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The Area of Responsibility of a Local Government at County Level and Possibilities for the Legal Organisation Thereof

1. Introduction

The local government has a significant role in a democratic society — as the main support in the organisation of a democratic method of government and at the same time a connecting point between civil society and the state, the local government is the main guarantee of the stable development of a society. If sufficient protection for the local government has been established in the legal order, it operates in true opposition to the centralisation of authority of the state, as a counterweight. Consequently, the legal bases for the organisation of local government are substantiated in the constitutions of most democratic countries. The legal regulation concerning the underlying principles of the organisation of a local government in the Constitutions of the Republic of Estonia has been consistent, and the associated provisions are contained in the constitutions of the years 1920, 1933, and 1992 (the current document). Therefore it can be said that, regardless of the differences in the theoretical starting points of local government dominating in various stages of the development of the country, the tradition of specifying the bases for the local government's organisation in the Constitution is comparable to the substantiation and regulation of fundamental rights, freedoms, and liabilities. Chapter XIV of the Constitution today gives various guarantees to a local government, which in interaction ensure it, as an independent subject of legal relationships, a fixed position in the organisation of public administration and relations with state administration; create a basis for its independent institutional framework; and guarantee the protection of its subjective legal status.*¹

However, the public relations of the state and the local government as well as the practice of the legal regulation ensuring it are not free from problems. The determination of the legal status of a local government, the substantiation of its area of responsibility, and the modernisation proceedings from the needs for development are affected by various factors. These may be political, economic, organisational, or legal. All of these factors have an independent effect and scope, but their close interrelations must also be identified. In transition societies, the main factor affecting and directing the public relations of the state and a local government is

¹ See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn 2002, p. 641 (in Estonian).

the political-legal element, which, as a rule, leads to the development of decentralised public relations of the state and the local government. In the conditions of stable democracy, the political-legal factor loses its priority status in the public administration of a state, and the socio-economic element emerges as a stronger factor. The reason for this is mainly the economic relations between various regions of the state, which are becoming closer; the movement of labour both domestically and between countries, accompanying the development of infrastructure; and the rapid urbanisation that has been characteristic of all countries since World War II. As a consequence of the peculiarity of the era and a specific state, the political factor may dominate the substantiation of the public relations of the state and the local government and may do so for a long time, not surrendering its position to the socio-economic element, the typical scope of which is in the conditions of stable democracy. The domination of the political factor is inevitably accompanied by disturbances in the balance of the public relations of the state and the local government, and the local government's possibilities for performing the administrative functions distinctive to it in the organisation of public administration may actually not match the development needs of the society at all.

As a glance back at history often helps to clarify and develop visions of the future, it is instructive to recall that the Estonian people reached independent statehood in 1918 on account of a developed and efficient local government tradition. It is also remarkable that the process of restoration of independent statehood in Estonia that began with the end of the 1980s was started with the restoration of the local government. The Supreme Council that operated in that period passed a series of legal instruments that were called pre-constitutional instruments in later legal theoretical treatments.² The resolution of the Supreme Council of 8 August 1989 concerning the passing of the administrative reform in the Estonian SSR stipulated a transition from the administrative system then in force to a local government administrative system that would comprise the decentralisation of the power of the people to management at local government levels within the republic, clear differentiation of national and local government management, and reorganisation of the territorial administrative structure. The planned reform prescribed the formation of a common and uniform two-level local government taking the historical tradition into account. In this model, the first level is made up of self-governed rural municipalities, boroughs, and towns and the second level of counties — constituting both self-governed and state management — and republican towns in which the functions of the first-level local government are performed at the same time.³

The ideas of the planned administrative reform were implemented by passing laws regulating the legitimisation and organisation of the local government.⁴ The political factor clearly stood out from the factors affecting the passing of the local government reform as the local government that was restored and began operation in 1989 via elections of councils of local government turned out to be a significant judicial power in the process of restoring national independence and performing various functions. The restored two-level local government was, above all, a definite political guarantee in restoring state independence. Here, it may be worth recalling the plenary meeting of the legislators of all levels held on 2 February 1990 and the declaration passed with respect to the state independence of Estonia, which contained an important message to the international community and, at the same time, provided the political powers of the time with determination to act.⁵ On the other hand, the local government was the immediate executor or ensurer of all extensive land, ownership, and other reforms executed in that period. Today, in evaluating and analysing the efforts of several countries that have selected a democratic means of development in their transition to market economy relations, and in ensuring the stable development of the society, it can be said that the reason for failure and setbacks generally lies largely in the fact that the planned reforms are not based on the foundation of the society on self-government.

