Traditional features of Hungarian public administration

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Abstract. The are at least two main examination aspects of Hungarian public administration and administrative law: first the approach sketching the main features of the broader *legal* system and of *law enforcement* practice, second – almost as importantly – the examination which describes and assesses 'reality' in a wider social scientific framework and through (public) *policy* features and processes. It shall be stated that legal approaches and analysis methods are dominant in the self-image of Hungarian public administration, in its practical operation and in its scientific description attempts. Among both the general features of the legal system reflected in administrative law and in its broader public policy features there are some which are relatively stable – providing a high level of security even in case of certain political and legal changes. We call them "elements of our administrative heritage":

a) the first such 'heritage-element' is *tradition*, which is kept alive by social memory and goes beyond itemised law. Today it may be observed in deep structural continuity, the further effects of certain civil values, and in typical ways of thinking and attitudes.

b) in the second place there is the *language* (linguistic) environment, the framework which with its highly regulated nature keeps together and from several aspects determines certain features of, and the dogma of, public administration.

c) as third factor we may mention the most obvious heritage-element in close relationship with the first two: *institutions which are permanently present in itemised law, those specific administrative solutions, which are stable and – in some cases – returning elements of Hungarian legal history*. Regarding the latter the issue of the historical constitution may be mentioned, which has become an exciting problem of 'living law' in Hungary with the approval of the Fundamental Law of Hungary.

Naturally, there are not only internal, but also (stable) external effects, influencing public administration.

Keywords: Hungarian public administration, tradition, historical constitution, state socialism,

transition, external effects

I. Introduction

During the presentation of Hungarian public administration and administrative law the consideration of at least two examination aspects is necessary: first the approach sketching the main features of the law system, the broader legal system and of law enforcement practice is reasonable, second – almost as importantly – the examination which describes and assesses 'reality' in a wider social scientific framework and through (public) policy features and processes. At the same time, it makes it possible to compare the Hungarian administrative phenomena with the similar phenomena of other countries, which may provide more objective results.[1]

Among both the general features of the legal system reflected in administrative law and in its broader public policy features there are some which are relatively stable – providing a high level of security even in case of certain political and legal changes.

II. The traditional features of Hungarian public administration in public policy approach

A starting point of this subchapter is that new Central-Eastern-European democracies established after 1989 did not build the political system on layered, sophisticated consultation procedures and institutional systems based on wide scale social participation, but – almost exclusively – on the Parliament-centred formation of political structures based on the principle of representation. Many believe that one of the great problems of societies getting out from under a dictatorship is that due to the lack of civil society filling in the space between individuals and the state during their socialisation, the members of these societies could never naturally learn to incorporate the identification of problems, formulation of their interests, exchange their thoughts, the harmonisation of different opinions, due to which the various problem-handling methods were not developed, either. From the public policy side it may be stated that in Hungary the legal and institutional requirements of representative democracy were fulfilled after 1990, but since then no material change has happened towards participative democracy; this means that Hungarian democracy "has frozen into" the level of representative democracy.2

A father tendency, a feature which may be hardly separated from the one mentioned earlier is that the all-time state – formed after the transition – imitates, reconstructs and replaces the civil sector through its conscious efforts, by this making it weaker *(more about this later).* During the analysis of this, it must not be forgotten that in the economic and sociological literature of the past one or

1 See e.g. Künnecke 2010, 266.

2 Jenei 2010, 95.

two decades the state, by undertaking the 'replacement' and 'simulation' of the organisation of market and self-regulating social mechanisms and the political organisation of society, it eventually hampers the connection between political decision-making mechanisms and the actual fragmentation of the interests of society.

Based on the main features of public policy/administrative environment it must be stated about Hungary in advance that a) due to the traditional 'from top-down' system, a general – and tendency-like – weakness is the lack of democratic control, accountability and transparency; b) due to the politicised and unstable practice of the reconciliation of interests, the quality of the decisions made in the public sector are often insufficient, as is their execution; c) public policy has balance problems; the weight and coordination of the relevant players is disproportionate and incalculable due to the extreme politicisation, and political predominance characterises the relationship of the political-administrative system and society, regardless[3]; d) the final phase of public policy is missing; public policy processes begin but they often do not get to the end. There is no evaluation phase and closure.[4] Within the scope of the latter evaluation the preliminary and subsequent (posterior) impact studies (law-reviews) are determinative, the main goal of which is grounding the decision-making situation of the legislator, in so far the analysis expands the pool of factors the consideration of which is – or should be – essential for well thought-through, grounded decision.[5]

It should also be mentioned here that in the modernization of Hungarian public administration – according to the standards of Western reform trends – the deficiencies of the balance of state and market are continuous;[6] and in the Hungarian model of public policy decision making – as mentioned before – the 'top-down' approach is dominant, in so far as the institutional mechanisms of the involvement of interest protection-integrative organisations operate only formally.[7] It is inseparable from the latter fact that the traditional features of Hungarian political culture are paternalism, intolerance and the transformation of personal relations into political ones,[8] and last, but not least the presence of corruption phenomena, which may be observed at a degree exceeding the average of the surrounding area.[9] Among the classic governmental failure phenomena – which is not traditionally Hungarian, but may definitely be observed here – the theoretical difficulties of setting and measuring public policy goals may be mentioned, as well as influence of strong interest groups, difficulties related to the size and complexity of governmental activities, and to the causal

