeble and it usually has an informal structure, due to both strong localism and the weak role played by regions.

European policies, however, pay even greater attention to urban areas and demand regions to develop a strong capacity for planning and coordinating territorially integrated interventions, also in order to bridge the still relevant divide between cities and rural areas.

Since the beginning of the 1990s, the Italian Parliament has tried to remedy the excessive fragmentation of local authorities, by establishing some limits for the creation of new municipalities and strengthening forms of association in public services management (in the field of education too).

State and regional funding have been provided to stimulate forms of cooperation, such as consortia and unions of municipalities, using instruments such as conventions and programme agreements.

However, these initiatives have not yet produced the expected results, also because of a complex and constantly evolving process of reorganisation of the tasks of local authorities. In recent years, national laws have in fact intervened several times (within the framework of an 'exclusive' legislative State competence for local authorities) in order to regulate the vertical distribution of powers on the basis of priorities often founded on the economic emergency and with the aim of reducing the costs of politics rather than on the will to improve decentralisation.

The most recent reform of local authorities is considered by many as an expression of a 'recentralising' logic, too. In 2014, new rules regarding municipal merger and union were adopted;[18] ten metropolitan cities were introduced into the system (which replaced just as many provinces), as new local authorities of large urban areas, with planning and territorial management functions. The remaining provinces have been transformed into second-tier 'large area' territorial authorities, bestowed with 'fundamental functions' in

[17] L. Vandelli, *Il sistema delle autonomie locali* (Il Mulino, Bologna, 2015) 72.
[18] Law no. 56 2014. *Disposizioni sulle città metropolitane, sulle province, sulle unioni e fusioni di comuni.*

some specific fields; their organisation was expressively classified as 'transitional', while waiting for a constitutional reform in order to decide their concrete future.

The law also set out a difficult process for reorganising the 'non-fundamental' functions of provinces; regions have accomplished this procedure through specific laws, sometimes by making divergent choices.

In the field of education, the law indicated 'provincial school network planning' among the fundamental administrative functions of provinces, 'without prejudice to regional planning' and 'school building management'. The linguistic formulas used did not, however, make it clear whether the new bodies cover services and activities previously carried out by the provinces in the context of 'public education' (a function that metropolitan cities have in fact inherited from the old provincial authorities). This applies, for instance, to school transport, especially with regard to students with disabilities: some regions considered such a service as a 'non-fundamental' task of the provinces, thus deciding to assume it directly or to delegate its exercise to municipalities, but often without allocating the resources necessary to cover the related costs to them.

As the Italian Court of Auditors has recently observed, provinces live in 'an objective condition of uncertainty which affects their constitutional prerogatives';[19] this is due to the fact that the reorganisation of the local government system took place in a climate of great vagueness about the fate of provinces,[20] while awaiting their definitive abolition, foreseen in the constitutional revision law of 2016, which was then rejected by the people in a referendum.

In such a chaotic context, it is not always possible to identify accurately the responsibilities of regional and local authorities, so administrative courts have sometimes had to intervene in order to define the areas of competence better in the territorial governance of education.

The different 'fragments' of education, at the various levels, do not always fit together in a rational manner; it would therefore be very opportune to provide structured and sound forms of inter-institutional collaboration, especially by reference to the most problematic aspects facing schools.

In this regard, a clear example is represented by school buildings, the multilevel governance of which involves State, regions and local authorities, directly affecting the quality of the education system.

Italian school buildings have unfortunately now assumed the characteristic of a real 'national emergency'. Recent surveys have highlighted that 65% of school buildings

[19] Corte dei Conti, Sezione delle Autonomie, *Audizione sulla finanza delle Province e delle Città metropolitane presso la Commissione Parlamentare per l'attuazione del federalismo fiscale*, 23 February 2017, 4.

[20] C. Pinelli, Gli enti di area vasta nella riforma del governo locale di livello intermedio, (2015) (3) *Istituzioni del Federalismo,* 578; R. Cheli, L'attuazione della legge Delrio a due anni dall'approvazione. Verso quale direzione?, (2016) (2) *Istituzioni del Federalismo,* 506.

were built before the entry into force of the anti-seismic legislation introduced in 1974 and only 9.6% between 1991 and 2015.[21] Only about a third of educational institutions possess all the necessary technical certifications and more than half are in seismic areas. Attention should moreover be drawn to the fact that Italy is one of the most endangered Mediterranean countries, due to the frequency of earthquakes that have historically affected its territory and the intensity that some of them have achieved.

With regard to school buildings, the shared responsibilities and executive powers between the various territorial authorities requires a strategic planning mentality and effective coordination, to avoid overlapping tasks, and allow timely building maintenance (over the last three years, 117 school buildings have collapsed).

Almost all educational facilities are owned by local authorities (municipalities and provinces); their slim budget is affected by the costs of construction, maintenance and the regular operation of schools.

The state provides support funding to regions which, on the basis of multiannual planning, allocates these funds to municipal and provincial administrations that have applied for them. This means that local authorities hold administrative functions in school buildings but, having regard to their difficult budgetary situation, they can actually only intervene after the allocation of resources from the State and their consequent distribution by the region.

Moreover, we must consider that the interventions have long been funded (discontinuously and with resources that have become increasingly inadequate compared to the real needs) in response to emergencies rather than on the basis of an effective programming logic, which would have first demanded the launch of the school building registry, envisaged since 1996.

The registration of school buildings only started in Italy in 2016; it has been associated with extraordinary plans for school safety operations in seismic risk areas and above all with the allocation of national resources for coordinating and implementing school building rehabilitation interventions. Attempts have been made to provide for more direct funding mechanisms, to allow a prompt start of the already planned works; moreover, as requested by territorial authorities for some time, school building interventions have been excluded from the Italian Domestic Stability Pact.

More importantly, a coordinated and joint action among the national Government, regions and local authorities, inspired by a programming logic and a culture of systematic prevention, has been finally accomplished.

Such a consideration should not lead to disregarding the role of the schools themselves. Education governance also requires effective forms of dialogue, confrontation and close cooperation between territorial autonomies and school institutions.

[21] Legambiente (2016), *Ecosistema Scuola. XVII Rapporto di Legambiente sulla qualità dell'edilizia scolastica, delle strutture e dei servizi,* 15.

Even if it is envisaged by national legislation, synergic integration has still to become established in Italy, as the relationship between local authorities and schools is, for the moment, largely characterised by an excessively bureaucratic attitude (which fuels disputes before regional administrative courts).

On the one hand, local authorities continue to see themselves as mere 'providers' of support services; furthermore, they relate to educational institutions in a hierarchical logic, without being able to stimulate innovative processes.

On the other hand, schools have long developed a relationship of resigned functional 'dependence' on local authorities, as regards funds and facilities (canteen, transportation, buildings maintenance, sports installations) without being able to elaborate and develop, in those subjects, really useful educational projects for the development of local communities, sharing experiences and skills to face the challenges of ever-evolving educational needs.

Over the years, local government initiatives aimed at broadening the educational offer (by, *inter alia,* financing musical, sports, environmental and cultural activities.) have increased, but co-planning between schools and territorial authorities remains episodic and non-systematic.

Moreover, schools still have great difficulty in building autonomously inter-institutional networks and developing associative forms for carrying out their tasks more effectively and positively affecting territorial education programming.

Encouraging signs seem to come from the agreements signed in recent years between schools, municipalities and regional school offices, designed to define strategies and ways of managing educational policies, encouraging constructive collaboration to improve school services, enrich the educational offer and support territorial development.

Despite the innovative stimuli deriving from such positive interactions, it should be noted, however, that national legislation still continues to consider school autonomy in mainly administrative terms (rather than enhancing didactic, organisational, experimental and research aspects) and to see educational institutions as national peripheral administrations, subjected to many strict constraints imposed by the State.

The role of school managers, who are responsible for both managing financial and instrumental resources and for the outcome of the service, has been only partially 'debureaucratised' over the years. They still remain state officials, with a managerial qualification; their task has been reformed according to a managerial logic and a business-oriented approach. In this way, school governance remains less sensitive to confrontation, dialogue with their territory and innovation, focusing instead on the results and the cost-effectiveness of the services provided to school market 'clients' rather than being based on educational needs of 'students' and on the quality of didactic activities.

As we have highlighted above, the territorial governance of education public service requires a synergic and effective involvement of all institutional levels in defining the objectives to be pursued and in assuming coordinated choices, based on a global knowledge of the needs and of the resources available.

The close link between the problems of education in Italy and the challenges of territorial decentralization are now stimulating some reflection.

In April 2016, after two years of intense parliamentary debate, a constitutional law was approved;[22] its main purpose was to renew the institutional architecture, achieving a new balance between both the two Assemblies and the different territorial levels of government.

Among the many objectives of the reform was to strengthen the principle of autonomy, redefine the relations between State and regions and make a radical modification of the legislative function distribution criteria. The system of local authorities was simplified and the elimination of the provincial level of government was confirmed.

Unlike the 2001 constitutional law and the 2006 revision effort – both marked by a strong 'federalist' impetus – the 2016 reform was approved in a context of deep crisis and delegitimisation of territorial authorities. During the last years, these latter have been affected by national policies of extreme restriction on the side of public spending, also favoured by the emotional reaction of the public opinion, following numerous judicial investigations concerning cases of corruption and wasted resources, which occurred at all peripheral levels of government (but concerning regions in particular). The outcry focused not only on the low political morality of local administrators, but also – in the opinion of many people – on an inadequate and ineffective articulation of national controls over them.

The regional system appeared overall weakened in the draft constitutional reform.

Provinces were abolished *tout court,* without reconfiguring the system of local authorities and creating great differences between metropolitan cities and the rest of the territory in each region – especially in the largest of them – which would have been deprived of an authority of 'large area' fit to manage functions of supra-municipal interest (such as urban planning, waste and environmental management, transport, technical assistance to municipalities, etc.) that cannot be fragmented at the lowest institutional level nor centralized at the regional one.

[22] In April 2016, the Italian Parliament approved a Constitutional Law concerning 'Provisions for overcoming equal bicameralism, reducing the number of Members of Parliament, limiting the operating costs of the institutions, the suppression of the CNEL and the revision of Title V of Part II of the Constitution', http://www.gazzettaufficiale.it/eli/id/2016/04/15/16A03075/sg (Last accessed: 14 July 2017). A constitutional referendum was held on 4th December 2016 and 59.11% of voters rejected this reform.

In the meantime, some problems related to the new metropolitan cities have emerged, as these authorities are still lacking both the essential funding for their proper functioning, and in an adequate political visibility (also for the indirect mechanism for the election of their mayors until now).

In short, the declared intention to open a new virtuous phase of Italian regionalism was disavowed by a logic of (re)centralization, expressed not only by the definitive abolition of provinces but also by the new distribution of legislative powers between the State and regions, which was destined – according to the proponents of the reform – to reduce institutional conflicts and disputes before the Constitutional Court.

The shared legislative power was eliminated, with the consequent expansion of State exclusive competence and the concept of national interest was (re)introduced, as a prerequisite for the activation of a 'supremacy clause' in favour of the central level.

The subject of our study helps us to test the effects of such provisions on local government autonomy.

Article 117 Const. was redrafted by indicating the areas of exclusive State competence, while the regional ones were partly listed, partly to be drawn pursuant to a residual clause.

Matters of shared legislative competence were mainly attributed to the State, in order to rule out regional laws completely. National competences included the establishment of 'general and common provisions on education', rules on 'vocational education and training', in addition to those on the education system. The decision to allow regions to legislate in those strategic fields eventually, in the future, was left solely to the State.

The residual clause, however, enabled regional laws to regulate matters not expressly reserved to the State, some of which were explicitly mentioned: these included the organisation of training – but no longer vocational education – school services and the promotion of the right to study (while continuing to respect the autonomy of school institutions).

The compensation for such a general diminution seemed modest. Under the new Article 116, co. 3, additional competences could have been attributed to regions 'by a national law, even at their request, after consultation with the local authorities', as is indeed foreseen even now. However, this would only have been possible for regions with a balanced budget and, in the educational field, strictly for 'vocational education and training'.

The 'centralising' animus of the reform emerged especially from Article 117, co. 4 of the revised Constitution, which stated that 'upon the Government's proposal, national law may intervene in matters not reserved to exclusive legislation when so requested by the maintenance of legal or economic unity or by the protection of the legal or economic unit of the Republic, or the protection of the national interest'.

Such a formula, improperly defined as a 'supremacy clause' (and ironically renamed a 'vampire clause'), was however not combined with those procedural safeguards that, in other constitutional systems – one thinks, for instance, of *Konkurrierende Gesetzgebung* in the Federal Republic of Germany – are aimed at avoiding arbitrary and indiscriminate use.[23] A breach would have been opened for possible national strong constraints on peripheral policies and a further limitation of regional autonomy.

V. Concluding considerations

Schools in Italy are a key driver of socio-economic growth but, compared to what happens in other European countries, there is a tendency to 'centralise' decision-making process as if such institutions should still be considered as state peripheral articulations, destined to guarantee a generic right to education, in a homogeneous manner across the national territory.

In other national systems characterised by a strong administrative and political decentralisation, a distribution of competences aimed at enhancing peripheral level has not generated, a push to the 'fragmentation' of education into a multiplicity of local subsystems. The culture of autonomy seems instead to have impelled the positive development of coordinating forms, both vertical (between national and peripheral level) and horizontal (between local authorities and educational institutions).

The development lines of the regional and local system in Italy have never been elaborated until today as part of a project shared by all political forces; for this reason, decentralisation has not grown on a basis of incremental dynamics, as in the case of almost all European countries, but has followed labyrinthine trails. Any recognition of progressive and significant degrees of autonomy for regional and local authorities has always been followed by phases, of different intensity, during which an attempt to reverse the process was made or a substantial recentralisation of competences was reached.

A positive reform of education governance should therefore be preceded in Italy by the awareness necessary for overcoming that attitude which makes perceived decentralisation become a mere 'bureaucratic' transfer of competences between institutions.

The building of a vital 'system of autonomies' primarily involves State willingness to reform itself, transforming its own mechanisms and making the dysfunctional central apparatus lighter.

[23] A. D'Atena, Il riparto delle competenze tra Stato e regioni ed il ruolo della Corte costituzionale, (2015) (1–2) *Italian Papers on Federalism,* https://www.ipof.it/il-riparto-delle-competenze-tra-stato-e-regioni-ed-il-ruolo-della-corte-costituzionale/ (Last accessed: 14 July 2017).

The State should focus on broader policies aimed at addressing the educational process, retreating from the concrete management of the education public service, which is expected to be largely given to regional and local authorities, the autonomy of which should be further strengthened to face the challenges of an increasingly complex and localized society.

A logic, that – as we have seen – still has difficulty in being fully shared.