In the context of the development of Estonia, it is paradoxical that, in the abandoning of the two-level local government model in 1993, again the political factor was the deciding one, as the state administration restored after the adoption of the Constitution in 1992 had sufficient political ambition to secure a dominant position for managing affairs at the county level and no readiness to include the local government in this process. As a result of the abandonment of the county level of local government in 1993, the relations between the state and the local government were not shaped to completion, and intertwining and duplication between state and local government functions of various types could be noted, among them social welfare, education, transport, and environmental protection services. Also, the county governor's competence is to organise and co-ordinate the activity of local offices of ministries and other central administrative institutions active in a county was settled in a poor manner.

² See Taasvabanenud Eesti põhiseaduse eellugu (History Preceding the New Constitution of Estonia). Tartu 1997, p. 25 (in Estonian).

³ Haldusreformi läbiviimisest Eesti NSV-s (About the Administrative Reform in the Estonian SSR). – ESSR Supreme Council and Government Gazette 1989, 26, 348 (in Estonian).

⁴ See ENSV kohaliku omavalitsuse volikogude valimise seadus ((ESSR Local Government Councils Election Act), ENSV kohaliku omavalitsuse aluste seadus (ERSS Local Government Fundamentals Act). – ESSR Supreme Council and Government Gazette 1989, 26, 346; 34, 517 (in Estonian).

⁵ Valikkogumik Eesti NSV Ülemnõukogu poolt vastuvõetud seadusandlikest aktidest (A Selection of Legislative Acts Adopted by the Supreme Council of the Estonian SSR). Tallinn, 1990, pp. 88–90 (in Estonian).

As a result, a model for the administrative organisation of a county was established that was substantiated from one side only, and the disharmonies soon appearing as the model entered into operation inhibited the development of democracy on the regional level and restricted the efficient use of the existing resources. This, in turn, led to the development of various regional administration reform plans, in the years 1999, 2001, and 2003. Preparations for a new attempt to pass the regional administration reform were begun in 2007 as well. Analysis of all prior reform plans indicates that, in their development, attempts have been made to take into account the various factors affecting the local government reforms and associated elements, but no applicable results have been achieved yet. Probably, one of the reasons here is also the fact that the dominant political factor that initiated the Estonian local government reform is vital enough and that, at the same time, insufficient consensus has been found between the various political powers to neutralise or surpass it. On the other hand, a common factor of all reform plans developed so far is that all of them rely greatly on a disorganised theoretical foundation. This is mainly reflected in the proposed reform plans leaving several conceptual issues unanswered and, at the same time, not taking into account the systemic approach in the implementation of the model for the administrative organisation of a county in its functional and organisational dimension as well as its legal order. A peculiarity of the county administrative level is that here the state administration and local government administration intertwine to form a complete system that, in turn, holds various relationships with the central power of the state and the local governments of the first level. Given the above system and its concomitant issues as background, it was regarded as necessary to discuss several issues related to the subject at the conference dedicated to the 15th anniversary of the Estonian Constitution as well, because both the state and the local government have been assigned a fixed place in the Constitution via fundamental rights and freedoms and, through that, also in relation to the protection and guarantee of various constitutional values.

The present article attempts to point out the factors that have kept the issues related to the management at county administration level topical virtually uninterruptedly since the regaining of independence; after that, the general requirements are specified that should be taken into account in modernisation according to the development needs of the county public administration model. The author also provides explanations as to whether and how it is possible to determine the county-level scope of responsibility of the state and the local government under the conditions of one-level local government stipulated in the Constitution, as well as possible solutions for the legal organisation of this.

2. Why is the subject of county management topical?

The needs for modernisation and improvement of management at the county administration level are mainly caused by socio-economic development. Also, the nature and effect of this factor have not been thoroughly and systematically analysed, which is why the rearrangements made so far have been random; unsystematic; and often subject to insufficient organisational, financial, and legal grounding. The main changes in the public administration of the state in the time since the regaining of independence have occurred mostly in the sphere of state administration and have significantly affected the county level of administration. The consolidation of functions performed in various fields of state administration has taken several state administration tasks related to management of various sectors from county-level jurisdiction to national scope, inevitably accompanied by a decrease in the importance of territorial state administration, in the given case county governors and the county governments managed by them. This direction of development has also been supported by the regulator, by means of changes in the Government of the Republic Act⁶, according to which the inclusion of county governments within the purview of the Ministry of Internal Affairs significantly changed the status of the county government and that of the county governor as well. The competence for official supervision of the county governor was transferred to the Minister for Regional Affairs with the amendment of the same Government of the Republic Act.