3 Jenei 2010, 95.

4 Pesti 2001, 206.

5 In details see: *A Közigazgatás Korszerűsítésének kormánybiztosa által készített szempontok. „Részletes útmutató a hatályos jogszabályok utólagos és jogszabálytervezetek előzetes felülvizsgálatához."* [Aspects prepared by the government commissioner of the Modernization of public administration. 'Detailed guide to the subsequent review of valid laws and the preliminary review of draft laws'] 1995, 5.

6 Jenei 2010, 94.

7 Jenei 2010, 95..

8 Kulcsár 1987, 336.

9 http://www.ey.com/HU/hu/Newsroom/News-releases/global_fraud_survey_2010_pr > accessed 11 July 2013

interconnection of certain public policy problems.[10]

It is also important that in Hungary '[the] all-time present seems to be outstanding because of the strong delegitimization of the all-time past, making it seem worthless, instead of focusing on its own achievements'.[11] In this field of force even the changes of the government are of the significance of 'catastrophe history'. However, attention must be also directed to the fact that the phenomena of *value crisis* known in sociology often appears in society along such fights for legitimacy…[12]

The processes of the two decades after the Hungarian transition (1990-2010) may be exemplified with two further paradoxes:

1. The integration of the Hungarian economy to the global market happened without the whole Hungarian economy catching up.
2. The continuous weakening of the state and the lack of the material reform of the state budget together led to the result that a large, but ineffective state was established. 'The Hungarian state model is too large to be a night watch state, but too powerless to be a welfare state. This model could best be called a '*speed bump state*', because it spreads out to several fields of economy and society, but it is not there where its power and organisational skills would be most needed; regarding its intentions it protects, but in reality it holds back processes, wants to prevent bad things but eventually it may be disregarded, passed by'.[13]

Parts of public policy models and directions applied since the transition have performed rather ambiguously. Privatisation and the realisation of public procurement risks have stored up much social deficit, as has the frequent overstepping by executive power of the system of checks and balances, and the depletion of the actual and potential human resources of the public sector.[14] 'It may be concluded that the 'market turn' reduced to privatisation and outsourcing did not result in real market competition at the end of the 20th century and at the beginning of the 21st. The monopoly of public institutions was often replaced by private monopoly. The privatisation of public services resulted in the establishment of the client system and outsourcing often became the source of increased corruption. (…) This way the effectiveness of public services was not significantly increased by the use of market mechanisms. The publicly known idea, according to which in public services private enterprises are more effective than public institutions, has not been proven in any countries of the modern world.'15 The embeddedness of such ideas was strengthened by the neoclassic economic approach, according to which the state shall intervene only in the field of those activities and services – like defence, education, public and property safety, protection of the environment – where market is not efficient or does not work at all. '(…) Until very recently it was

10 Hajnal 2008, 33.

11 Szigeti 2008, 17.

12 Szigeti 2008, 17.

13 Pulay 2010, 29.

14 Horváth 2011, 92.

15 Jenei 2010, 95-96.

assumed in Hungary that regarding their significance, tasks performed by the state are behind the activities fulfilled by private enterprises in line with market instructions.'16

In the 1990s – after the transition – there was a regrettable shift: during the transition to a market economy, the state withdrew from a number of fields, but during this 'abolishment of the state' several tasks could not be exposed to the profit-oriented processes of the market. These tasks were usually incorporated to the so-called non-profit sector, which was unfortunately mixed up with the sphere of civil organisations both legally and practically: 'It often happened that in complete sectors only the signboards were repainted, shifted from state to public utility status, while the old structure, the old system of operation, state financing and the old 'expert' staff remained.'[17] This environment, however, had a weakening effect on organised civil society, upholding its – unnecessarily strong – dependant status.

The result of the 'abolishment of the state' after the transition was quite odd, because for the establishment of the rule of law, the tool system of public administration was weakened on purpose, while from the other side the need for public services provided or organised by public administration did not decrease.18 However, the 'rediscovery' of the state is not a direction to be absolutised: if the state performed all of its tasks through a central bureaucracy, it could hardly escape critical remarks about a total – and what is more important, less effective – state. Basically this is the reason why the tasks acknowledged or undertaken by the state are only partially performed by the state, in line with the principle of subsidiary, it often relies on the organisations of the economic and civil sector, as well as – with growing significance – on the assistance of church organisations.