Milosavljević, Miloš,[*] Milanović, Nemanja[**]
and Benković, Slađana[***]

Public Procurement Management and Contract Efficiency: Empirical Evidence from Serbian Local Administration

Abstract

Public procurements in Serbia account for one tenth of the country's Gross Domestic Product. Accordingly, control, monitoring and regulation of public procurements are crucial factors in and constituents of efficient governance. Ever since the introduction of the Law on Public Procurements in 2002, Serbia has been reforming the system of public procurements. The establishment of an independent regulatory institution was aimed at facilitating governance, educating clerks and managers, supporting transparency and competitiveness, and decreasing corruptive behaviour in public procurements. Hitherto, however, the adversarial goals of public procurement management and contract management have been out of the scope of both scholars and practitioners. This study aims to examine the influence of public procurement management on contract management practices. Study results indicate that procurement planning and solicitation have the most important influence on the efficiency of contract management. The paper draws attention to the importance of public procurement and contract management for the efficiency of local administration in Serbia.

Keywords: public procurement, contractual management, local administration, Serbia

I. Introduction

Public procurement relates to all purchases made by public authorities. It is centred around the issue of how authorities spend taxpayers' money on goods, services and

[*] Milosavljević, Miloš PhD, Assistant professor, Faculty of Organizational Sciences, University of Belgrade.
[**] Milanović, Nemanja PhD Candidate, Assistant, Faculty of Organizational Sciences, University of Belgrade.
[***] Benković, Slađana PhD, Professor, Faculty of Organizational Sciences, University of Belgrade.

DOI: 10.56749/annales.eltreajk.2017.lvi.8.123

works.[1] As such, it is one of the key economic activities of governments[2] and an important tool for the effective redistribution of national wealth. The procurement function in contracting authorities expanded from a simple acquisition of office supplies to contracting a broad range of public functions a long time ago.[3] For instance, municipalities and cities nowadays contract out a wide range of services, ranging from education and healthcare to transportation and domestic and commercial waste collection.[4] The shift to market delivery of goods, services and works was conceived as a means of promoting efficiency and managerialism in the public sector.[5]

Proponents of contracting out goods, services and works to private delivery argue that competition incentives yield efficiency and bypass costly labour and supply. The most important reasons for private delivery are related to fiscal stress and cost reduction, whereas political pressure and ideological considerations of policy-makers are not found to play an important role in the field.[6] Contrary to this, Boyne[7] states that the empirical arguments for cost-reduction and the efficiency of contracting out services are bureaucratic myths rather than reality, as a result of numerous methodological flaws in the extant studies. Using a meta-regression analysis Bel, Fageda and Warnerd[8] infer that contracting out services to private providers does not lead to any efficiency improvements; moreover, when the efficiency of service delivery has already been enhanced, the opposition to contracting out is more likely.[9]

Given their high importance for a myriad of different economic, societal, political and technological dimensions, public procurements have been heavily regulated. In an economic sense, they account from 10 to 25 percent of total GDP

[1] H. Walker and S. Brammer, Sustainable procurement in the United Kingdom public sector, (2009) 14 (2) *Supply Chain Management: An International Journal,* 128–137, https://doi.org/10.1108/13598540910941993

[2] S. Brammer and H. Walker, Sustainable procurement in the public sector: an international comparative study, (2011) 31 (4) *International Journal of Operations & Production Management,* 452–476, https://doi.org/10.1108/01443571111119551

[3] T. L. Brown and M. Potoski, Contract-management capacity in municipal and county governments, (2003) 63 (2) *Public Administration Review,* 153–164, https://doi.org/10.1111/1540-6210.00276

[4] J. Levin and S. Tadelis, Contracting for government services: Theory and evidence from U.S. cities, (2010) 58 (3) *The Journal of Industrial Economics,* 507–541, https://doi.org/10.1111/j.1467-6451.2010.00430.x

[5] A. Hefetz and M. E. Warner, Contracting or public delivery? The Importance of service, market, and management characteristics, (2011) 22 (2) *Journal of Public Administration Research and Theory,* 289–317, https://doi.org/10.1093/jopart/mur006

[6] G. Bel and X. Fageda, Why do local governments privatise public services? A survey of empirical studies, (2007) 33 (4) *Local Government Studies,* 517–534, https://doi.org/10.1080/03003930701417528

[7] G. A. Boyne, Bureaucratic theory meets reality: public choice and service contracting in U. S. local government, (1998) 58 (6) *Public Administration Review,* 474–484, https://doi.org/10.2307/977575

[8] G. Bel, X. Fageda and M. E. Warner, Is private production of public services cheaper than public production? A meta-regression analysis of solid waste and water services, (2010) 29 (3) *Journal of Policy Analysis and Management,* 553–577, https://doi.org/10.1002/pam.20509

[9] P. Garrone and R. Marzano, Why do local governments resist contracting out?, (2015) 51 (5) *Urban Affairs Review,* 616–648, https://doi.org/10.1177/1078087414549548

across Europe. In addition, the public purchasing system administers public money. Therefore, all countries face the problem of unrelenting budget constraints and concerns about efficiency.[10]

Public procurements not only uphold the efficiency, but also a broader set of strategic goals. To mention a few, public procurements are used to spur innovation and development[11]), implement different national, regional and local sustainability policies,[12] influence political and fiscal decentralisation and foster local economies[13] and to improve the rational usage of natural resources and achievement of social outcomes.[14]

On the other side, the goal of contract management and administration is to 'ensure that proper mechanisms are in place to monitor and evaluate contractors, suppliers and service providers' performance in the fulfilment of their contractual obligations'.[15] Effective contract management requires mitigating the risks and problems that could plague contractual processes, and requires contract-management capabilities for dealing with possible problems.[16] It is argued that highly specialised expertise is needed for the optimal monitoring arrangements that allow the quality and quantity of goods and services delivered to be compared against the contract specifications.[17] The main theoretical propositions in the current body of knowledge suggests that public

[10] K. V. Thai, International public procurement: innovation and knowledge sharing, (2015) *International Public Procurement,* 1–10, https://doi.org/10.1007/978-3-319-13434-5_1

[11] V. Lember, R. Kattel and T. Kalvet (eds), *Public procurement, innovation and policy* (Springer, 2014) https://doi.org/10.1007/978-3-642-40258-6; S. Appelt and F. Galindo-Rueda, Measuring the link between public procurement and innovation, (2016) (3) *OECD Science, Technology and Industry Working Papers,* https://doi.org/10.1787/5jlvc7sl1w7h-en

[12] C. Bratt, S. Hallstedt, K.-H. Robèrt, G. Broman and J. Oldmark, Assessment of criteria development for public procurement from a strategic sustainability perspective, (2013) 52 *Journal of Cleaner Production,* 309–316, https://doi.org/10.1016/j.jclepro.2013.02.007; M. K. Amann, J. Roehrich, M. Eßig and C. Harland, Driving sustainable supply chain management in the public sector, (2014) 19 (3) *Supply Chain Management: An International Journal,* 351–366, https://doi.org/10.1108/scm-12-2013-0447; S. Witjes and R. Lozano, Towards a more Circular Economy: Proposing a framework linking sustainable public procurement and sustainable business models, (2016) 112 *Resources, Conservation and Recycling,* 37–44, https://doi.org/10.1016/j.resconrec.2016.04.015

[13] S. Vagstad, Centralized vs. decentralized procurement: Does dispersed information call for decentralized decision-making?, (2000) 18 (6) *International Journal of Industrial Organization,* 949–963, https://doi.org/10.1016/s0167-7187(98)00044-7; B. Brezovnik, Ž. J. Oplotnik and B. Vojinović, (De)Centralization of public procurement at the local level in the EU, (2015) 11 (46) *Transylvanian Review of Administrative Sciences,* 37–52.

[14] C. McCrudden, Using public procurement to achieve social outcomes, (2004) 28 (4) *Natural Resources Forum,* 257–267, https://doi.org/10.1111/j.1477-8947.2004.00099.x

[15] J. A. Lynch T., *Public procurement and contract administration: A brief introduction* (Lean pub, 2013) 8.

[16] Brown and Potoski, Contract-management capacity in municipal and county governments, 153–164, https://doi.org/10.1111/1540-6210.00276

[17] Prager, J. Contracting out government services: Lessons from the private sector, (1994) 54 (2) *Public Administration Review,* 176–184, https://doi.org/10.2307/976527

contractors are poor-quality agents in procurement contracting game, which leads to high inefficiency on the public sector side.[18]

Although the distinctions between the main goals of public procurements and contract management are obvious, the relationship between these two driving forces of efficient public administration have received a paucity of attention in recent scholarly studies. For instance, Decarolis[19] examined how *ex post* renegotiations severely affect the lowest price bid and distorts the performance of public procurements, while, Davison and Sebastian[20] reported on the most common issues in contract administration as affected by contract type. These, and other similar studies only tangentially address the relationship between public procurement efficiency and contract administration and management. Accordingly, this study aims to fill the gap in the present body of knowledge by examining the influence of public procurement management on contract management practices.

In the context of this study, public procurements are viewed as a strategic function in procuring organizations, rather than a clerical function used for gatekeeping purposes.[21] As such, public procurement processes include not only the purchasing of goods, services and works, but planning these activities, solicitation, implementation and monitoring as well.

The remainder of this paper is organised as follows: Section 2 depicts the geographical context of the study by delineating the Serbian setting of public procurements. The same section outlines the theoretical framework for public procurement and its importance, reviews the literature on the relationship between public procurement management and contract management efficiency and develops the main research questions. Section 3 thoroughly explains the methodology used in the study with particular emphasis on the development of measures, indicators and scales used for the analysis. Section 4 presents the results of the study. Section 5 discusses the results and provides an insight into the strengths, limitations, and implications of the study for various stakeholders.

[18] Y. Minchuk and S. Mizrahi, The (in) effectiveness of procurement auctions in the public sector, (2016) 24 (4) *Applied Economic Letters,* 247–249, https://doi.org/10.1080/13504851.2016.1181704

[19] F. Decarolis, Awarding price, contract performance, and bids screening: Evidence from procurement auctions, (2014) 6 (1) *American Economic Journal: Applied Economics,* 108–132, https://doi.org/10.1257/app.6.1.108

[20] B. Davison and R. J. Sebastian, An analysis of the consequences of contract administration problems for contract types, (2009) 1 (2) *Journal of Management Research,* 1–32, https://doi.org/10.5296/jmr.v1i2.44

[21] D. Matthews, Strategic procurement in the public sector: A mask for financial and administrative policy, (2005) 5 (3) *Journal of Public Procurement,* 388–399, https://doi.org/10.1108/JOPP-05-03-2005-B005

II. Literature review

1. A case for public procurements in Serbia

The regulated practice of public procurement in Serbia was established in 1875, when the Law on Military Procurement and Auctions was passed to ensure more effective spending of public funds. Certain features of this law are incorporated in the current public procurement system, such as setting limits above which a public auction must be organized. Below these limits, direct agreement is allowed.

History aside, a modern legal framework of the Serbian public procurement system was introduced with the Law on Public Procurement (LPP) from 2002.[22] The LPP incorporated exemplary EU contracting directives in procedures for the award of public service contracts,[23] public supply contracts[24] and public works contracts,[25] and the procurement procedures for entities operating in the water, energy, transport and telecommunications sectors.[26] The LPP underwent the most significant change in 2004, when the Republic Commission for Protection of Rights in Public Procurement Procedures was established within the Public Procurement Office.

For a decade and a half, Serbia has been undergoing reforms aiming to achieve good governance in public procurements. Persistent modifications of the law and harmonisation with EU legislation are tackling public procurements, which currently account for one tenth of Serbia's Gross Domestic product. A set of legal and institutional prerequisites was set in 2002, and the system has been gradually improving ever since. In 2004, European Union bodies adopted two new directives on public procurement: Directive 2004/18/EC on procedures for the award of public works contracts, public supply contracts and public service contracts, and Directive 2004/17/EC on procurement procedures of entities operating in the water, energy, transport and postal services sectors. This change strongly influenced the harmonisation of the legislative framework for the public procurement system in Serbia with EU directives. The new LPP was therefore adopted[27] in December 2008, being in effect until April 2013, when it was replaced by the current LPP.[28]

The current Law represents a substantial shift in harmonising Serbian with EU public procurement legislation, particularly considering the amendments adopted in

[22] Official Gazette RS 39/2002.
[23] Council Directive 92/50/EEC.
[24] Council Directive 93/36/EEC.
[25] Council Directive 93/37/EEC.
[26] Council Directive 93/38/EEC.
[27] Official Gazette RS, 116/2008.
[28] Official Gazette RS, 124/2012, 14/2015 and 68/2015.

EU Directive 2014/24/EU and Directive 2014/25/EU. The negotiation position in the inter-governmental conference on Serbia's EU accession for Chapter 5 – Public procurement was established at the beginning of 2016. The Republic of Serbia opened Chapter 5 on December 13, 2016.[29]

Bearing this in mind, public procurement attracted attention from both practitioners and scholars in Europe, and similarly in Serbia, as well. From a practical point of view, the central authority – the Public Procurement Office – frequently reports on the status of and dynamics in public procurements with occasional reporting on particular projects related to various improvements.[30] The system is also monitored by a few nongovernmental institutions.

From an academic point of view, the body of evidence is still developing. Nevertheless, only a paucity of research has filled the knowledge-base on public procurements in Serbia. Specific issues, such as the benefits of centralising public procurements,[31] transparency in public procurements,[32] distinct features of e-procurements,[33] and methodologies for bidder selection process improvements[34] have been thoroughly examined in the extant literature.

The influence of public procurement management on contractual efficiency has been out of the scope of research radars. As displayed in Table 1, the number of procurement contracts has been gradually decreasing in last fifteen years. However, the value of procurements per contract has increased approximately 7.5 times (from 426,000 in 2003 to 3,212,000 RSD in 2016). Therefore, the importance of managing individual contracts increased immensely throughout the observed period.

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[29] The Government of the Republic of Serbia, *Pregovaračka pozicija Republike Srbije za međuvladinu konferenciju o pristupanju Republike Srbije Evropskoj Uniji ua pregovaračko poglavlje 5 – Javne nabavke* (The Government of the Republic of Serbia, text in Serbian, Belgrade, 2016) http://eupregovori.bos.rs/progovori-o-pregovorima/uploaded/pg_pozicija_pg_5(1).pdf (Last accessed: 3 July 2017).

[30] E.g. Public Procurement Office, Strengthening public procurement in Serbia (Public Procurement Office, Belgrade, 2010) http://www.ujn.gov.rs/en/obavestenja/story/119/STRENGHTENING+-PUBLIC+PROCUREMENT+IN+SERBIA.html (Last accessed: 6 June 2017).