In the light of the concentration of state administration, several key socio-economic and demographic changes at local government administration level have not been analysed sufficiently. Regardless of the fact that, in the last decade, several local government units have merged in Estonia, the rapid decline in the number of people in local government units located further from centres can still be felt. This has considerably decreased the administrative capabilities of the units in several fields assigned to the competence of the local government. Various assessments have been made of the situation, the factor that links them being the indication of the need for rapid changes.⁷

With the impact of socio-economic development speaking to the needs and desires for economic purposefulness, several co-operation regions have appeared outside the scope of local government units. In these, public services are rendered in various forms of co-operation between the local government units. At the

⁶ Vabariigi Valitsuse seadus. – RT I 1995, 94, 1628; 2007, 44, 316 (in Estonian).

⁷ Riigikontrolöör ei näe väikevaldadel tulevikku (Auditor General Sees No Future for Small Communes). – Postimees, 15 November 2007 (in Estonian).

same time, it must be admitted that the development phase of local government is not sufficiently supported by the organisational and legal elements. Thus, the legal substantiation of the co-operation between local government units has fallen well behind the development needs. However, at the same time, further expansion of the services beyond the territories of local government can be predicted. This is caused, in part, by the development of information technology but also by the domestic migration operating and expanding for various reasons between different regions of Estonia. However, the co-operation areas of local government units do not coincide with the scope of public administration, and activities that often have common goals are left with no co-ordination between the state administration and local government administration levels. As a result, differences between regions have increased with respect to both the availability of public services and their relative quality. And then there is the main issue: currently, the possibilities of the local government units and respective territorial communities for participating in developing resolutions related to the management of a county are rather limited.

What forecasts can we make with respect to the future of the county level of management in a situation in which several functions of state administration have been transferred to areas of scope comprising several counties and where the main organiser of co-operation between local government units is the local government association of the respective county? At the same time, we must also consider that the association of local government units of a county has been assigned a rather modest legal status in today's legal order, in the form of a not-for-profit association. This has created a real contradiction between the content of the tasks performed by them or that may be transferred to them in the future and the legal status needed for the performance of the tasks.

A development scenario according to which a county and the institutions managing it will find an honourable place in history in the nearest future is possible. The state administration functions performed by today's county government will in that case be performed with the help of different forms of co-ordination of sectors of state administration, and the local government organised on a territorial basis in rural municipalities and towns will be transformed, on county level, into forms of local government unit co-ordination operating on functional grounds. In case of such a development scenario being realised, a historical flashback to the organisation of county management in Estonia is justified, as is the identification of the nature and relationship of territorial and functional administration and learning of the critically assessed experience of other countries.

Between different sources, the definition of a region is ambiguous and often hard to identify, as this term can denote a county as well as other administrative units. In differentiating between region and county, it would be expedient and wise to proceed from the fact that, by their origin, regions (in the given case, the areas of scope of public administration formed in our country by the present time) belong to artificial administrative units; i.e., they are established by the state. It is also possible for a region to mark a sphere of activity for an administrative unit. A region may also be treated as a regional association (union) that is competent as a legal person in public law to complete the tasks imposed on it. However, the Estonian counties — though we treat these in the meaning of regions as well — have formed over the course of centuries of historical development and bear a territorial and communal identity that can be discriminated from those of others. The existence of such identity is a primary basis for substantiating a public administration model for potential use in a county. It is also important that those who bear county-level public administration authority — county government and county governor — have differing public relations with the central power of the state as well as local government units. It should also be noted that regions, as a general rule, are functional state administrative units or special administrative units. Unlike a region, a county can be treated as a general administrative unit in its main functions. Proceeding from the practice established in Western European countries, the regions operating as general administrative units are mainly local-government-oriented. In Estonia, regionalism has appeared to be efficient so far, but in a form contrasting against that typically seen in Western Europe, and state administration is organised in counties.*⁸

The need to position our regional administration organisation on the scale of comparison of the administrative space of European countries keeps the subject of the improvement of regional administration topical. It has become a significant external factor in the rearrangement of the county management level, and it is difficult to ignore its existence in making political resolutions and choices. A well-known truth is that the expanded and renewing Europe is firmly striding toward being a Europe that values local government administration. This is confirmed by general developments and in-depth assessments in several European countries. Traditionally, new challenges are seen in the substantiation of regional administration and policy in decentralising public administration*⁹, and, in relation to this, the source of and key to the economic success of countries is mainly sought in the development of regions.*¹⁰

⁸ Maakondlik ja regionaalne juhtimine. 1.–2. juuni ja 8.–9. detsembri 1994.a. konverentsi materjalid (County and Regional Management. 1–2 June and 8–9 December 1994 conference materials). Tallinn 1994 (in Estonian).