In addition to the traditional public policy question, asking which activities belong to the catalogue of public tasks, it is also important who performs these and under what authorisation and state support. Within the scope of presenting Hungarian public administration ideas, the analysis of the staff number and number of public administration institutions of the past two decades is very important, which – often – presents these as practical competition between the aspects of efficiency and effectiveness.[19] The governmental cycle after 2010 brought about some novelties in this sense, in so far as it obviously refused some of the solutions favoured by public management: the abolition of PPP-constructions within the solutions of the performance of public services started, the obligatory private pension fund system was abolished and the sector neutral state approach came to an end, even as a sceptical approach may be observed about the outsourcing of human public services.[20]

16 Csáki 2009, 13-14.

17 Pankucsi 2012, 144.

18 Nagy Marianna 2011, 203-204.

19 Gellén 2012, 14.

20 Horváth 2011, 93.

As a summary it may be stated that in the development of society in the past twenty years the dominance of political and subjective factors may be observed, contrary to other – economic, social, legal, EU integration – factors.21 This approach may be still upheld even though an important element of the renewal process of governmental goals and methods was the transformation of the financing system of public sector, and in general it is (was) true that public administration reforms usually start(ed) due to budget/financial reasons in Hungary.

III. Traditional features of Hungarian legal system

The Hungarian legal system may be characterised as part of the 'Western law legal type', within which it may be put into the continental law family.22 However, the statements of works23 raising the issue of belonging to the so-called post-Socialist law family are also justified, in so far as operational mechanisms typical of the members of this family of law can be seen.24

It shall be repeatedly stated that legal approaches and analysis methods are dominant in the self-image of Hungarian public administration, in its practical operation and in its scientific description attempts.[25] It is a tendency which had existed earlier, but was strengthened by Socialism: the transformation of any social fact or conflict into one of legal nature – along with a relatively low level of legal consciousness of citizens, and strengthened by other factors – increases the richness in information of hierarchical system of relations, ensures the continuous reproduction of all kinds of dependencies and the upholding of fear/citizens' passivity, as well as the relativisation of the personal responsibility of the decision-maker/politician/law enforcer.

The Hungarian legal system, the broader legal system and legal thinking has always been characterised by strong German and Austrian orientation, due in part to the geographical features and certain cultural-historical features of Hungary. However, in addition to this, it is obvious that in the approaches of some of those dealing with the science of law or economics – from the beginning – other directions may also be observed, and therefore we may talk about French, in a given period Russian, and with periodical intensity Anglo-Saxon (American) influence. In Hungarian public law

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21 Szigeti 2011, 24.

22 Among the characteristics of legal systems belonging to the continental law family it may be highlighted that written law has primacy over case law. The laws regulate the relations of life in an abstract way, they form a closed system. The functions of the legislator and of the law enforcer are sharply divided. The judge does not make law, but rather precedents only make the application of law clearer. This rule prevails even if some authors correctly point out the precedential features of the uniformity decisions of the Curia, i.e. that they have the characteristics of individual sources of law (see e.g. Szalma 2011, 41.) As part of the continental legal system, the Hungarian legal system does not recognise binding precedents. However, lower courts are generally bound by the harmonised decisions of the Supreme Court/Curia ('Kúria') and of the interpretations issued by the Constitutional Court ('Alkotmánybíróság').

23 Fekete 2004

24 Fekete 2004

25 For more about this see Gajduschek 2012

thinking a certain duality was observable for a long time – until 1945 – according to which there was simultaneously a strong legal conservativism, 'living in the trance of the Corpus Iuris', and an up to date transmission of the most modern European achievements in legal theory and positive law.[26]

IV. Effects on Hungarian public administration

IV.1. Introduction

The effects on Hungarian public administration may be outlined in two basic groups. It is worth dividing the elements of the heritage of the past which have their effects today, and the new – external and internal – challenges of the present.

IV.2. Heritage of the past

IV.2.1. Heritage of the far past

Sketching the (institutional) history and continuous elements of Hungarian public administration – interpreted in the broadest sense – which has a history of more than one thousand years, exceeds the scope of this work; instead of this we wish to direct attention to some significant circumstances which play important role in the scientific and political discussions of the present era:

a) the first such 'heritage-element' is *tradition*, which is kept alive by social memory and goes beyond itemised law. Today it may be observed in deep structural continuity[27], the further effects of certain civil values, and in typical ways of thinking and attitudes. This system of values is not only observable in the latest legislative instruments, but also in the sphere beyond itemised law, in the attitude and self-image of the staff of public administration, and in the social expectations placed on public administration.

b) in the second place there is the *language* (linguistic) environment, the framework which with its highly regulated nature keeps together and from several aspects determines certain features of, and the dogma of, public administration. Language, expert terminology/dogmatic continuities, and their role in influencing scientific-professional, scientific-ethical directions are impossible to overrate.[28] It is a determinative fact that the terminology of (still) valid laws – special grammatical structures or certain words and expressions – is often the last example of the old spoken language in the form of

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26 Szabadfalvi 1999

27 Hankiss 1986, 92.

28 The National Avowal part of the document placed to the top of the hierarchy of laws states: 'We pledge to cherish and preserve our heritage: the Hungarian culture, our unique language, and the man-made and natural riches of the Carpathian Basin', and according to Article H paragraph (2) of the Fundamental Law 'Hungary shall protect the Hungarian language.'

language used today. In this case the differentiation between terminology used by law and spoken language is very important, because the special terminology of law has always shown some difference from spoken language (especially when legal culture used mostly the German or Latin language) but today there is a huge gap also between grammatical structures used in the everyday Hungarian language and in legal texts which are more than 30-40 years old.