[31] P. Jovanović, N. Žarkić Joksimović and M. Milosavljevic, The efficiency of public procurement centralization: Empirical evidence from Serbian local self-governments, (2013) 11 (4) *Lex Localis – Journal of Local Self-Government,* 883–899, https://doi.org/10.4335/11.4.883-899(2013)

[32] M. Milosavljevic, N. Milanovic and S. Benkovic, Waiting for Godot: Testing transparency, responsiveness and interactivity of Serbian local governments, (2017) 15 (3) *Lex Localis – Journal of Local Self-Government,* 513–528, https://doi.org/10.4335/15.3.513-528(2017)

[33] M. Milovanovic, M. Bogicevic, M. Lazovic, D. Simic and D. Starcevic, Choosing authentication techniques in e-procurement system in Serbia, in *2010 International Conference on Availability, Reliability and Security, IEEE,* https://doi.org/10.1109/ares.2010.82

[34] V. Bobar, K. Mandic and M. Suknovic, Bidder selection in public procurement using a fuzzy decision support system, (2015) 7 (1) *International Journal of Decision Support System Technology,* 31–49, https://doi.org/10.4018/ijdsst.2015010103; V. Bobar, K. Mandić, B. Delibašić and M. Suknović, An integrated fuzzy approach to bidder selection in public procurement: Serbian Government case study, (2015) 12 (2) *Acta Polytechnica Hungarica,* 193–211, https://doi.org/10.12700/aph.12.2.2015.2.12

2. Public procurement contract efficiency

Erridge and Nondi[35] elaborate on the types of public procurements according to the EU regulation and point out three ways in which a contract can be granted to a supplier: (1) open procedure – any supplier may tender; (2) restricted procedure – any supplier may apply to be considered, and the purchaser then selects suppliers to tender; and (3) negotiated procedure – the purchaser conducts direct discussions with one or more suppliers of the purchasers' choice. On the other side, different contracts require different contract management approaches by the contracting authority. Criteria that define the rigour of the contracting authority's contract management are explained by Kraljic's supply matrix.[36]

Goods and services of great importance for the contracting authority are either easily available on the market or offered by a limited number of providers. In the first case, contracting authorities can easily choose another bidder in the event of contractual obligations being violated and use the benefits derived from great volume and value of their public procurements. Even so, there is a risk that the contracting authority cannot purchase a sufficient amount of goods and services during the process of choosing another supplier. In that case contract management should be founded on inventory management and a contract monitoring process.

The significance of contract management is even higher when the contracting authority considers goods and services as exceptionally important, but there are only a few providers. In contrary, the contracting authority should accumulate inventory, which leads to higher inventory costs, and so contract management and market research should contribute to a more efficient public procurement process. Even though procurement contracts differ in terms of their complexity, all legal arrangements require distinctive, holistic and multidimensional contractual skills, knowledge, expertise and experience.[37]

3. Public procurement management and contract efficiency

Public procurement management refers to all activities needed for efficient planning, implementation and monitoring of procurement processes within a contracting authority. More or less all jurisdictions worldwide have similar managerial objectives

[35] A. Erridge and R. Nondi, Public procurement, competition and partnership, (1994) 1 (3) *European Journal of Purchasing & Supply Management,* 169–179, https://doi.org/10.1016/0969-7012(94)90006-x

[36] P. Kraljic, Purchasing must become supply management, (1983) 61 (5) *Harvard Business Review,* 109–117.

[37] K. Lavery, *Smart contracting for local government services: Processes and experience* (CT: Greenwood Publishing Group, Westport, 1999).

related to public procurement.[38] Schapper, Veiga Malta and Gilbert[39] pinpoint efficiency and effectiveness as important goals of public procurement policies and emphasise public procurement management as an important tool for achieving these goals.

Appropriate management of procurements requires appropriate tools and techniques. The main procurement management tools and techniques identified in the extant literature encompass (1) procurement planning, (2) solicitation planning, (3) solicitation, (4) source selection, (5) contract administration, and (6) contract closeout.[40] It should be stressed that these key procurement areas (particularly tools and techniques needed for these areas) do not differ from those of private sector contractors. Murray[41] argues that application of any methodology developed for the private sector is not necessarily valid for the public sector party. This is particularly due to the fact that public procurement regulation puts constraints on the contracts and the award mechanisms that private procuring agencies use.[42] However, the tools and techniques previously mentioned are rather generic by nature, and could be implemented for all procurement projects in both the public and private sector.

Following the previous literature review, the study hypothesises that public procurement management processes affect the contractual efficiency of local administrations. The specific hypotheses researched in this study are:

RQ 1: Procurement planning positively affects overall contract management efficiency;

RQ 2: Solicitation planning positively affects overall contract management efficiency;

RQ 3: Solicitation positively affects overall contract management efficiency;

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[38] O. Jaško, P. Jovanović and M. Čudanov, Cost efficiency of public procurement at local level: Chances for Improvement of local self-government and public enterprises in Serbia, (2015) 13 (3) *Lex Localis – Journal of Local Self-Government,* 789–807, https://doi.org/10.4335/13.3.789-807(2015); D. S. Jones, Procurement practices in the Singapore civil service: Balancing control and delegation, (2002) 2 (1) *Journal of Public Procurement,* 29–53, https://doi.org/10.1108/JOPP-02-01-2002-B002; J. D. Coggburn, Exploring differences in the American states' procurement practices, (2003) 3 (1) *Journal of Public Procurement,* 3–28, https://doi.org/10.1108/JOPP-03-01-2003-B001

[39] P. R. Schapper, J. N. V. Malta and D. L. Gilbert, An analytical framework for the management and reform of public procurement, (2006) 6 (1/2) *Journal of Public Procurement,* 1–26, https://doi.org/10.1108/JOPP-06-01-02-2006-B001

[40] PMI, *A guide to Project Management Body of Knowledge,* http://www.cs.bilkent.edu.tr/~cagatay/cs413/PMBOK.pdf (Last accessed: 20 June 2017); R. G. Rendon, Procurement process maturity: Key to performance measurement, (2008) 8 (2) *Journal of Public Procurement,* 200–214, https://doi.org/10.1108/JOPP-08-02-2008-B003

[41] J. Gordon Murray, Improving the validity of public procurement research, (2009) 22 (2) *International Journal of Public Sector Management,* 91–103, https://doi.org/10.1108/09513550910934501

[42] S. Tadelis, Public procurement design: Lessons from the private sector, (2012) 30 (3) *International Journal of Industrial Organization,* 297–302, https://doi.org/10.1016/j.ijindorg.2012.02.002

RQ 4: Source planning positively affects overall contract management efficiency;
RQ 5: Source selection positively affects overall contract management efficiency;
RQ 6: Contract administration positively affects overall contract management efficiency;
RQ 7: Contract closeout positively affects overall contract management efficiency.

III. Methodology

1. Development of the research instrument

The study used questionnaire as the main research tool. The questionnaire was developed for the purposes of this study, and encompassed three sections. The first section dealt with the demographic features of respondents – the size of the local administration where respondents worked, their age and gender and their current working position.

The second section dealt with the dependent variable. The examinees were asked about their perception of the overall efficiency of contract management in their local administration with a single item inquiry (on a seven-grade Likert-type scale, ranging from completely inefficient to completely efficient).

The third part provided the dependent variables – the efficiency of procurement management tools and techniques. Similar to the dependent variable, a Likert-type scale was used for the assessment of respondents' perception of the efficiency of the tools and techniques used in local administrations. An initial set of questions was created on the basis of tools and techniques described in PMI.[43] After piloting the questionnaire with seven respondents (three with an academic and four with a practical background), the questions were refined in order to ensure their comprehensibility. Public procurement planning was addressed with three items: (1) Efficiency of needs analysis, (2) Compliance of procurement plans with financial and strategic plans, and (3) Efficiency of contract type selection. Performance of solicitation planning was measured with four items: (1) Efficiency of the standard forms for procurement, (2) Efficiency of expert judgments for the assessment of needs and inputs in the process, (3) The quality of internal procedures for public procurements, and (4) The quality of selection and evaluation criteria. Solicitation was covered with three items: (1) Efficiency of advertising procurements, (2) Efficiency of pre-bid conferences, and (3) Efficiency of proposal collections. Source selection was reviewed with four items: (1) Efficiency of contract negotiation, (2) Efficiency of weighting system, (3) Efficiency of

[43] PMI, *A guide to Project Management Body of Knowledge*.

screening system, and (4) Efficiency of independent estimates. Contract administration was reviewed with three items: (1) Efficiency of contract change control system, (2) Efficiency of performance reporting, and (3) Efficiency of payment system. Finally, contract closeout was reviewed with two items: (1) Efficiency of verification system, and (2) Efficiency of procurement audits.

2. Sampling procedure

The study used a paper-and-pencil approach. The questionnaire was distributed to civil servants and political appointees (clerks, specialists and managers) in Serbian local administrations (cities and municipalities) in written form. Since the list of all public procurement clerks is unknown (to the best of authors' knowledge there is no compiled list of public procurement administrators), the study was based on a 'snowball' sampling technique.[44] This sampling relies on peer-to-peer recruitment of study participants and formation of a referral chain.[45] The initial group of examinees were graduate students on the Public Procurement Study Programme at the Faculty of Organizational Sciences in Belgrade. The initial group accordingly created a referral chain.

Although it can be a subject of various biases,[46] the referral chain was actively controlled – particularly its initiation, progress and termination. Using the coded questionnaires, the number of referrals was controlled to limit clustering within local administrations. None of the local administrations received a quota higher than 10% of a total sample size. In total, 158 examinees responded to the questionnaire.

3. Data collection and analysis

Data was collected in the period January–April 2017 by a group of trained assistants. Afterwards, the data was entered in SPSS (Statistical Package for Social Sciences). Quantitative data was analysed using descriptive statistics: percentages, means and standard deviations. Interdependence of determinants (independent variables) and contract management efficiency (dependent variable) were determined by correlation (Pearson moments two tailed correlation coefficient analysis) and multiple regression.

[44] P. Biernacki and D. Waldorf, Snowball sampling: Problems and techniques of chain referral sampling, (1981) 10 (2) *Sociological Methods & Research,* 141–163, https://doi.org/10.1177/004912418101000205

[45] T. Bodin, G. Johansson, T. Hemmingsson, C. Nylén, K. Kjellberg, B. Burström and P. O. Östergren, S09-2 Respondent-driven sampling in sampling hard-to-reach precarious workers, (2016) 73 (Suppl 1) *Occupational and Environmental Medicine,* A109–A109, https://doi.org/10.1136/oemed-2016-103951.294

[46] K. Avrachenkov, G. Neglia and A. Tuholukova, Subsampling for chain-referral methods, (2016) *Lecture Notes in Computer Science,* 17–31, https://doi.org/10.1007/978-3-319-43904-4_2

IV. Results

1. Pre-analysis

The study was conducted among 158 public procurement officers and clerks in 38 municipalities in Serbia. The respondents were evenly distributed when it came to the size of municipality they have been working for.[47] Regarding the gender profile, almost two thirds of replies were from women. Finally, as for the working position of examinees, more than a half of them were operating staff-clerks.

The study further analysed the descriptive statistics. Contract management efficiency in Serbian local administrations is perceived as medium to high, which indicates the relative maturity of processes. As for the public procurement management areas, the highest grade was given to source selection (=5.28/7, n=158), but all the average scores on examinees' perceptions were in the medium to high range. The details of the descriptive statistics are given in Table 3.

Table 3 shows that composite measures for independent variables have high values of internal consistency. All variables excluding Solicitation scored between 0.7 and 0.95 regarding Cronbach's Alpha, which indicates an acceptable unidimensionality of the measured variables.[48]

As displayed in Table 4, the study identified a strong positive relation between contract management efficiency and all examined variables. The highest correlation coefficients were calculated for source selection ($r=.685$, $p<.01$) and procurement planning ($r=.652$, $p<.01$). Nevertheless, a significant correlation with overall efficiency was found for other variables.

2. Main analysis

Since the study found a strong positive correlation between public procurement management variables and contract management efficiency, the next step was to examine the influence and intensity of variables seen as independent of contract management efficiency (dependent variable). The results of the multiple regression analysis indicated that the research model predicted 49.2% ($R^2=.492$) of the variability of contract management efficiency, which is shown in Table 5. As Durbin-Watson was $d=1.849$ (between the two critical values $1.5<d<2.5$), it could be assumed that there is

[47] See Table 2.

[48] M. Tavakol and R. Dennick, Making sense of Cronbach's alpha, (2011) 2 *International Journal of Medical Education,* 53–55, https://doi.org/10.5116/ijme.4dfb.8dfd

no first-order linear autocorrelation in the multiple linear regression data. Collinearity was further examined with the variance inflation factor, and high VIF was found for the determinant of procurement planning. However, the construct of this variable was kept as such.

The high significance of the F-test ($p<.01$), indicates the existence of linear interdependence. In this way, the study results indicate that there was a linear relationship between the variables in the model. Beta expresses the relative importance of each independent variable in standardized terms. Only two determinants were found to be significant predictors of contract management efficiency. Accordingly, the study results clearly indicate that appropriate contract management depends on the quality of procurement planning and source selection.

V. Discussion and conclusions

1. Summary of key findings

The aim of this study was to explore the relationship between two conflicting managerial processes – public procurement management and contract management. For this purpose, a specially developed questionnaire was distributed to 158 public procurement clerks, specialists, and managers in local administrations in Serbia. After analysing the study results, it was found that public procurement management activities strongly affect contract management efficiency. In total, nearly a half of the variability of contract management efficiency depends on the efficiency practices of public procurement clerks, specialists, and managers. In particular, some specific public procurement determinants were found to have an important role in predicting the efficiency of contract management.

First, procurement planning was found to be a significant predictor of efficient contract management. Planning as such is advocated as an important element of management in municipalities.[49] It should, however, be emphasised that the concept of procurement planning is based on the perception of the respondents. The results would be more robust if objective descriptions were used for procurement planning processes and practices.[50]

[49] A. I. Alonso, The shaping of local self-government and economic development through city strategic planning: A case study, (2014) 12 (3) *Lex Localis – Journal of Local Self-Government,* 373–391, https://doi.org/10.4335/12.3.373-391(2014)

[50] T. Deželan, A. Maksuti and M. Uršič, Capacity of local development planning in Slovenia: Strengths and weaknesses of local sustainable development strategies, (2014) 12 (3) *Lex Localis – Journal of Local Self-Government,* 547–573, https://doi.org/10.4335/12.3.547-573(2014)

Second, the results of the study indicate that source selection plays an important role in the efficient contract management. This result can be explained in two conflicting ways. On one side, careful source planning may lead to partnerships between contracting authorities and bidders. Partnerships are particularly important when public procurement manifests some salient features, such as a recognition that the goal of procurement cannot be reached in traditional ways.[51] Careful planning and closer relations with bidders can sometimes meet the requirements of value for money, accountability and flexible competition[52] and reduce the risk of non-selection.[53] Close relations with bidders and tight purchaser-supplier models are generally more related to private than public sector procurers,[54] although public authorities tend to create winning patterns for suppliers who once won the bid as well.[55] On the other side, it could be speculated that public procurement officers in a contracting authority might incline towards collusive tendering and bid rigging. Such behaviour is hard to detect, as bidders might create quasi-cartel firms for the procurement of goods, services and works to contracting authorities.[56] Given the level of corruption in Serbia,[57] this speculation should be thoroughly considered and analysed in-depth.