⁹ New Challenges Facing Public Administration and Regional Policy in Poland. – *European Public Law* 2003 (9) 3, pp. 335–344 (see especially p. 337).

¹⁰ Region and Place: Devolved Regional Government and Regional Economic Success. – *Progress in Human Geography* 2005 (29) 5, pp. 618–625.

The domestic regional policy factor has also started to affect the reforming of the regional administration level significantly. Due to the domination of sectoral policies, the indeterminacy of the functions of the state and the local government is deepening and several regional policy tasks have been left without an institutional carrier, which is why several opportunities for guaranteeing the balanced development of regions have been left unexercised.

3. Which requirements should one proceed from in the modernisation of the county administrative organisation model?

Finding solutions for every problem under investigation presumes the establishment of methodologically determined starting points and the setting of a few central requirements for the administrative organisation model of a county.

The treatment of the planned model in three balanced dimensions — functional, organisational, and legal — should be established as a general requirement, and the functional dimension of the model is the deciding one. Thus, one should identify first the administrative functions which are justifiably exercised on the county level, and then the organisational and legal order should be substantiated.

The second requirement is to determine who has primary competence to legitimise the institutions performing administrative functions on the county level. If, in the conditions of a single-level local government, we regard a county as a co-operation region of local government units, a general opinion should also be formed as to whether the regional administrative institutions on the county level are legitimised by the people of the given county directly or indirectly. In the latter case, the associated competence should be given to councils by law.

A third requirement for the county administrative organisation model to be established is the consideration of democratic bases. This presumes the establishment of new opportunities for citizens for participation in community life, together with the opportunity to delegate their rights and obligations to a higher administrative level as well. The development of democratic bases in administrative organisation presumes the decentralisation of executive state power and the reallocation of functions between the state and local government administrative levels.

The fourth requirement is the consideration of evolutionary development in the functional and organisational organisation of local government. Here, consideration of the local government traditions of county governance is also justified, proceeding from the development needs and possibilities of public administration.

Guaranteeing of the stability of the model is the fifth requirement. This presumes renewal and adaptation in changing conditions. This involves achieving a so-called moving balance, under which a certain rigidity and functional flexibility of the organisational structure must be designed in, providing the new functions with a place in the existing structures and at the same time guaranteeing the ability for fast response in changing situations. With respect to certain parameters, the model must also allow alternative solutions in recognition of differences from one county to the next, to guarantee the efficient use of local conditions and opportunities.

The sixth requirement presumes the handling of the public administration organisation as a complete system with relations and balance among various administrative levels, and where the changes planned in the functions, organisation, and legal status of the parts of the system cause changes in the system as a whole as well. The implementation of this requirement, in the case of a regional administration model for establishment, presumes the identification of transfers and relations with the first level of state administration and local government.

Finally, the seventh requirement presumes the development of state supervision as a state guarantee of a balanced complete system and public interest in the activities of institutions engaged in county management, and co-ordination in the activities of bodies engaged in supervision.

4. What form of legal organisation can meet the requirements set for the county administrative organisation model?

In the Estonian legal order, the form providing various solutions is a legal person under public law. The analysis of the options for such a legal arrangement in the organisation of public administration was, however, compiled years ago¹¹ and the theoretical development of the concept of the legal person in public law has been modest in recent years.

When considering § 25 (2) of the General Part of the Civil Code Act¹² according to which “A legal person in public law is the state, local government unit and other legal person that has been established in the public interest and on the basis of a law applying to this legal person”, we can find support for further discussions here. In handling the state and a local government unit as a legal person in public law, we could position the county in this complete and logical system as well.

A county as a legal person in public law would unite the public interests of a county as a territorial community, connect the state and local government administrative functions at county level on clear and definite grounds, and enable unique substantiation for the organisation of the institutions performing the respective functions.

¹¹ K. Merusk. Avalik-õiguslik juriidiline isik avaliku halduse organisatsioon (Public Legal Person in the Public Administration). – *Juridica* 1996/4, pp. 174–178 (in Estonian).

¹² Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2007, 24, 128 (in Estonian). Available in English at <http://www.just.ee/23295> (26.11.2007).