Another important relationship in this sense is that the UNESCO 'Guidelines for Terminology Policies. Formulating and implementing terminology policy in language communities', published in 2005, urging the establishment and upkeep of national terminology policy, draws attention to the fact that if the professional terminology of a language does not develop in certain subjects or the development is very slow, it may happen eventually that in today's speedy technological development material communication cannot be performed after a while in the given language in certain professional fields (this means that functional loss of language functions may occur), and this may lead to the exclusion of unilingual communities from scientific development. This problem may be raised in relation with the direct use of English language terminology in the science of public administration – in the lack of Hungarian equivalents.[29]

c) as third factor we may mention the most obvious heritage-element in close relationship with the first two: *institutions which are permanently present in itemised law, those specific administrative solutions, which are stable and – in some cases – returning elements of Hungarian legal history*. Regarding the latter the issue of the historical constitution may be mentioned, which has become an exciting problem of 'living law' in Hungary with the approval of the Fundamental Law of Hungary.

IV.2.1.1. Some features of the concept of historical constitution

As a feature of Hungarian history, the intensive presence of interruptions has been referred to before, which has always been a problem of legal continuity in relation with public law/administrative institutions. The Fundamental Law defines itself as a basic legal instrument restoring the historical constitution of the nation. Even though this 'historical constitution' is one of the main sources of the new structure, its meaning is defined in the preamble in an abstract way.[30] Legal historical experiences show that in the upkeep and reappearing of traditional law – even nowadays – the phenomena has an important role, according to which countries which gain their independence or become autonomous somehow sooner or later will incorporate into their own 'revolutionary' program the intention to revitalise traditional law for ideological-political reasons.[31] The straightforward appearance of historical constitution in Hungary in the (new) Fundamental Law – which has become a ground for interpreting itemised law – may be evaluated as a similar development.

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29 The conference entitled 'The Renewal of the Hungarian Language and Hungarian Legal Language', organised by Lőrincz Lajos Research Group on 5th December 2013, also drew attention to the importance of that question.

30 As it is stated in the National Avowal: 'We honour the achievements of our historical Constitution and the Holy Crown, which embodies the constitutional continuity of Hungary and the unity of the nation' and 'We do not recognise the suspension of our historical Constitution that occured due to foreign occupation. We declare that no statutory limitation applies to the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships.'

31 Kulcsár 1997, 129.

Another feature of this is that the historical feature of the constitution has never meant petrification, naturally; a historical constitution changes too. 'However, this change is never a violent disruption and an introduction of a new system, but a[n organic] development, further building, the [continuous] incorporation of necessary reforms into the constitution.'32

One possible approach to the historical constitution is the one which gives – at most – symbolic significance to the notion and phenomenon of historical constitution, stating that the relevant parts33 of the National Avowal of the Fundamental Law and of Article R) paragraph (3) only wish to establish and strengthen respect for the achievements of the historical constitution: 'Such constitutional provisions are clearly self-impulsive norms, the role of which is to trigger the effect of strengthening social cohesion, which is a feature of the historical constitution'.34 This is true, because the category of historical constitution – an independent type of norms – is difficult to fit in to the traditional (valid) hierarchy of norms, primarily due to its undefined content. The representatives of this approach believe that the historical constitution is much more the catalogue of the solutions of legal (public law) culture than of the sources of laws and of individual legal (political) solutions. Among the most cited authors, András Jakab also refuses the idea that within the context of the new Fundamental Law, the historical constitution shall receive more role than being a 'concept supporting reasoning'35. Péter Paczolay is at the same opinion: 'The Hungarian historical constitution – despite all efforts made for its justification – was a constitution of rather low value, the building of which was even more destroyed in the storms of the 20th century. Now some elements of certain, rather symbolic elements of the old Hungarian constitution may be kept. However, legal continuity is practically present only in symbolic elements today, like the coat of arms and the Hymn'.36

However, in addition to the above mentioned – limited – historical constitution concept we shall also refer to a more radical concept too, which views historical constitution as a way for establishing itemised law expansion, an independent (and more and more dominant) method of legal interpretation, and common political agreements. A 'domesticated' form of this concept is an idea which would make an attempt to create an expandable 'catalogue of achievements' composed of valid individual legal institutions reappearing in positive law in order to (by taking the Fundamental Law seriously) give the interpreted notion real meaning, and to prevent the unlimited, discursive formation of domestic scientific schools which do not understand each other due to the use of diverse legal categories. This opinion identifies the institutional way of getting in touch with the past as the establishment of a careful, partial material continuity. Therefore this approach may be called the concept of partial material legal continuity. However, this approach also states that the 'renationalisation' mentioned above and the adoption of certain historical legal institutions 'may be

32 Egyed 1941, 248.

33 According to Article R) paragraph (3) 'The provisions of the Fundamental Law shall be interpreted in harmony with their goal, the National Avowal included therein, and the achievements of the historical constitution'.