2. Contributions and implications

Public procurement is high on the agenda of policy holders, decisions makers, scholars and other interested parties. The findings of this study make several contributions to the body of knowledge related to public procurement. Any thorough discussion of a myriad of public procurement governance issues contributes to better understanding of the ongoing Serbian reforms and harmonisation with EU procedures. The existing literature reports that newcomers to the EU perform worse than their counterparts regarding the

[51] W. C. Lawther and L. L. Martin, Innovative practices in public procurement partnerships: The case of the United States, (2005) 11 (5–6) *Journal of Purchasing and Supply Management,* 212–220, https://doi.org/10.1016/j.pursup.2005.12.003

[52] Erridge and Nondi, Public procurement, competition and partnership, 169–179, https://doi.org/10.1016/0969-7012(94)90006-X

[53] S. Seshadri, K. Chatterjee and G. L. Lilien, Multiple source procurement competitions, (1991) 10 (3) *Marketing Science,* 246–263, https://doi.org/10.1287/mksc.10.3.246

[54] P. Furlong, F. Lamont and A. Cox, Competition or partnership?, (1994) 1 (1) *European Journal of Purchasing & Supply Management,* 37–43, https://doi.org/10.1016/0969-7012(94)90041-8

[55] O. Mamavi, H. Nagati, G. Pache and F. T. Wehrle, How does performance history impact supplier selection in public sector?, (2015) 115 (1) *Industrial Management & Data Systems,* 107–128, https://doi.org/10.1108/imds-07-2014-0222

[56] R. H. Porter and J. D. Zona, Detection of bid rigging in procurement auctions, (1993) 101 (3) *Journal of Political Economy,* 518–538, https://doi.org/10.1086/261885

[57] P. C. Van Duyne, E. Stocco, V. Bajovic, M. Milenović and E. E. Lojpur, Searching for corruption in Serbia, (2010) 17 (1) *Journal of Financial Crime,* 22–46, https://doi.org/10.1108/13590791011009356

efficiency of public procurements,[58] probably due to the fact that anti-corruption efforts in Europe's post-communist states have been less successful than expected.[59] The results of this study depict a self-perceived progress of local administrations in establishing state-of-the-art contractual procedures, plans and managerial mechanisms related to public procurement.

Some lessons are also drawn for public procurement improvements in candidate countries. As there was no real public procurement system in Serbia prior to 2002, most of the legal and institutional infrastructure was 'imported' from the EU legislation as part of the process of harmonisation and accession. The latter values speed and efficiency,[60] and leaves a small space for debates and arguments on real capacities for and capabilities of developing any particular systems change. The findings of this paper confirm that the development of coordinated administration and efficient and uniform goals are time consuming activities, and even the legacy of accession is insufficient when it comes to public administration reforms.

The study also provides several implications for scholars and practitioners' contract management in public administration. First, the study provides empirical evidence for the multiplicity of local government' goals. The main aim of public procurement management is to improve efficiency. However, administrative goals related to contractual administration[61] only partially support fulfilling public procurement goals. The results raise some questions related to the main focus (bureaucratic or managerial efficiency) of local administrations. Another important implication of the study is the development of a new research instrument for the collection of data related to contract administration. Research instruments of this kind are sparse in the current body of knowledge.[62]

[58] M. Milosavljevic, N. Milanović and S. Benković, Politics, policies and public procurement efficiency: A quantitative study of 25 European countries, (2016) 14 (3) *Lex Localis – Journal of Local Self-Government,* 537–558, https://doi.org/10.4335/14.3.537-558(2016)

[59] Å. B. Grødeland and A. Aasland, Fighting corruption in public procurement in post-communist states: Obstacles and solutions, (2011) 44 (1) *Communist and Post-Communist Studies,* 17–32, https://doi.org/10.1016/j.postcomstud.2011.01.004

[60] K. Raik, EU accession of Central and Eastern European countries: Democracy and integration as conflicting logics, (2004) 18 (4) *East European Politics and Societies,* 567–594, https://doi.org/10.1177/0888325404269719

[61] Lynch, *Public procurement and contract administration...*

[62] A. A. Amirkhanyan, Collaborative performance measurement: examining and explaining the prevalence of collaboration in state and local government contracts, (2008) 19 (3) *Journal of Public Administration Research and Theory,* 523–554, https://doi.org/10.1093/jopart/mun022

3. Limitations and further recommendations

One of the main strengths of this paper is its geographical context, in that the study was conducted among local administrations in Serbia. The country was one of the last to establish the system of public procurement and it has been gradually improving and evolving over the last decade and a half. Public procurement studies of this kind are in rather short supply. Even so, this creates certain limitations. As with other studies with a strong national background,[63] the results obtained from this cannot be generalised to other countries and their local administrations. Policy holders, decision makers and researchers should refrain from any generic interpretation of results in other geographical contexts. This, however, offers an avenue for further research. Using the same (or an improved) methodology, the study could be replicated in other regions. Not only would that provide an insight from other countries, but it would create an opportunity for comparative analyses.

The other important strength is the focus on local administrations. Bearing in mind the poor oversight of the system, the study adds to the body of knowledge and harvests the momentum of administrative reforms based on harmonisation and integration with the EU. It should, however, be noted that local administrations account for only a small fraction of total public procurements in Serbia. In 2016, they accounted for around 16% of total public procurements.[64] This questions whether the study findings can even be generalised to public procurement in Serbia. At the same time, it clears the path for additional research. Other public sectors – central administration, justice, health and social protection, education and science, public and municipal enterprises, foundations and charities – should also be examined and explored in follow-up studies.

Finally, the study offers an empirical insight and provides primary data collected via a specially developed questionnaire. Nevertheless, future, more comprehensive study should focus on (1) the inclusion of additional variables and (2) capturing the development of the observed variables. As for the first item, further instruments for data collection on public procurement management should at least include the assessment of inputs and outputs, rather than solely examining managerial tools and techniques. The additional set of variables and more sophisticated research instrument would contribute to the better understanding of the effect of public procurement management to contract

[63] M. Plaček, The effects of decentralization on efficiency in public procurement: Empirical evidence for the Czech Republic, (2017) 15 (1) *Lex Localis – Journal of Local Self-Government,* 67–92, https://doi.org/10.4335/15.1.67-92(2017); M. Murray Svidroňová and J. Nemec, E-Procurement in self-governing regions in Slovakia, (2016) 14 (3) *Lex Localis – Journal of Local Self-Government,* 321–335, https://doi.org/10.4335/14.3.321-335(2016)

[64] Public Procurement Office, *Report on public procurement for 2016,* http://www.ujn.gov.rs/ci/izvestaji/izvestaji_ujn (Last accessed: 6 July 2017) 6.

efficiency. As for the second item, this study is cross-sectoral and captures only a static dimension of public procurement management. For more prolific results, a new study using time-series analysis would be needed. Only then would the evolutionary characteristics of the research phenomena be captured.

Tables

Table 1. Number of public procurement contracts, total value and mean value per contract

Year	No of Contracts	Total value (1000 RSD)	Mean value per contract (1000 RSD)
2003	231,661	98,777,652	426
2004	215,815	109,282,212	506
2005	148,758	124,753,207	839
2006	152,485	168,914,947	1,108
2007	122,587	187,559,752	1,530
2008	109,910	234,028,744	2,129
2009	91,992	190,655,028	2,073
2010	83,693	273,055,306	3,263
2011	111,249	293,324,810	2,637
2012	92,710	303,694,136	3,276
2013	83,121	262,938,735	3,163
2014	87,712	298,374,363	3,402
2015	104,527	354,982,753	3,396
2016	104,370	335,268,082	3,212

Source: Public Procurement Office, *Report on public procurement for 2016* and authors' calculation

Table 2. Some demographic features of respondents

Size of municipality	Small (<50)	Medium (50-250)	Large (>250)	Missing	*Total*
	51	56	32	19	158
Gender of respondents	*Female*		*Male*		*Total*
	97 (61.4%)		61 (38.6%)		158 (100%)
Working position	*Clerk*	*Specialist*	*Manager*	*Missing*	Total
	87	25	11	35	158

Table 3. Descriptive statistics for the observed variables

Variable	**N**	**Mean**	**Std. Dev.**	**Cronbach's Alpha**	**No of items**
Contract mngt efficiency	158	5.28	1.53	–	1
Procurement planning	158	4.85	1.62	.909	3
Solicitation planning	158	4.63	1.30	.846	4
Solicitation	158	4.67	1.06	.596	3
Source selection	158	5.26	1.18	.896	4
Contract administration	158	5.41	1.29	.822	3
Contract closeout	158	4.80	1.39	.730	2

Table 4. Correlation matrix for the observed variables

Variable	**1**	**2**	**3**	**4**	**5**	**6**	**7**
Contract mngt efficiency		,652**	,516**	,483**	,685**	,622**	,566**
Procurement planning			,804**	,656**	,793**	,788**	,742**
Solicitation planning				,601**	,701**	,695**	,621**
Solicitation					,568**	,653**	,579**
Source selection						,795**	,700**
Contract administration							,785**
Contract closeout							

Table 5. Regression model for contract management efficiency

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.	Collinearity Statistics	
		B	Std. Error	Beta			Tolerance	VIF
1	(Constant)	,691	,489		1,413	,160		
	Procurement planning	,280	,119	,296	2,356	,020	,205	4,874
	Solicitation planning	–,149	,116	–,126	–1,281	,202	,333	3,001
	Solicitation	,074	,115	,052	,647	,518	,510	1,960
	Source selection	,542	,137	,418	3,950	,000	,289	3,461
	Contract administration	,096	,140	,081	,683	,496	,233	4,293
	Contract closeout	,043	,108	,039	,395	,693	,340	2,938

a. Dependent Variable: Contract mngt efficiency
R=.715 R^2=.511 SE=1.094 F=26.292 Sig=.000 Durbin Watson=1.849

Wall, Rachel* and Jones, Alistair**

Combined Authorities: A Loss of Urban Identity or Urban Imperialism?

Abstract

The aim of this paper has been to examine the impact that the process of establishing combined authorities has had on existing political relations between local authorities and senses of identity on an empirical basis. The research has demonstrated how this process rests upon but also can have a significant impact on local politics.

Keywords: England, local governance, urban identity, urbanisation, municipal administration, unitary authorities, combined authorities

I. Introduction

As a result of devolution to Scotland, Wales, Northern Ireland and London, the UK government turned its attention to the rest of England and created a new, centrally inspired legislative framework within which devolution would take place. The latest wave of reform is focused on governance structures and a form of territorial re-scaling with the creation of combined authorities, headed by elected mayors. Combined authorities are created where groups of councils enter negotiations with government to agree the devolution of powers and finances through a 'devolution deal'. The new legislative framework for devolution in England provides councils with opportunities to create a bespoke devolution deal for their areas, which reflects local needs and identities. While this new legal framework makes provisions for devolution deals and combined authorities to be established in urban and rural England, the process has been predominantly city-centric and focused on urban centres and their surrounding rural areas.[1]

* Wall, Rachel, PhD Researcher, Local Governance Research Unit, De Montfort University Leicester.
** Jones, Alistair, Senior Lecturer, Local Governance Research Unit, De Montfort University Leicester.

[1] C. Copus, M. Roberts and R. Wall, *Local Government in England: Centralisation, Autonomy and Control (Palgrave, London, 2017),* https://doi.org/10.1057/978-1-137-26418-3; R. Wall and N. Vilela Bessa, Deal or no deal: English devolution, a top-down approach, (2016) 14 (3) *Lex Localis Journal of Local Self-Government,* 657–672, https://doi.org/10.4335/14.3.655-670(2016)

DOI: 10.56749/annales.eltreajk.2017.lvi.9.141

The process of rescaling governing structures at the local level has implications for existing political relationships and for existing territorial boundaries[2] and how the local political elite identifies with these boundaries – many of which are quite artificial constructs as a result of numerous territorial reforms – while local areas are being combined into new 'super authorities'. Political relations between councils are being tested, as municipalities within these wider metropolitan regions seek to establish new institutions in which they can effectively govern their own localities and simultaneously govern collectively across multiple geographical boundaries. The creation of these new governance structures has implications for where power will lie within combined authorities, where different tiers of local government and different territorial interests (urban and suburban/rural) will have decision-making capacity and how existing territorial identities will be tested, as these sub-regional governing entities are established and senses of place are challenged.

In exploring these implications, the paper will address the following questions:

– What will be the impact of this territorial re-scaling of local government on political relations between municipalities within the new metropolitan regions?

– How will the existing territorial identities within the municipalities comprising the combined authorities respond to these structures?

The paper will retrace the ongoing policy debates of local government reform in England, and how these debates find relevance in academic discussions of territorial reform, territorial identity and metropolitan governance reform. As such, an analytical framework is developed through which to begin to examine the case of Leicester and Leicestershire. The paper will provide an understanding of the critical political and territorial challenges posed by the current devolution agenda in England for a city locked within a metropolitan region.

The next section of the paper will retrace the reorganisation of local government in England since the 1960s in order to illustrate the development (or the absence) of metropolitan governance structures and how they have led to the current devolution process. The second section will set out government thinking on devolution to provide a policy-oriented framework for the paper. The third section will discuss some of the relevant concepts relating to political relations between councils and territorial identity. The penultimate section will present the case of Leicester and Leicestershire and will discuss the findings of documentary analysis, in addition to early empirical research conducted with 12 county, city and district councillors. The final section will draw together conclusions from research conducted to date and present considerations on future directions of the research in terms of a longer PhD project examining the local politics of devolution to English local government.

[2] H. Baldersheim and L. Rose, *Territorial Choice: The Politics of Boundaries and Borders* (MacMillan, Hampshire, 2010), https://doi.org/10.1057/9780230289826

II. Methodology

The paper is based on research conducted as part of a continuing PhD research project and is therefore an early reflection of the development of in-depth case studies as part of a more long-term PhD thesis. The research consists of 12 semi-structured interviews conducted with county, city and district councillors situated within the combined authority area examined in this paper. The data is supplemented by documentary analysis as well as findings from other relevant research projects which have examined the views of councillors in relation to the current devolution process taking place in England. During the period in which the empirical research was conducted, two significant political events were taking place in England, local county elections and a general election. These events had implications for access and, as such, the sample of councillors interviewed is smaller than originally envisaged and further empirical research is required in order to develop further the findings and conclusions within this paper.

III. The rescaling of local government in England: towards metropolitan governance?

The habitual rescaling of local government structures in England has resulted in a long period of institutional instability whereby, with local government having no constitutional right to exist and a lack of autonomy, central government has imposed and continues to impose significant changes on the size, scope and structure of local government in England.[3] The ongoing orthodox assessment, which been in place since the 1960s regarding the appropriate size and scale of local government structures in England, has been dominated by attempts to reconcile the dual-purpose nature of local government.[4] Such debates focus on attempting to strike a balance between ensuring efficient service delivery and maintaining the democratic quality of local authorities.[5]

[3] J. Stewart, An era of continuing change: reflections on local government in England 1974–2014, (2014) 40 (6) *Local Government Studies,* 835–850, https://doi.org/10.1080/03003930.2014.959842; P. John, The Great Survivor: The Persistence and Resilience of English Local Government, (2014) 40 (5) *Local Government Studies,* 687–704, https://doi.org/10.1080/03003930.2014.891984; H. Elcock, J. Fenwick and J. McMillan, The reorganization addiction in local government: unitary councils for England, (2010) 30 (6) *Public Money & Management,* 331–338, https://doi.org/10.1080/09540962.2010.525000

[4] M. Chisholm, *Structural Reform of British Local Government: rhetoric and reality* (Manchester University Press, Manchester, 2000); HMSO, *Committee of Inquiry into the Conduct of Local Authority Business (Widdicombe Committee),* Research Vol. II (The Local Government Councillor, Cmnd 9799, London, 1986); N. Flynn, S. Leach and C. Vielba, *Abolition or Reform? Greater London Council and the Metropolitan County Councils* (Harper Collins, London, 1985); HMSO, *Committee on the Management of Local Government, (Maud report),* Research Vol. II (The Local Government Councillor, London, 1967).