34 Csink – Fröhlich 2012, 98.

35 Jakab 2011, 199.

36 Paczolay 2011

possible only in consideration of the constitutional requirements of the past period',[37] thus it considers it useful to establish some kind of a *test* in this regard.

Article 28 of the Fundamental Law refers to the obligatory (!) use of the contents of the historical constitution – not quite specified by the legislator – by the law enforcers as it states: '*In the course of the application of law, the courts shall interpret the law primarily in light of their purpose and in accordance with the Fundamental Law. When interpreting the Fundamental Law or any other law, it shall be presumed that they are reasonable and serve the public good and morally right and economic purposes.*' Based on the comparison of the cited paragraph of Article R) and of Article 28 the only possible conclusion is that during their activities based on the Fundamental Law courts shall view the achievements of the historical constitution as a starting point – in each and every case.

The outlines of the above mentioned two concepts are strengthened by the polemy which became apparent in Decision IV/2096/2012 ABH of the Constitutional Court. In the reasoning of the decision – examining the retiring age of judges – the following is stated: 'It is a minimum requirement of the consolidated interpretation of the Hungarian historical constitution to accept that the Acts of Parliament constituting the civic transformation completed in the 19th century form part of the historical constitution. These had been the Acts that had created – upon significant precedents – a solid fundament of legal institutions that served as a basis for building a modern state under the rule of law. Therefore when the Fundamental Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless. In this situation the responsibility of the Constitutional Court is exceptional, or indeed historical: in the course of examining concrete cases, it has to include in its critical horizon the relevant resources of the history of legal institutions.' In this specific case the Constitutional Court did this, using the provisions of two laws from the 19th century as independent reasons. The separate opinion of Béla Pokol, however, sharply contravenes this new practice introduced in the examined field: 'Article R) of the Fundamental Law stipulates interpretation in light of other achievements of our historical constitution as a basis of interpretation, but its present unfinished nature requires us to be careful. The present legal historical citations from these laws in the reasoning shall only be considered as partial rules of a regulation in the past. If these were considered obligatory today and normative force attributed to them against the will and laws of the present legislative majority, then we would question the concept of the changeable law. In this sense I believe that Article R) shall not be used, because it contravenes the idea of changeable modern law.'

Without analysing the relevant regulations of the new Fundamental Law it is obvious that in outlining the essence and limits of court practice 'supervising' the achievements of the historical constitution the Constitutional Court and the Curia will have great roles.

IV.2.2. The heritage of state socialism

While the cooperation of the 'Western block' after the Second World War may be described as an integration based on common interests, the integration of the Eastern Bloc showed the picture of 'a unified empire', coordination put into an absolutistic centralisation.[38] The great, comprehensive

37 Varga 2011, 4.

38 Tamás 2001, 102.

unification was realised in the region by establishing similar types of states (constitutions) and administration based on central ideas. From the aspects of operation of the system, it is very important that in the Eastern Bloc common political forums worked: the main issues were treated as political, not legal [administrative] questions. Regarding the expectations of the state from public administration, the priority of state interest prevailed against the expectations popular at present (legal security, rule of law, etc.).

Nevertheless, by losing its political identity, Hungary did not lose fully its legal and administrative identity.[39] We may talk about some kind of continuity not only in the sense that our public administration has kept some kind of European spirit also in the era of state socialism, but also that '[the] organisational activities of our public administration, the rules of management, its sample documents, moreover, file cover documents in 1989 are very much like the *K. und K.* administration of the era before the Great War.'[40] Lajos Lőrincz considers this – if we like, material, if we like, formal – continuity the conservativism of Hungarian public administration: '(…) the advantage of the cursed slowness of Hungarian public administration is shown now, in so far as forty years was not enough to live up to its latest idol: due to its recklessness it failed to break up all its connections to Europe.'[41]

In the previous subchapter it has been mentioned that in Hungary the certain 'deep structural' continuity of civil values was observable as well. Continuing this logic, there are significant reasons to believe that values, attitudes and expectations of Communism have persisted after the political transformation. This 'instinctive logic' and often unwitting motivation may not only be observed on the side of administrative clients, but – as referred to before – on the side of the administrative staff, as well.

András Tamás warns from excessive generalisations about Hungarian public administration, saying, '[The] public administration of state socialism is effective and cheap in many respects, while in reality it is absolutist and less democratic: but it would be a mistake to consider it "underdeveloped".'[42]

The further existence of the practices of state socialism and its 'recanonisation' in the process of the transition are not only present in the basic elements of public law/political/state organisational establishments, but also in the sciences of public administration. *Dogmatic* and *scientific approach* continuity mean, at the same time, the presence of highly similar notions and terminology (specific linguistic expressions) appearing at the level of legal norms, and of the continuous revival of scientifically accepted approaches, paradigms, canonised by the few players who know each other well. In addition to the advantages of this (the clear, consistent, 'politics and system-independent' use of well-adaptable notions) we shall also consider certain risks: the abolishment of some traditional 'forced mechanisms' of healthy science – done in state socialism – led to the situation that from the scientific journals of Hungarian public administration, the critical attitude and remarks

39 Tamás 2001, 102.

40 Tamás 2001, 108.

41 Lőrincz 1991, 1064.

42 Tamás 2001, 104.

otherwise present in scientific disputes are missing (e.g. reviews – now traditionally – do not contain parts driving attention to the weaknesses and deficiencies of the given essay), and – with the exception of a few examples – the possibility of categorising authors into well separated scientific schools is low. It must be added that the dogmatics of public administration law is only partially worked out; the main sign, consequence and at the same time reason for which is that works meant to be scientific are often limited to the presentation of the content of laws (…).[43] Naturally, the mentioned features only show long-term directions – which may be changed by the practice of decades – while the identification of real counter-directions and conscious counter-effects is also possible.