[5] Copus et al., Local Government in England...

As Table 1 below demonstrates, local government in England has, as a consequence of numerous central reforms, seen a continued reduction in the number of authorities. The table however, must be read with some caution, as it is not a comprehensive listing of all Acts of Parliament that have re-organised local government; rather, the table is indicative and illustrative of the overall process of amalgamations. What the table also shows is how, with a simple legislative change by the centre – and since the 1990s by secondary legalisation – local government units.

Table 1. The Legislative Rescaling of Local Government in England

Act	Effect
London Government Act 1963	Greater London Council and 32 London boroughs
Local Government Act 1972	Reduced 45 Counties to 39; Replaced 1086 urban and rural districts with 296 District Councils; Abolished 79 County borough Councils; Created 6 Metropolitan County Councils; Replaced 1,212 councils with 378
Local Government Act 1985	Abolishes 6 metropolitan councils and the GLC
Local Government Act 1992	Results in: 34 County Councils, 36 Metropolitan Borough Councils; 238 Districts; 46 Unitary councils
2009 re-organisation under the provisions of the 1992 Act	Reduced 44 councils to nine across seven English county areas

Source: Copus et al., Local Government in England... (amended)

The reorganisations of local government since the mid-1970s by successive Conservative and Labour governments have rested on assumptions and beliefs within central departments and selected external bodies.[6] Those beliefs are that, despite unitary local government not being the norm across the rest of Europe, large single-unit municipal authorities can deliver economies of scale, for which evidence is mixed at best.[7] In assessing recent developments of English local government, it is clear that while units of local government have grown in size, they have shrunk in many other aspects; functions have been removed, resources have declined, administrative workforces have been reduced while the intensity and complexity of local needs have increased significantly.[8]

[6] Stewart, An era of continuing change... 835–850.
[7] Ibid; M. Chisholm, Emerging realities of local government reorganization, (2010) 30 (3) *Public Money & Management,* 143–150, https://doi.org/10.1080/09540960903513847; Elcock et al., The reorganization addiction in local government..., 331–338.
[8] S. Weir and D. Beetham, *Political Power and Democratic Control in Britain: The Democratic Audit of Great Britain* (Routledge, London, 1999).

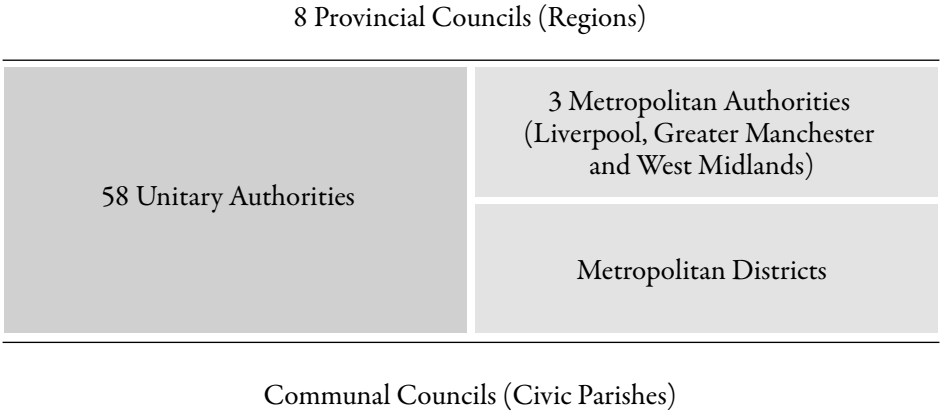
Carr[9] reminds us that the manner in which central state legislation determines the scope, autonomy and size of local government is significant in shaping the behaviour of the local political *elite*. In order to determine just how far-reaching this influence is on the current devolution process, it is important to consider how these policy debates (in England) have travelled and in what way they serve to inform or are reflected in the current devolution policy being implemented. For the purposes of this paper, the journey of reform of London's government and the subsequent policy debates are excluded from the analysis and discussion. The history of local government in London is one that can and has warranted research and publications of its own, and the path of reform has often not occurred in parallel with local government reform throughout the rest of England. London, in the case of local government reform, and so much else, is another country. As such, this paper focuses on solely on local government reform outside of the capital.

1. The Redcliffe-Maud Report: a push for unitary local government

While the current devolution reforms across England have been declared revolutionary by their main architect, former Chancellor of the Exchequer George Osborne, the fundamental principles which underpin combined authorities can be traced back to the local government reforms of the 1960s. The Royal Commission on Local Government (1966–1969), under the chairmanship of Lord Redcliffe-Maud, made a radical set of recommendations for a complete overhaul of the size, structure and functional capacity of local government in England (with the exception of Greater London, which was the subject of the preceding Herbert Commission). The Redcliffe-Maud report broadly recommended that England, under the umbrella of 8 regional provinces, be divided into 61 new local government areas which facilitated an interdependence between urban towns and the rural country. Of these new unitary authorities, it was proposed that there should be three metropolitan areas (Birmingham, Liverpool and Manchester). The figure below sets out the Redcliffe-Maud report's proposed structure for local government in England. As discussed further in this section, these reforms were not largely implemented, only proposed.

[9] J. B. Carr, Chapter 10: Whose Game Do We Play? Local Government Boundary Change and Metropolitan Governance, in R. Feiock, *Metropolitan Governance: Conflict, Competition and Cooperation* (Georgetown University Press, 2010) 296–332.

Figure 1. Redcliffe-Maud recommendations for local government structure in England (1969)



Source: Authors own diagram

The rationale underpinning the recommendations of the Maud Commission centred around the notion that not only were existing local authorities too small, but also that the administration and delivery of services in rural and urban areas are interdependent and, therefore, should be delivered by a single authority. The existing administrative fragmentation between counties and county boroughs was deemed to breed 'ambitions and fears' over boundaries and an undesirable hostility between tiers of local government.

It is within the Redcliffe-Maud report that the idea of 'city-regions' as a form of local government was first introduced into mainstream policy debates on local government structures in England – a concept which clearly underpins the current combined authority model in England. The report describes city-regions as:

> A conurbation or one or more cities or big towns surrounded by a number of lesser towns and villages set in rural areas, the whole tied together by an intricate and closely meshed system of relationships and communications, and providing a wide range of employment and services.

While the Labour government at the time under Harold Wilson broadly accepted these recommendations (with the addition of more metropolitan authorities), any attempt to implement the proposals formally was halted by the Conservative Party's general election victory in 1970; it was elected on a manifesto which committed to a two-tier structure for local government.

2. Local Government Act of 1972: the two-tier system

The commitment to a two-tier system, which placed an emphasis on respecting existing historical boundaries, was implemented through the Local Government Act of 1972. The Act retained the Redcliffe-Maud model of two-tiered metropolitan authorities, although the geographic boundaries took in less of the surrounding rural areas than originally proposed – a political move which sought to control predominantly Labour urban centres from exerting too much influence over the surrounding Conservative localities.[10] These new metropolitan counties covered Greater Manchester, Merseyside, South Yorkshire, Tyne and Wear, West Midlands and West Yorkshire. The Act made provisions for the rest of England to be governed by two-tiered authorities. The Act also stipulated a minimum population size for districts of 40,000 residents, a clear reduction of the Redcliffe-Maud suggestion of 250,000.

3. Abolishing the Metropolitan Counties

The metropolitan authorities had experienced a short life before they were abolished only 13 years later by the Thatcher government in 1986. This Act effectively turned the lower-tier metropolitan districts into unitary authorities. The majority of functions were devolved to the new unitary councils, with three authorities now holding city status.[11] While unitary councils are generally responsible for running their own services, some county-wide structures for service delivery still remain even now.[12] These joint boards, which are residual structures from the upper metropolitan counties, are made up of councillors who are appointed to these bodies by their respective council. This abolition of metropolitan government across England was, much like their inception but only in parallel, perceived to be a highly political move which served to benefit the government of the day; specifically, to address the growing tensions over public spending between the largely Labour-controlled metropolitan counties and the Conservative Thatcher government.

The Banham Commission of the early 1990s focused on English local government, excluding London and the old metropolitan counties. While the post-Thatcher

[10] J. A. Chandler, *Explaining Local Government: Local Government in Britain Since 1800* (Manchester University Press, Manchester, 2007), https://doi.org/10.7228/manchester/9780719067068.001.0001

[11] S. Leach, The transfer of power from metropolitan counties to districts: An analysis, (1987) 13 (2) *Local Government Studies,* 31–48, https://doi.org/10.1080/03003938708433329; A. Coulson, Economic Development – The Metropolitan Counties 1974–1986, (1990) 16 (3) *Local Government Studies,* 89–104, https://doi.org/10.1080/03003939008433527

[12] S. Leach, and H. Davis, The Operation of the Metropolitan Passenger Transport Authorities since 1986, (1991) 11 (1) *Public Policy and Management,* 51–56, https://doi.org/10.1080/09540969109387642

Conservative Government tried to steer the Banham Commission towards the introduction of unitary authorities across England, Banham did not play ball. Instead, there was a mixture, where some unitary authorities were introduced (e.g. the city of Leicester), and tiered authorities were retained elsewhere (e.g. the remainder of Leicestershire). Interestingly in the case of Leicester and Leicestershire, the status quo of a straight two-tiered structure was not considered as an option.

Indeed, policy debates surrounding the shape of English local government and, more specifically, the shape of metropolitan government in England have corresponded with the development of academic understandings and conceptualisations of metropolitan governance reform. As such, the debate has been dominated by the two traditional schools of thought; the Metropolitan Reform Tradition (MRT) and the Public Choice Perspective (PCP).[13] Consequently, the circular debate of local government reform in England can be characterised as being dominated by two narratives; *i)* MRT: local government is too fragmented and inefficient and, thus, must be amalgamated into larger units; and, *ii)* PCP: fragmentation enhances competition and, hence, local government would benefit from smaller units with greater capacity for local self-governance.

The next section of this paper will outline the more recent development of the current devolution policy being implemented in England, in order to identify whether we are experiencing a shift away from traditional, circular debates of size and efficiency, towards something more closely aligned to a 'New Regionalism' approach to metropolitan governance.

IV. Devolution and combined authorities: revolution, evolution or convolution?

formal structures of regional governance – and, by extension, metropolitan governance – are somewhat of a novelty to England; as we read in the previous section, where formal structures of metropolitan governance have existed, they have only done so for very brief periods at the expense of the political expediency of central government. The more recent attempts at establishing a formal structure of elected regional governance in England has proved unsuccessful. In considering the recent development of combined authorities, a meaningful point to begin would be the creation (and later abolition) of the Regional Development Agencies (RDAs) during Tony Blair's Labour Government (1997–2007), which enjoyed little popularity among the demos.[14] Since this unsuccessful attempt

[13] D. Kübler, Introduction: Metropolitanisation and Metropolitan Governance, (2012) 11 (3) *European Political Science,* 402, https://doi.org/10.1057/eps.2011.41

[14] C. Copus, *Leading the localities: executive mayors in English local governance* (Manchester University Press, Manchester, 2006), https://doi.org/10.7228/manchester/9780719071867.001.0001

to establish democratically elected regional governance in England, there has been a significant shift from devolution focused on delivering democratic accountability at a sub-national level, to devolution that centres on economic objectives and delivering growth.[15] Amongst the large volumes of Acts of Parliament within recent decades that impact on local government, there are some recent pieces of legislation and government policies which are directly relevant and have arguably helped to formulate and shape the current devolution agenda in England.

First, the Local Democracy, Economic Development and Construction Act 2009 made provisions for the establishment of combined authorities, meaning that a group of local councils in any given area, providing there is consensus between them, could pool appropriate responsibilities and receive certain functions from central government, limited to transport and economic development. The Cities and Local Government Devolution Act 2016 introduced amendments to the 2009 Act by removing statutory limitations on which powers could be devolved and made provision for the introduction of directly elected mayors to combined authorities.

In a continued pursuit for local economic growth in England, the Coalition Government (2010–2015) abolished the RDAs through the Pubic Bodies Act 2011 and introduced Local Enterprise Partnerships (LEPs), the remit of which was to define local economic priorities and lead economic growth and job creation within their local areas, to which LEPs could apply for finances.[16] This replacement of a regional tier of government with a sub-regional tier presented implications for democratic accountability and efficiency: councils are able to join more than one LEP, and the new LEPs are made up of unelected individuals and, as organisations, lack a formalised role and legal powers to effect change.[17]

The former Chancellor, George Osborne, in order to address England as the 'unfinished business' of devolution in the United Kingdom[18] laid out a long-term, purportedly radical agenda for local government to build upon the progress of City deals and Growth deals – prosperity through partnerships – which were intended to increase the capacity of local civic and business leaders to identify local economic needs and promote growth. The legal framework within which these changes were

[15] V. Lowndes and A. Gardner, Local Governance under the Conservatives: super-austerity, devolution and the 'smarter state', (2016) 42 (3) *Local Government Studies,* 357–375, https://doi.org/10.1080/03003930.2016.1150837; D. Richards and M. Smith, Devolution in England, the British Political Tradition and the Absence of Consultation, Consensus and Consideration, (2016) 51 (4) *Representation,* 385–401, https://doi.org/10.1080/00344893.2016.1165505

[16] John, The Great Survivor..., 687–704.

[17] J. Morphet and S. Pemberton, 'Regions Out – Sub-Regions In' – Can Sub-Regional Planning Break the Mould? The View from England, (2013) 28 (4) *Planning Practice and Research,* 384–399, https://doi.org/10.1080/02697459.2013.767670

[18] C. Jeffery, The Unfinished Business of Devolution, (2007) 22 (1) *Public Policy and Administration,* 92–108, https://doi.org/10.1177/0952076707071506

to be implemented took the form of The Cities and Local Government Devolution Act 2016. The Act gave effect to the Greater Manchester Combined Authority while providing statutory authority for the rest of England to enter into negotiations with The Cities and Local Growth Unit, HM Treasury and officials from the Department for Business, Innovation & Skills to agree on a set of devolved powers and responsibilities from central government, through a 'Devolution Deal', to create a combined authority of local councils within a functional economic area.[19]

The 2016 Act does not provide any detail or prescription of which powers are to be devolved. It is here that the Act has the potential to enable what central government has coined a 'bespoke devolution', whereby local councils can join together to negotiate the terms of devolution to their combined authority on an area-by-area basis.[20] In a speech to the Conservative Party Conference in 2015, then Chancellor – and prominent advocate of the current devolution agenda in England – George Osborne, promised 'the biggest transfer of power to our local government in living memory' and challenged all who were listening to 'let the devolution revolution begin'.

V. Territorial relations and identity

The reform debate in England has long been dominated by the dichotomy of representation and efficiency.[21] Numerous studies have explored territorial reforms and the resulting patterns of conflict.[22] While there is extensive academic literature addressing the development of local governance, partnerships and networks,[23] it would seem that, in parallel with the increasing focus on the governance relations between the public and private spheres, one key element of local governance has been somewhat overlooked; the relations between local political actors across existing boundaries and, by extension, how central policy change affects these relations.

[19] F. Gains, Metro Mayors: Devolution, Democracy and the Importance of Getting the 'Devo Manc' Design Right, (2016) 51 (4) *Representation,* 425–437. https://doi.org/10.1080/00344893.2016.1165511

[20] HM Government, *The Cities and Local Government Devolution Act 2016* (The Stationary Office, London, 2016).

[21] Copus et al., Local Government in England...; H. Elcock, *Local Government: Policy and Management in Local Authorities* (Routledge, London, 1994); J. Dearlove, *The reorganisation of British Local Government: Old Orthodoxies and a Political Perspective* (Cambridge University Press, Cambridge, 1979).

[22] Baldersheim and Rose, Territorial Choice...; M. Keating, *The New Regionalism in Western Europe: Territorial Restructuring and Political Change* (Edward Elgar, 1998); S. Lansley, S. Goss and C. Wolmar, *Councils in Conflict: The Rise and Fall of the Municipal Left* (Macmillan, Hampshire, 1989), https://doi.org/10.1007/978-1-349-20231-7

[23] B. Denters and L. Rose, *Comparing Local Governance: Trends and Developments* (Palgrave MacMillan, London, 2005); S. Goss, *Making Local Governance Work: Networks, Relationships and the Management of Change* (Palgrave, London, 2001); R. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Open University Press, 1997).

Zimmerman[24] notes the need for 'double legitimacy' for any new form of government. For this reason, a new identity needs to be instilled. This had previously failed with the introduction of the aforementioned RDAs. For most people, there was no identification with those bodies, and that they were non-elected merely increased the degree of separation. Instead of this 'double legitimacy', there is instead a fear of further amalgamation and re-organisation, as the lower tiers of government feel increasingly threatened by the introduction of combined authorities. The belief, mistaken or otherwise, is that the creation of a new tier of government may be at their expense. Even so, that closeness of contact between the public and 'government' tends to be through that lower tier. It is the territorial identifier to which people tend to attach themselves.

One of the salient issues that has emerged through the process of creating the new combined authorities in England is the issue of identity. The existence of distinct regional identities in England is not universal. In some instances, such as the West Midlands and the North of England, regional identity is clearly identifiable and naturally occurring, having developed historically and is rooted in a sense of collective memory.[25] On the other hand, there are 'regions' of England which are founded on artificial boundaries which serve a purely administrative and strategic purpose – one such example being the East Midlands.[26] There is an extensive literature covering different aspects of 'identity' from different academic disciplines and perspectives, notably (political) geography, history, sociology and psychology. While acknowledging all of that literature, one aim of this paper is to touch briefly upon the idea of territorial and regional identity. The notion of 'territorial identity' has been extensively researched and developed, particularly within the context of the European Union and regional governance.[27] For the purposes of this paper, the concept of 'identity' and, more specifically, 'territorial identity', is borrowed from scholars such as Paasi,[28] who defines 'regional identity' as a process of formalising 'territorial boundaries, symbolism and institutions'.[29]

In light of the considerations given thus far to the policy context of territorial rescaling in England, the development of devolution reforms and the salience of

[24] K. Zimmerman, Democratic Metropolitan Governance: Experiences in Five German Metropolitan Regions, (2014) 7 (2) *Urban Research and Practice,* 182–199, https://doi.org/10.1080/17535069.2014.910923

[25] M. Halbwachs, *On Collective Memory* (University of Chicago Press, Chicago, 1992), https://doi.org/10.7208/chicago/9780226774497.001.0001

[26] I. Hardill, P. Bennetworth, M Baker and L. Budd, *The Rise of the English Regions?* (Routledge, London, 2006), https://doi.org/10.4324/9780203421505

[27] M. Keating, Thirty Years of Territorial Politics, (2008) 31 (1–2) *West European Politics,* 60–81, https://doi.org/10.1080/01402380701833723

[28] A. Paasi, Region and Place: Regional Identity in Question, (2003) 28 (4) *Progress in Human Geography,* 475–485, https://doi.org/10.1191/0309132503ph439pr

[29] Ibid.

territorial relations and identity, the next section of the paper will now turn to the empirical case being examined, Leicester and Leicestershire.

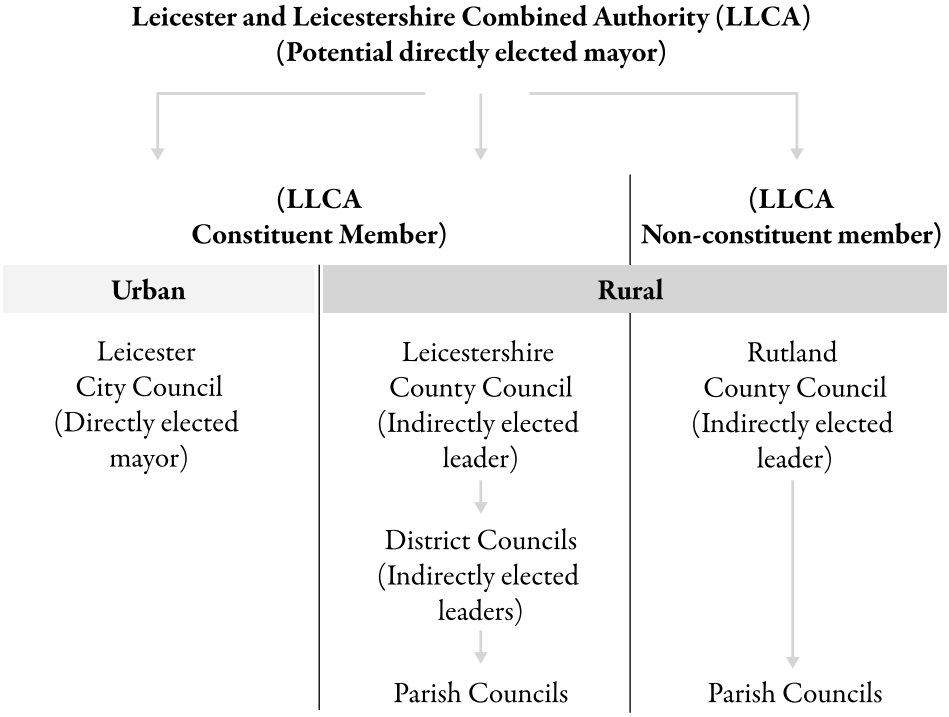
VI. The case of Leicester and Leicestershire

In December 2015, the city council, county council and all seven district councils, together with the Leicester and Leicestershire Local Enterprise Partnership, submitted a prospectus for a Leicester and Leicestershire Combined Authority (LLCA). The proposal, branded beneath the slogan 'Leicester and Leicestershire: Delivering Growth Together', sets out plans for a combined authority which would seek to obtain, through a devolution deal with central government, additional powers and funding from central government to stimulate economic growth, develop transport and infrastructure and address issues surrounding skills and employment. The proposed name of the LLCA was indicative of the dominant role that the city and county have taken in formulating this new governance structure. This dominant role is also reflected through a proposed operating agreement for the LLCA, which outlined key statutory and non-statutory administrative roles and from which councils within the LLCA that individuals for such roles would be drawn. As such, it was proposed that these senior administrative and managerial roles would be entirely appointed from either the county council or the city council. The proposed governance structure of the LLCA is outlined in Figure 2.

When examining the city of Leicester and the surrounding county of Leicestershire, a number of issues arise. There is a clear urban-rural divide. This is not simply city versus county, but any urban areas, including the likes of Loughborough, Market Harborough an Shepshed. Those in the city tend to lump everyone else together. If you are not in the city, you are county. This is not reciprocated. The idea of there being a 'Leicestershire' territorial identity is not clear. Rather, there is a degree of identity with the lower tier of council – the closest tier of government to the people. Such a geographical territorial identity is not new, especially at a regional level.[30] Thus, it could be expected for people across the region to identify with the newly proposed body. In reality, the 'political' identities of the city of Leicester, and those of the lower tier authorities appear much more profound.

[30] Ibid.

Figure 2. The proposed structure of the Leicester and Leicestershire Combined Authority



Source: designed for this paper

1. Territorial relations: turf wars

Interviews with councillors confirmed the notion that political relations between councils in two-tier areas can be problematic and characterised by tension and conflict, which, as we have seen from our assessment of the ongoing policy debate, is often attributed to 'ambitions and fears' over boundaries between tiers that experience different levels of influence and autonomy. When asked to comment on whether the current devolution process and the prospect of a combined authority has affected, positively or negatively, the relationships between the borough, county and city councils, it began to emerge that, even prior to devolution being discussed, the relationships between the county and the districts showed a greater degree of tension and conflict than the relationship between the city and the county and/or districts. As one city councillor highlighted:

> You often find loggerheads with the county councillors and district councillors, even those within the same party; they fight behind the scenes, swearing at each other. The district councillors like to have a go at the big boys with the big boots. (City Councillor)

The interviews conducted with district councillors highlighted in particular a distinct fear that, despite devolution policy broadly being a joint effort between councils to establish a combined governance structure (and, as such, a move away from previously formalised amalgamations of local authorities), the introduction of a combined authority would lead to the upper tier (the county) dominating and centralising services and functions away from the lower tier. As one councillor summarised, thus:

> I can't begin to tell you how opposed the county council were to Leicester becoming unitary. You just would not believe the tactics that were used at that time. It was appalling, frankly. So, I doubt very much that's its changed sufficiently for the county to willingly devolve services to boroughs. Therefore, a unitary, erm, sorry [...] devolution in Leicestershire would be about the county taking control and I would be strongly opposed to that because it's taking services away. (District Councillor)

As such, the research has highlighted that the policy rhetoric surrounding the 'revolutionary' devolution process currently taking place in England, which boasts a promise of bespoke and radical reforms resulting in bottom-up solutions to be developed between councils is, in some instances, instead resulting in the reemergence of old and circular debates about reorganisation, particularly in favour of larger, unitary units of local government. The (re)emerging fear among district councillors extended as far as the county wanting to abolish districts entirely, in favour of a single unitary authority to cover the entire county of Leicestershire, resulting in a reduction of the number of councillors representing residents within the county. Some district councillors described what they perceived to be a clear message from the county council of such intentions, as expressed by one councillor:

> I think so because I think, I'm thinking of one particular county councillor, who has made it quite clear that he wants unitary [...] that's what it looks like to me. (District Councillor)

The hostility between tiers over their territorial turf and any consequent desire for reorganisation was not simply top-down. Indeed, district councillors, as the lower tier, expressed a view that the county council could be abolished entirely, leaving only the smaller districts to provide services across the county at smaller scales, as smaller units of local government. Interestingly, some district councillors were not outrightly

opposed to the idea of combining existing authorities, but more opposed to the outcome being shaped from above by both the city and the county. The source of conflict for district councillors is less about change and more about a perceived urban and county imperialism. As one councillor highlights it:

> We could abolish the county council; there might be some other boroughs that we'd have to combine where they're not big enough and we could share services where it was appropriate, we could buy them from other districts. (District Councillor)

What has emerged from the research is that, of those city councillors interviewed, there was a clear trend that distinguished those who had previously sat simultaneously on both the county council and the city borough (as 'twin-hatters) prior to the 90s reforms, and those who had not. Those who had were markedly more in favour of abolishing district councils and amalgamating Leicestershire and its districts into one unitary county. Those who had not experienced either did not have a view or were clearly opposed to the idea.

In the case of Leicester and Leicestershire, these conflictual conversations of reorganisation, much like the devolution proposal, which was developed for the LLCA, is led predominantly by the county and the city, at the expense of the districts. The process is perceived as 'devolution going on "up there" but we can't reach for it because it's being kept at a distance from us' (District Councillor). The city of Leicester is seemingly immune from any calls for amalgamation, seen as the distinct urban centre by its rural counterparts. Some councillors highlighted by political interdependence between the city and the county through their similar levels of autonomy and remit for service delivery and decision-making. As such, the political relationship between the city and county is stronger, despite the stark contrast of their party politics, than between the county and the districts which, by comparison, are broadly homogenous in partisan terms.

2. The dichotomy of representation and efficiency

The circular dichotomy of efficiency and representation, which has dominated central policy debates of local government reform in England, was reflected in how the local political elite have responded to the new devolution reforms. More specifically, a distinction became apparent where councillors at different levels were providing a rationale underpinning their views on what the future structure of local government should look like in Leicester and Leicestershire. The way in which individual councillors attempt to reconcile the dichotomy of efficiency vs. representation appears, albeit broadly, to correlate with the tier of local government at which they operate. These distinct views

can be categorised into three general groups. First, there are those councillors, serving at the county level, who wish to see larger units of local government and who favour cost savings and efficiency. This view is articulated by one councillor thus:

> There is the potential for positive results if we were to reorganise and amalgamate. We could achieve greater efficiencies through synergy of back office functions; we could reduce bureaucracy, and eliminate duplication through the removal of dual hatted councillors, which the public do not often understand in any case. (County Councillor)

Second, there are those councillors – predominantly district councillors – who wish to retain smaller units of local government. These councillors were primarily concerned with ensuring sufficient representation of their local communities, which was seen as a more worthwhile pursuit than achieving cost savings and efficiencies through larger units of local government. As one district councillor commented:

> In the end, I am not convinced but I don't know, because the figures have never been presented to me, but I am not convinced that, in the end, it would save that much money and we would lose an awful lot in terms of the big things like democracy. It would be much less democratic and we would have things that are vitally important to local people like planning being dealt with at county where you would have officers who have never set foot in the area deciding about planning in areas that they know nothing about. (District Councillor)

The final group of councillors are those who did not appear to have a strong view on whether the structure of local government should change. They place very similar amounts of value upon ensuring that structures of local government are efficient and cost-effective, and also safeguarding the adequate representation of local areas and that their identities retain relevance and influence in decision-making processes. This group broadly consisted of city councillors (except for those who were former 'twin-hatters').

3. Challenging senses of identity

One of the starkest trends among district councillors was the way in which they perceived the prospect of the combined authority to be a direct challenge to the local areas they represent, the identities of localities they serve and the relevance of the tier of local government of which they are an elected member. A number of district councillors expressed their agreement when questioned about whether they felt the new combined

authority structure would draw powers up from the lower tier rather than draw them down from central government.

There was a consensus among all the councillors interviewed, at all tiers, that the areas they represent have a strong sense of local identity within their current administrative boundaries. Even in the case of the city, councillors expressed a view that residents are more inclined to identify with their ward or suburb, rather than the wider city of Leicester, a view summarised by one city councillor:

> Residents in my ward don't say they're from Leicester or from the city. They usually say they're from [city ward anonymised] or even from their neighbourhood. There's small pockets of communities within the city itself. People looking at the city from the outside might assume the city has one identity but local residents might say otherwise. (City Councillor)

The existence of twin and in some cases triple hatters – where a councillor sits on a principal authority (or two principal authorities) and a district and/or council – makes the relationships between different tiers of local government somewhat more difficult. What emerged from interviews with councillors was that where a district councillor sits on both the district and their local parish or town council, the concerns they have about the impact upon their local area of a new combined authority structure is somewhat intensified.