IV.2.2.1. The revival of the solutions of state socialism – mistake or necessity?

It is a fact that '[the] collapse of an empire-like public administration has a great sucking force which is able to bury a lot of things underneath'.[44] However, it may also be observed that as we are getting further away from the 1980s, instinctive opposition towards the earlier solutions is disappearing: partly the fading of memories, partly the instinct of returning the previous patterns, partly the need for adequate and practical answers given to necessities emerging from the different crises weaken the uniformity of rejection which gave a definite 'no' to everything which was somehow related to the power and administrative solutions of state socialism.

In some fields the solutions of the *Kádár-era* have reappeared, even though, it must be added, not with the intention to return to Kádárism [*many of them were not even evolved (created) within the era of state socialism*], but mainly because these solutions seemed to be adequate answers to the new problems, especially in those fields where the possibility of state – and material – control significantly decreased after 1989: e.g. *in the field of public education* supervision we may experience the return of some important elements of the structure which existed till 1985.[45]

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43 Jakab 2010, 98-101.

44 Tamás 2001, 104.

45 Act I of 1985 on education declared the professional independence of institutions and determined the principles of divisional and institution management supervision. Until that time, the educational institutions operated under the supervision of the minister for education and the direct instruction of the authorities performing the cultural-educational tasks of the councils' executive committee. In professional issues, the institutions did not have decision-making competence; the training and educations tasks were regulated by obligatory education plans, and the issues of operation were defined in the obligatory rules. The directors of institutions were instructable in each sense. [Article 1 of statutory rule 14 of 1962; articles 2-3 of statutory rule 24 of 1965] In 1985, the authority (the general education supervision and the authority together) was abolished (today the general opinion is that this was a mistake), and instead of supervision and professional inspection a counselling activity was established which was regionally organised and operated in the competent (county, district) institutions providing pedagogic professional service. The counsellors were requested to perform the tasks by the given schools, or the maintainer commissioned them with an evaluation-analysis task; the services of the counsellors were available for fee, of course. The counsellors did not supervise, but used their professional knowledge to help and develop the work of teachers and public education institutions. The changes of 1993 and 2003 only brought about minor modifications in the system. Public law experts were selected from the list of professionals, but their professional (inspection) activities were not supervised by anyone. The clients usually accepted their opinions, but no one qualified the professional knowledge of public education experts upon a unified criteria system. On the other hand, there were no nationally unified and public guidelines, methods, tools and protocols available for experts, either, for performing their work, therefore everyone proceeded upon his (or the client's) expectations. This is also why the establishment of a new system was

Within this scope, the disposition of certain tasks to unsuitable types of organisations or levels after the transition has been another reason. In this regard it is enough to refer to the notion of district; the name (and partly the institutional structure) abolished in 1984 returned to Hungarian public administration law in 2010 as an old-new institution.

In addition to professionally, properly reasoned conscious steps the – previously mentioned – unconscious mechanisms work too: earlier researchers believed that citizens favoured/favour the village meeting and the institution of community debate to a public hearing[46], the reason for which in the case of the village meeting is probably – in the opinion of the researchers – that the institution originates from the era of councils (Act I of 1975 on councils introduced it), and thus it has a tradition of several decades in villages, and has been built in to public knowledge as 'classic' legal institution.[47]

However, in summary it may be stated that a return to models and institutions similar to the administrative solutions of the *Kádár-era* does not primarily result from nostalgia for Socialism, but from two other factors: on the one hand it is the result of a special and continuous 'swinging',[48] on the other hand the forces of the global economic crisis lead to solutions which shift the diverse administrative institutions (institutional systems) towards the growing need for state control and centralising solutions. The notion of swinging refers to the phenomena that at the time of the change of regime the rejection of the solutions of the previous system showed constrained forms: staying away from the magnified disadvantages of the previous solutions understated by politics often buried the viable (partial) solutions, well-operating practices, but with regard to these the two decades which have passed clearly showed which elements should be considered really antidemocratic, contrary to real public interests, maybe restricting individual freedoms or which disregard of the requirements of basic transparency and effectiveness, and which are those the partial reintroduction of which – in line with the requirements of the rule of law (typically ensuring some kind of legal remedy) – may be reasonable.

In addition to the above mentioned information, the fact of the crisis resulted in the revival and spread of institutions – earlier linked to socialism – such as the conscious support of co-operative

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necessary.