Some of the district councillors we interviewed were 'twin-hatted', in that they sit on both the district council and the local parish council. A prominent concern for these councillors was that the distance between those making decisions which impact upon their local area and the residents they serve in those areas would be increased drastically as a result of the creation of a combined authority. As two councillors commented:

> Particularly out in the villages where it's very local and if they can't access a person face to face who they know, they get quite distraught. We're [Councillor B] both on the parish council together as well and this comes through very much at that level. (District Councillor)

> That county even at the moment is there and we are here and we are dealing with everyday problems in the borough and in the wards. We can bring it into here, we can bring it into the offices here and actually get something done; we can use leverage. (District Councillor)

Councillors struggled to provide an explanation of the identity that was displayed by the combined authority for district councillors, the combined authority is perceived to

only represent city and county interests. City councillors took a more holistic view. The issue of identity was less salient for county councillors. While there was a recognition that different parts of the county of Leicestershire have their own senses of identity – particularly towns and smaller urban centres – there was less concern at this upper level that the introduction of a combined authority would have a tangible impact on their importance and relevance.

As highlighted by parallel research conducted with district councils across the whole of England for the All Party Parliamentary Group for District Councils, many of the new combined authorities are utilising Functional Economic Areas (FEAs) as the most suitable geographical scale for the development of these new structures. These 'natural' economic geographies go beyond and across historical administrative boundaries, in favour of reflecting patterns of economic activity. Many districts provided evidence of how delivering different services at the right spatial level is viewed as an opportunity wherein devolution could lead to more sustainable models of public service provision. While this rationale for the development of combined authorities at a sub-regional level serves an administrative purpose (they are 'natural' in that they reflect the clustered economic demands of regional areas), this does not appear to resonate at the most local level. These new and artificial structures exist at such a distance from local communities that there is a danger that senses of identity and place become subsumed and somewhat lost. Our research with councillors suggests that, as we move further away from the new structure and towards local communities, this concern is more prevalent.

VII. Conclusion

The current devolution process playing out in England is a relatively new approach to metropolitan governance and decentralisation. Whilst previous reforms to local government in England have, in large volumes, attempted to alter the role, shape and scope of local government, none has attempted to do so across groups of local authorities and in direct tension with existing territorial identities and administrative boundaries. The current devolution process in England therefore presents us with a new contested space for local and regional politics to play out within.

The aim of this paper has been to examine the impact that the process of establishing combined authorities has had on existing political relations between local authorities and senses of identity on an empirical basis. The research has demonstrated how this process rests upon but also can have a significant impact on local politics.

In the case of Leicester and Leicestershire, the process of shaping and establishing a combined authority as part of the new legal framework for devolution has had a significant impact on existing relationships between the city, county and

district councils involved in this new structure. The city and county councils have taken a leading role in driving the combined authority forward. For the district councils, as the lower tiers of local government, the process has intensified existing fears about their existence and a desire from the upper tier to abolish and amalgamate existing structures of local government. As such, the devolution process has failed to deliver on a central promise of 'bespoke' and 'bottom up' solutions which step away from previous reforms. Rather, the devolution process has intensified existing conflicts and stimulated a local response to the policy which centres on reorganisation and circular debates about efficiency versus representation.

Szegedi, László*

The Role of EU Agencies – Autonomous or 'Inbetweener' Bodies in Light of Agencies' Inspection Power over National Authorities?

Abstract

The mushrooming of EU agencies is one of the major changes in EU regulatory governance; however, questions arise as to whether these EU bodies can be considered appropriate solutions to fight against the substantive implementation deficit of EU law at national level. Carrying out inspections as labour-intensive activity and expertise-based competence to review the Member States' implementation of EU law has not become broadly applied by EU agencies. This article focuses on the evolution of three different EU agencies, which have or have not been empowered to carry out inspections over national authorities by, *inter alia,* the European Environmental Agency, the European Aviation Safety Authority and the European Union Agency for Railways. The European Environmental Agency is an EU agency with more than two decades of history but it never could acquire such competence. On the other hand, transport agencies such as the European Aviation Safety Authority and European Union Agency for Railways have been made responsible for carrying out such inspections. Explaining further factors in relation to conferring such powers could help to better understand the EU agencification process and the inter- and intra-institutional relations of the EU's composite administration.

Keywords: agencification, EU, independent bodies, agencies, national authorities, inspection, administrative procedure

I. Introduction

Concerns over the implementation of EU law have been discussed in the literature for a long time, focussing on the driving forces behind the compliance performance of the Member States.[1] The compliance patterns, combined with territorial categorisation as a

* Szegedi, László PhD, Assistant Professor, National University of Public Services, Faculty of Public Governance and Internatuional Studies (szegedi.laszlo@uni-nke.hu).

[1] K. J. Alter, The European Court's Political Power, (1996) 19 (3) *West European Politics,* 458–487, https://doi.org/10.1080/01402389608425146; F. Duina, Explaining Legal Implementation in the

DOI: 10.56749/annales.elteajk.2017.lvi.10.161

research agenda, also gained momentum.[2] However the institutional structures to ensure uniform and proper implementation of EU law on national level are far from complete. Nevertheless, it is far from the structure of the national ministerial administration with its classical centralistic organisation. The task of implementing Union norms remained at the level of the Member States including the national authorities as well as the national courts. Considering the implementation deficit, it is clear that appropriate and uniform implementation has to be supported by the European Union. EU-level intervention could be undertaken by a supranational body, which collects and analyses the related data on the implementation performance of the Member States and react appropriately in case of non-compliance. This article intends to analyse whether EU agencies can ensure better implementation of EU law by inspections and how their potential performance can be influenced by various factors and actors present at the EU's institutional landscape.

The European Environmental Agency's role has always been limited to information gathering and could never acquire inspection power. The transport agencies of the EU, such as the European Aviation Safety Authority along with the European Maritime Safety Authority, were the first ones in the evolution of the EU regulatory agencies with inspection powers over the national authorities.[3] Nevertheless, the European Union Agency for Railways also acquired such formal power in course of the last reform package on railways, dated back to 2016.

European Union, (1997) 25 (2) *International Journal of the Sociology of Law,* 155–179, https://doi.org/10.1006/ijsl.1997.0039; J. Tallberg, Supranational influence in EU enforcement: the ECJ and the principle of state liability, (2000) 7 (1) *Journal of European Public Policy,* 104–121, https://doi.org/10.1080/135017600343296; D. Mabbett, The Development of Rights-based Social Policy in the European Union, (2005) 43 (1) *Journal of Common Market Studies,* 97–120, https://doi.org/10.1111/j.0021-9886.2005.00548.x; T. A. Börzel, Participation through Law Enforcement: The Case of the European Union, (2006) 39 (1) *Comparative Political Studies,* 128–152, https://doi.org/10.1177/0010414005283220; L. Conant, Compliance and What EU Member States Make of It, in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, Oxford, 2012) 1–30, https://doi.org/10.1093/acprof:oso/9780199644735.003.0001

[2] C. Knill and A. Lenchov, Coping with Europe – The Impact of German and British Administration on the Implementation of EU Environmental Policy, (1998) 5 (4) *Journal of European Public Policy,* 595–614, https://doi.org/10.1080/13501769880000041; T. A. Börzel, Why There is No 'Southern Problem', On Environmental Leaders and Laggards in the European Union, (2000) 7 (1) *Journal of European Public Policy,* 141–162, https://doi.org/10.1080/135017600343313; L. Dimitrova Antonatea, The new Member States of the EU in the aftermath of new Enlargement: Do new European rules remain empty shells?, (2010) 17 (1) *Journal of European Public Policy,* 137–148, https://doi.org/10.1080/13501760903464929

[3] M. Groenleer, M. Kaeding and E. Versluis, Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation, (2010) 17 (8) *Journal of European Public Policy,* 1212–1230, https://doi.org/10.1080/13501763.2010.513577; E. Versluis and E. Tarr, Improving Compliance with European Union Law via Agencies: The Case of European Railway Agency, (2013) 51 (2) *Journal of Common Market Studies,* 316–333, https://doi.org/10.1111/j.1468-5965.2012.02312.x

The *definition* of inspection as a legal instrument has a relatively broad scope in the literature.[4] This article defines inspection as the process of investigating of the facts, usually combined with on-site screening and visits by EU officials. However, this does not necessarily reflect the definition of inspection power applied by national administrative authorities and regimes, as EU agencies are usually not allowed to take decisions on infringements by Member States. This refers to the allocation of powers between EU agencies and further EU institutions, as the EU agency is mainly responsible as inspector for data-gathering but taking decisions on legal consequences (i.e. initiating infringement proceedings) is the exclusive task of the European Commission. Additionally, the sector-specific policy areas and the description of powers conferred upon EU institutions and EU bodies under the labels of 'monitoring' or 'audit' or 'inspection' do not necessarily distinguish between *direct control,* fulfilling the supervisory power with regard to Union citizens and the *control of control* with regard to the national authorities.[5] The focus of this paper relies on the control of control, namely the power of EU agencies to inspect national authorities and their performance regarding the direct control of market participants. Therefore, the *rationale* of inspections is to provide reliable data and information on the implementation performance of the Member States and identify the crucial deficiencies and further implementation concerns.

There are some obvious factors which could be the main obstacles to carrying out inspections, especially that the demand for on-site visits makes it clear that, among the several methods for checking the implementation of the Member States, inspections represent a labour-intensive, time-consuming approach, which necessarily involves a significant number of EU officials. From the perspective of the Member States, the delegation of inspection powers to EU level creates a clear 'potential threat,' as this could serve as a basis for future infringement proceedings as well.[6] Moreover, not only the Member States but the Commission would be keen to keep its prerogatives on whether to initiate infringement proceedings. Second, the independence of EU decision-making has multiple dimensions, as the profile of EU officials involved in certain inspections at micro level also need to be taken into account. The flexibility of staff policy based on the requirements of certain situations, ease of planning and deploying the human resources

[4] A. David, Inspections as an instrument of Control of Implementation in the European Composite Administration, in J. Oswald and B. Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia Uitgevers, Cambridge–Antwerp–Portland, 2011) 357–381; K. Knipschild, European veterinary and food law and the European Composite Administration, in O. Jansen and B. Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia Uitgevers, Cambridge–Antwerp–Portland, 2011) 357–381; M. Kaeding and E. Versluis, EU Agencies as Solution to Pan-European Implementation Problems, in M. Everson, C. Monda, and E. Vos (eds), *European Agencies in between Institutions and Member States* (Wolter Kluwer International BV, The Netherlands, 2014) 73–87.

[5] David, Inspections as an instrument of Control of Implementation..., 359.

[6] Ibid, 368.

and the number of experts involved might also have a crucial impact on the efficiency of inspections carried out by EU agencies. Further factors in relation to inspections include ensuring that the information acquired by inspections is well-targeted, with a focus on both specific deficiencies and the concerns of Member States, which could serve as basis for further country-specific analysis and related recommendations. The risk analysis and crisis management using earlier country-specific findings makes it possible to build up a proper follow-up mechanism based on the identified weaknesses.

This paper starts with the theoretical examination of EU agencies and the process of agencification, which is one of the major changes in the EU institutional landscape of recent times. The theoretical considerations on EU agencies will be followed by the institutional history of the agencies concerned and/or the experience gained during their inspection cycles. Finally, the article concludes by evaluating the elements that will be decisive when EU agencies carry out inspections.

II. EU agencies as inspectors and the 'agencification' process

EU agencification over the last decades marks the era, when the European Union is seeking new governance mechanisms by creating these 'inbetweener' EU bodies, which function between EU institutions and Member States, while having regulatory tasks over market participants.[7] They functioning at the centre of a triangle consisting of EU institutions and national authorities as well as market participants, a position that could substantially influence their inspection performance.

There are various approaches to classifying EU agencies.[8] The so-called mushrooming of EU agencies refers not only to the phenomenon that the number of such bodies has expanded tremendously in recent decades, but also to the fact that substantial powers have been conferred upon them by creating a direct relationship between market participants/citizens and these kinds of bodies. This shift of power has led to some common rules on their establishment and functioning, in the form of the Joint Statement and Common Approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies. However, EU agencies, as non-Treaty bodies, still lack a proper primary legal basis for their functioning, Article 263.1 of the Treaty on the Functioning of the European Union

[7] M. Everson, C. Monda and E. Vos, European Agencies in between Institutions and Member States, in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Wolters Kluwer International BV, The Netherlands, 2014, 3–9) 4.

[8] E. Vos, European Agencies and the Composite EU Executive, in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Wolters Kluwer International BV, The Netherlands, 2014) 20–23.

only guarantees judicial review of agencies' acts intended to produce legal effects *vis-á-vis* third parties before the Court of Justice of the European Union.

In relation to the agencies, it should be obvious that their actual development (as well as of other EU-level actors) also involves the diffusion of values and ideas among agency personnel and national experts involved in the implementation at the national (as well as the EU) level.[9] Nevertheless, it has also been identified, in relation to various competences exercised by EU agencies that they 'should be flexible and resort to a combination of compliance strategies in order to be able to have an impact at the domestic level'.[10] As a theoretical expectation, the inspection powers conferred on EU agencies could reveal potential conflicts between the actors in the EU regulatory space.

The general concept of *independence* not only refers to the relationship with the regulated market participants, but also to national counterparts, as well as the EU institutions. The inspections are addressed in more or less direct form to certain segments of the internal market (direct control) and/or the national authorities acting as direct inspectors (control of control). The labour-intensive nature of inspections combined with the resources required by this kind of competence could potentially lead to conflicts between the Commission and the agency as well. Additionally, the Commission and single commissioners do not function in the form of a centralised ministerial administration although the Commission could have substantial impact on the agency's work in form of influencing its staffing policy, by initiating the related budget proposals. EU officials have various integrity requirements related to their tasks based on the Treaties and the EU Staff Regulation, as well as the related requirements of sector-specific laws. Employment at EU agencies could include 'double-hattedness' problems at the level of individual EU officials, considering the fact that European personnel selection is also reliant on national candidates, especially with regard to highly qualified experts needed to be employed for on-site inspections.

In several cases, the EU agency has been created as response to crisis situations related to the inadequate risk analysis and crisis management capacities at EU-level. As such, how agencies are allowed to *formulate their own work plan,* including risk analysis and crisis management plans, could be an essential consideration. Theoretically, agencies gained the opportunity to build up close relations with the national authorities, although indirectly with market participants. This close link and the horizontal overview concerning the regulated market enable the agencies to identify the emerging risk factors effectively. Moreover, the identified risks, based on the inspection reports and recommendations can serve as a basis to build up a proper follow-up mechanism. A certain level of flexibility should also be guaranteed in the planning of inspections

[9] Groenleer, Kaeding and Versluis, Regulatory governance through agencies of the European Union?, 1218.

[10] Versluis and Tarr, Improving Compliance with European Union Law via Agencies..., 332.

based on the former findings as well as ever-changing market environment. Moreover, the agencies should keep their flexibility to monitor market changes and threats, as well as potential deficiencies, regardless of the outcome of the previous inspection cycles, which requires effort and resources to invest into areas that do not necessarily have a high position on the agenda of the Commission. On the whole, swift responsiveness and ongoing flexibility regarding risk analysis and crisis management are crucial to maintain each agency's credibility.

Transparency could be crucial in inspection cycles. More specifically, *information* as an outcome of the data-gathering process of the agency might vary widely covering general as well as more targeted issues. Depending on its preparation and focus, the inspection will certainly, produce more detailed, country-specific information on the implementation performance of the Member State concerned as well. Obviously the combination of various inspection reports gives the opportunity to have a more horizontal and comprehensive view of market circumstances, and potentially formulate policy-oriented statements rather than just technical and scientific evaluations of the related subjects. As for theoretical expectations in this regard, the transparency of the outcome of the investigation process can also serve as a basis for addressing the general public as well.

III. EU agencies as inspectors over national authorities

1. The European Environmental Agency

The European Environmental Agency (EEA) was established in 1993, operating from 1994 in Denmark (Copenhagen). Schout summarised that the EEA 'started as a chaotic body that only few really wanted and which was partly created because it was, in 1994, necessary to have enough agencies to satisfy'[11] the regulatory needs. The underlying reason for such a difficult beginning was that 'each of the tasks mentioned during the negotiations was conferred upon the EEA without the required staff and budget to perform adequately – even though the EEA after twenty years managed to become a 'highly regarded organisation'.[12]

[11] A. Schout, Inspecting Aviation Safety in the EU: EASA as an Administrative Innovation?, in E. Vos (ed.), *European Risk Governance: Its Science, Its Inclusiveness and Its Effectiveness* (Mannheim University Press, Mannheim, 2008, 257–294) 265.

[12] Ibid.

Inspection power over national authorities has never been conferred upon the EEA. It might be worth analysing what arguments took place during the evolution of the EEA in this regard. The first period of the EEA (1994–2003) has been summarised by Martens as the era of inter-institutional tensions due to the political vision of its first director Mr. Jiménez-Beltrán, who put much emphasis on the EEA producing policy analyses rather than gathering facts.[13] The EEA also undertook an analysis of the institutional performance of DG Environment as well as exercising its inspection power over national authorities, which led to the Commission proposing a budget freeze. Citing the three factors of the theoretical assumptions, the Commission expressed its position clearly and provided the staffing and budget fort the EEA to conduct its core tasks related to data-gathering. As for its independence on work plans and methods, the Commission criticised the EEA for focusing too much on general analyses without providing hard facts for further evaluation. As for the third factor, this period of the EEA could create its own identity by the transparency of its analyses, even if this led to some tensions with other EU institutions, especially the Commission.

The next chapter of the relationship between the Commission and the EEA can be characterised as an inter-institutional partnership (2004–), as the EEA gave more emphasis to DG Environment's priorities; the European Parliament clearly positioned itself as the EEA's ally in the budget-proposal process, and EIONET (European Environment Information and Observation Network) was able to acquire a substantial position in data gathering.[14] The networks could counter the problems of lack of information and motivation that occur, according to the findings of organisational theory, in hierarchical organisations in particular.[15] With regard to uniform application, it has to be borne in mind that there is no mechanism like preliminary ruling procedures, which ensure the uniform application of EU law. As a result, divergent practices might also occur if no court process or infringement proceeding is initiated in certain cases. In this regard, networks, could have a substantial role, especially in environmental policy-making and enforcement.[16]

[13] K. Martens (ef.), *Mechanismsof OECD Governance* (Oxford University Press, Oxford, 2010) 888–889.
[14] Ibid, 890–892.
[15] J. Sommer, Information cooperation procedures – With European environmental law serving as an illustration, in J. Oswald and B. Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia Uitgevers, Cambridge–Antwerp–Portland, 2011, 55–91) 68.
[16] M. Angelov and L. Cashman, Environmental inspections and environmental compliance assurance networks in the context of European Union environment policy, in M. Faure, P. De Smedt and A. Stas (eds), *Environmental Enforcement Networks: Concepts, Implementation and Effectiveness* (Edward Elgar Publishing, 2015) 350–376, https://doi.org/10.4337/97817834774O1.00030

2. The European Aviation Safety Authority

The European Aviation Safety Authority (EASA) established in 2002 has its headquarters in Cologne (Germany). EASA could be considered as a pioneer in performing inspections of national authorities, being mainly standardisation inspections. More precisely, EASA took over the coordination of standardisation activities previously carried out by the Joint Aviation Authorities in Air Operations, Synthetic Training Devices and Flight Crew Licensing on 1st January 2007. In recent years the related Regulation on standardisation inspections has been updated,[17] while the policy areas covered by standardisation inspections have also been expanded.

As for *independence* and the relationship with the Commission in term of *staffing policy and budgetary issues,* there is a clear relationship between the number of inspections and inspection visits carried out yearly. As a result, there is a relatively stable number of inspection visits[18] according to EASA's annual reports. Interestingly, the number of findings of deficiencies which 'may raise safety concerns' is also stable (26–28%). In course of 2014/2015, so-called Continuous Monitoring Activities (CMA) have been introduced, which resulted in a slight decrease of inspection visits. The capping of resources[19] has its impact on overall functioning of the EASA. Recent annual reports reveal that EASA is already following a more proactive recruitment policy, involving forward planning and prioritisation of activities in favour of others. CMA have also been part of this prioritisation programme, which has been combined with the system of National Coordinators to keep the effective level of inspections but with fewer on-site visits. In practice, the National Coordinators are responsible for continuously submitting data on the performance of national authorities. However, it might also raise some institutional concerns related to independence. Nevertheless the revision of EASA's Basic Regulation foresees an emergency oversight mechanism by temporarily transferring national certification, oversight and enforcement tasks to EASA, if a Member State fails to act.[20] Even if the emergency oversight mechanism is intended to be applied only in an emergency situation, EASA would require additional staff to handle the workload while functioning as a 'substitute' authority.

[17] Commission's Implementing Regulation No. 628/2013.

[18] The number of the inspection visits available in the EASA's Annual Reports: 2009 (85), 2010 (111), 2011 (107), 2012 (121), 2013 (103), 2014 (107), 2015 (99).

[19] Regulation (EU, Euratom) No. 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union [OJ L 287/15].

[20] Article 55 of Proposal for a Regulation of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and repealing Regulation (EC) No 216/2008 of the European Parliament and of the Council, COM(2015)613.

EASA reached full occupancy of all posts according to the establishment plan for the first time in 2015.[21] There are some agency-specific needs related to HR policy, even if the HR policy of agencies is considered to be less-flexible, with more focus on the 'Commission's harmonised planning system and less on agencies' particular idiosyncrasies'.[22] However, EASA could move towards having more room for manoeuvre in this regard. Consequently it has proposed that the Commission should have an agency-specific category of staff members on a structural part-time basis in order to allow them to continue the outside activities that are necessary for keeping their professional qualifications required for performing their occasional duties in the Agency.[23] A competency-based assessment of staff performance using EASA-specific factors was also introduced that year.[24]

Regarding the formulation of its *own work plans* and applying a risk-based approach, certain factors could influence EASA's performance. Even if the standardisation inspections could be streamlined due to the new CMA system, there are no further requirements[25] on the independence of Coordinators, which might led to 'double-hattedness' problems in the future considering also the decreasing number of visits.

Further conclusions on inspections have been drawn related to the revision of EASA's Basic Regulation: The ground handling industry highlighted the inefficiencies stemming from repetitive audits and inspections of the same service providers by aviation authorities. On the other hand, the EASA's standardisation inspections could reveal the clear demand for a common EU mechanism for conformity assessment of aviation security equipment, which led recently to the submission of the related legislative proposal.[26]

As for the *transparency* factor, the lack of transparency of individual inspection reports created a clear concern in first years after the creation of EASA.[27] The Implementation Regulation on standardisation inspections similarly follows the approach that individual report availability is dependent on the conclusions produced and the opportunity to react to its findings.[28] In terms of the figures, the annual reports

[21] EASA's Annual Activity Report Year 2015, 35.
[22] A. Schout and F. Pereyra, The institutionalization of EU agencies: agencies as 'mini commissions', (2011) 89 (2) *Public Administration,* (418–432) 429, https://doi.org/10.1111/j.1467-9299.2010.01821.x
[23] EASA's Annual Activity Report Year 2015, 36.
[24] EASA's Annual Activity Report Year 2015, 45.
[25] Article 6.2 of Commissions Implementing Regulation No. 628/2013 only requires from Competent Authorities to ensure clear lines of communication with the Coordinator without stipulating further requirements on the Coordinator's independent functioning as such.
[26] Proposal for a Regulation of the European Parliament and of the Council on establishing a Union certification system for aviation security screening equipment, COM(2016)491 final.
[27] Schout, Inspecting Aviation Safety in the EU..., 284.
[28] Article 21.4 Commissions Implementing Regulation No. 628/2013.

for 2008 and 2009 only highlighted the statistical data on the inspection performance (number of overall visits) by EASA.[29] Later on this has been combined with figures on findings, with a focus on the stable level of safety concerns, sometimes including information on the number of inspectors and standardisation training sessions. However no further information has been made available on further investigation measures or case-specific safety issues.[30]

3. The European Union Agency for Railways

The European Union Agency for Railways, formerly known as the European Railway Agency, acquired inspection power over national authorities in the course of 2016, as the Agency Regulation enacted this kind of competence as part of the reform package,[31] so there is no available data yet on the inspection performance of this Agency. The inspection power of the European Union Agency for Railways refers to monitoring the performance of the national safety authorities, as well as the notified conformity assessment bodies, which is combined with monitoring the progress of railway safety and interoperability.[32] As for *staffing policy and budgetary issues,* the Basic Regulation foresees that the Agency should promote the inclusion of qualified auditors from national safety authorities in the audit team.[33] The Union legislator added to the related provision (presumably to avoid double-hattedness problems), that the auditors are not subject to the actual audit.[34] What can be expected of the Agency, also in terms of budgetary requirements, is the establishment of a list of qualified auditors and providing training when needed.[35] As for *risk analysis and prerogatives over its own work plan,* no requirements are yet available. However, the related provisions reflect the seriousness of the deficiency, but the right to take final decisions will certainly be kept by the Commission.[36] The *transparency* factor, as in the case of EASA, will be highly dependent on the practice followed by the Agency itself. In future it might be interesting to see whether monitoring could also serve as a basis for mutual learning, which can be stimulated by the enhanced transparency of the audit reports. Nevertheless, the

[29] EASA's Annual Activity Report Year 2008, 23–26; EASA's Annual Activity Report Year 2009, 25.
[30] M. Scholten, The Political Accountability of EU and US Independent Regulatory Agencies (Brill Nijhoff, 2014) 106–110, https://doi.org/10.1163/9789004262997
[31] Chapter 7 of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing the Regulation (EC) No. 881/2004 [OJ L 138/1].
[32] Article 33–35 of Regulation (EU) 2016/796.
[33] Article 33.2 of Regulation (EU) 2016/796.
[34] Article 33.2 of Regulation (EU) 2016/796.
[35] Article 33.2 of Regulation (EU) 2016/796.
[36] Article 33.3–33.7 and Article 34.4–34.6 of Regulation (EU) 2016/796.

European Parliament's proposal also foresaw a further competence for the Agency as a dispute resolution body in the event of conflicting decisions by national authorities, although this was not implemented in the Regulation concerned.[37]

Scholars have revealed the motivation of the Agency's staff on the conferral of the new power. The case studies of this Agency highlight that this inspection power might be seen by agencies in general as a threat to their well-established relationship with market participants as well as with national regulators, while making them more exposed to EU-level political consequences.

Kaeding and Verslius concluded, by citing Trieb, that the major compliance problems occur following one or a combination of the following factors: non-compliance due to (a) opposition or unwillingness (b) unclear rules or a lack of expertise; and/or (c) administrative capacity problems.[38] However, the case of the European Railway Agency does not necessarily lead us to conclude that the more powerful agencies could be considered as 'always-true-solutions' for non-compliance problems, especially taking the unwillingness of the agency itself to gain new competences over national authorities to ensure conformity with EU requirements.

Interviews with European Railway Agency staff made it clear that they were afraid of losing the essential mutual trust for keeping up with and obtaining relevant information from national authorities.[39] It has also been revealed that the Commission itself put more emphasis on securing the 'policeman role' for the European Railway Agency compared to that of EEA as it lacked the staffs to get a better insight on the application of EU railway rules at national level.[40] Additionally, territorial heterogeneity based on regulatory capacity and performance could be identified between larger and 'older' Member States and newer, especially smaller EU countries, as the latter ones pointed out the potential benefits of the stronger position of a more powerful agency, also against their own governments.[41]

IV. Conclusions

EU agencies can still be considered as 'inbetweener' bodies in light of their inspection power over national authorities, even if there is no ministerial administration as such,

[37] European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004 [COM(2013)0027 – C7-0029/2013 – 2013/0014(COD)] (Ordinary legislative procedure: first reading) Am. 88.
[38] Kaeding and Versluis, EU Agencies as Solution to Pan-European Implementation Problems, 85.
[39] Ibid, 86.
[40] Versluis and Tarr, Improving Compliance with European Union Law via Agencies..., 327.
[41] Ibid, 328–330.

with its classical centralistic organisation, in the European composite administration. EU agencies are therefore influenced by the Commission and further EU institutions as well, while being keen to keep their good relationship with their national counterparties. Theoretically, the EU agencies' staff and resources available for inspections, especially with regard to on-site visits, can be crucial due to the labour-intensive and costly nature of this competence. However, the Commission's followed different approaches to give political support for stronger agencies. On the input side, the effectiveness of the agency's activity as inspector is highly dependent on the flexibility in creating its own work plan for inspections by following a risk-based approach and its independence from national as well as supranational political considerations in order to examine certain Member States. This factor can only be further examined based on data and figures related not just to EASA (which could acquire enough experience in this regard) but other agencies as well. Theoretically, the opportunity should also be guaranteed for EU agencies to formulate non-country-specific reports by summarising their inspection reports and by creating some kind of public personality. However, the Commission has taken steps to keep certain 'out of the political limelight' and reserving the political decision-making as its own prerogative.

It might be interesting to examine the underlying factors for the different approaches followed by the Commission, even if these are rather theoretical assumptions. Environmental policy-making tends to be a subject matter with a far-reaching character, so the Commission might have felt itself threatened by the proactive approach followed during the first period of the EEA. On the other hand, the safety and standardisation issues of the inspections performed by the two transport agencies are clearly essential for the proper functioning of the internal market, while they tend to refer to technical regulatory issues, which can hardly serve as a clear basis for political activism and image-building by any of the related agencies. However, the reluctance to create the EU's road transport agency,[42] with the potential to conflate far-reaching environmental and economic matters leads us to believe that the political 'exposedness' of the related policy area could be a material factor, nevertheless an obstacle to further agencification of the EU Executive.

[42] Euobserver, *Why doesn't the EU have a road transport agency?,* https://euobserver.com/dieselgate/136011 (Last accessed: 9 July 2017).