From 1 January 2013 education institutions – except for kindergartens – were put under state management, as general rule. In the new system from 1 September 2013, the evaluator expert will be also evaluated after the completion of his inspection by the evaluated/inspected teacher and/or manager on a special evaluation form, which will not only be a formal gesture. The further employment, commission of the expert will depend on whether he receives at least an average 60% of the maximum score with regard to the inspections conducted within five years. In the new system there will be three separate roles. Experts will participate in the evaluation and training of teachers. Those may apply to become experts who have at least ten years of experience and are registered into the national expert register upon recommendations. They shall successfully complete the training organised for them by the Education Research Institute or the Education Office and shall update their knowledge regularly. Experts shall have up-to-date knowledge of laws, didactic and methodological novelties. The new counsellors and subject referents will support the work of teachers. There is great interest for the positions: five thousand applications arrived for the eight hundred places. Education supervisors will perform the supervisory tasks upon a nationally unified system of aspects, and the third group is composed of those participating in the qualifications, who evaluate teachers within the framework of the teacher career model. Regarding the previous practices see Szüdi 2008.

46 Hóbor – Varga 1998, 291.

47 Kiss 2013, 18-20.

48 In the field of the relationship of administrative reforms and the state Peters views the 'swinging' observed in legal literature into a broader context. [Peters 2008]

forms which existed before, the introduction and strong support of new forms of these co-operatives, also via organisation, coordination and information supply (naturally, not by the pattern of the forced formation of co-operatives which happened in two waves in the '50s and '60s).

IV.2.3. Heritage and consequences of the transition of 1989

However, the quick transition from state socialism to capitalism left several social questions unsolved which were present and documented already in the 1980s and generated new difficulties at the level of society. This way the less controlled and otherwise forced privatisation which affected all sectors, the radical change of consumer habits, the very fast growth of social differences and social tensions (e.g. the obvious fallback of the Roma people), and the presence of large and uneconomical social service systems which were left unchanged led to the result that – with some exaggeration – the institution of careless crediting became one of the main tools of individual and community (e.g. self-governmental) 'success', and the money was not reinvested into production and into the making of products. In short this may be summarised in a way that the 'price', a sort of political and financial cost of bloodless, peaceful transition was *the complete lack of breaking with the past* (with its institutions, prominent leaders, ways of thinking, 'permanent reaction attitudes' and surviving practices). A peculiar feature of this – legally only partial – transition is the survival of the Constitution[49] approved at the beginning of communism – in 1949 – which remained in force with completely new content, but under the same number and with the same structure.[50]

Another (further) problem of our region – related to our topic, and referred to previously – is that '[the] expansion of the capitalist economy to the public service sector and to sectors unilaterally secularised earlier which are affected by market deficiencies, happened after a mechanical withdrawal of the state. Often in an emptied, unprepared environment, which led to the formation of new market failures it seems that the political sphere sometimes underestimated the related realistic risks (e.g. the creation of new type monopolies, clientelism), while the public considered it more severe than in reality.' [51]

After 1990 the existence of the concept of '3,200 small republics' in the self-governmental sector reflected on the principle which abstains from establishing clear and direct inferior-superior relationships, and *as a counter-effect of the previous system(s)* it tried to define the new 'system' be

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49 Hereinafter the word 'constitution' refers to the Constitution of the Republic of Hungary (Act XX of 1949) modified with Act XXXI of 1989 which remained in force till 31 December 2011, while the expression ’fundamental law’ refers to the Fundamental Law of Hungary which entered into force on 1 January 2012.

50 The constitution which was announced on 23 October 1989 to mark the anniversary of the revolution of 1956 was intended to be temporary (as indicated in the preamble). The establishment of the new constitution was the task of the Parliament formed as result of the free elections. However, the temporary constitution remained permanent and the new fundamental law was not created Instead, 'continuous constitution-making' was typical. During the twenty years which passed between 1990 and 2010 the Parliament modified the Constitution 25 times. Among these modifications there are some which are minor and less significant, as well as ones which may be considered partial revision.

51 Horváth 2012, 13.

as *emphasizing* the various *freedoms*. This approach caused more practical problems than necessary after 1990, both in the relationships of state administration organisations and local governments, as well as in the internal affairs of local governments (e.g. in the relationships of the representative body, the mayor and the clerk), and in the provision of public services.

V. External effects and patterns

V.1. Introduction

As referred to previously, in general the political decision makers and the participating administrative organisations in the preparation phase of decision-making rely less and less often on the results of – partly foreign language – scientific research, often using these selectively and subsequently in order to legitimize their own decisions. Therefore there is no tight, direct and *in each case* provable relationship and *unconditional* synchrony between the administrative solutions existing in different countries and used in Hungary and the related internal and external scientific views. Nevertheless topics, models emphasized by domestic legal literature are more or less present in specific domestic solutions – this means that these constructions have definite explanatory force in the examination of domestic phenomena.

To the abovementioned factors we shall add that the results of most directions (e.g. *New Public Management*) – which today have clear contents as scientific concepts – appeared in Hungary among the rules of law usually with a certain delay, and in a fragmented way (while the description and criticism of the contents of certain directions were available in works analysing the operation of public administration).[52] The ideas, which consider the appearance of a particular (legal) institution and practice as a consequence of other similar practices which were known elsewhere may be described as classic economic mistakes, more precisely as *post hoc, ergo propter hoc* type false conclusions.[53] Regarding these contexts scientific evidences are often missing (documentations and reasoning of proposals; the existence of statements appearing in parliamentary debates or at least at conferences, showing consideration of different patterns, etc.), and if their effect may be observed in some regards, public policy programs start, but the itemised law norms aiming at their introduction are usually executed in reality as program norms or are applied – in line with the previous practice – upon the old patterns.

Since 1989, the approach of focusing on searching foreign patterns and, more and more, on the review of old (pre-1945) solutions has been dominant in the search for paths and directions to be followed in Hungary.[54] At the same time (existing at the same time) external patterns mean ideal typical models transmitted by 'international economic sciences', the suggested solutions for general (global) problems and specific (individual) administrative solutions, and newly created institutions (see e.g. the Tobin tax phenomena and its consequences in Hungary).

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52 E.g. Horváth 2002

53 Samuelson – Nordhaus 1990, 640.

54 Tamás 2001, 102.

The political and political economy approach dominant from the 1980s supposed that it was possible to balance the lack of internal capital necessary for capital market economy with the 'import' of foreign investments. In addition to central legislation supporting this idea the 'economic policy' of local governments was intended to serve this for example with the forced privatisation of local public services, or with the occasional use of the property of local governments for business purposes.[55] The politicians believed to have found – partially – the proper organisational and operational frameworks and contents of the *administration facilitating economic transition* in the institutionalisation of 'new public management' (NPM) and aimed – with some exaggeration – at establishing 'company-like', not authority-oriented public administration.[56]

Nevertheless, even though *indirectly* the goals of developing an NPM-type public administration may be observed in what are referred to as government decisions for modernisation of public administration [Government decision 1026/1992. (V. 12.), Government decision 1100/1996. (X. 2.), Government decision 1052/1999. (V. 21.), Government decision 1113/2003. (XII. 11.), Government decision 1044/2005. (V. 11.), Government decision 1052/2005. (V. 23.)], formulating the public administration reform ideas (development goals), in these documents – in the opinion of Tamás Horváth M. – there is no (adequate) terminology in line with which in any cycle the managerial principle was (consistently) undertaken, let alone a public policy strategy built on this (which, with some delay, could have resembled the new public management). Moreover, the 'borrowed' notions and institutions often became sources of difficulties (e.g. even though the obligatory impact study of laws was introduced, the regulations were not enforced in reality).[57]

In certain (sub)chapters of this work, we analyse separately the administrative reforms of 2010 and of the subsequent years, their content, as possible answers which may be given to the crisis. Among these reform steps, we especially focus on the Magyary Zoltán Public Administration Development Programme published in the summer of 2011. In Hungarian legal literature, several analyses have been published which focus on the question whether the tools of the Magyary Programme are provenly suitable for establishing a state which is able to withstand the circumstances of the crisis. Within this the preconditions of the efficiency increasing measures of the Magyary Programme, the possibilities of coordination, flexibility and stabilisation which have become more valuable during the crisis, as well as their possible hampering factors.[58] The separate analysis of this instrument is reasonable also because it has become one of the frameworks, continuously renewed and 'updated' foundations of the ideas of the Hungarian government after 2010 about the *good state*, which goes beyond public administration, by making principles such as adding national aspects into public administration, among others, equal with the requirement of effectiveness, which had been favoured before.[59]

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55 Kökényesi 2012, 250-251.

56 Kökényesi 2012, 251.

57 Horváth 2011, 92.

58 Gellén 2012, 12.

59 *Magyary Zoltán Közigazgatás-fejlesztési Program* [Magyary Zoltán Public Administration Development Programme] 2012, 5.

V.2. Possibilities and effects of 'external' models

When we try to list external directions affecting Hungarian public administration – which may be considered a scientific concept – we must obviously take into account the public administration reform ideas of influential international organisations, and the administrative practices and ideas of the European Union, as an integration composed of national states.[60]

In relation with international organisations, it must be highlighted that their different funding programs – in the past two-three decades – tried to influence the administrative reforms [SIGMA (OECD) program] of recipient countries (among them Hungary), sometimes even by competing with each other. 'From the view of the role of the state, these organisations were usually interested in the transfer of tasks from the central state to the market, social players or local governments',[61] and they usually promoted the models formulating these ideas.

However, especially with regard to the *good governance* theories (and models) it is unavoidable to state that this approach does (did) not primarily react on problems originating from Western-European development, but the artificial set of requirements made for developing/catching up countries, the main goal of which (was) to increase the support-receiving and utilisation capacity of aided countries in a way that the 'proper' regulation methods of the relationship of the state and society were determined, urging the need to introduce proper market mechanisms and models compatible with those of Western democracies.[62] Nevertheless, the notion *good governance* still appears in the description attempts of the economic development features of Western (and post-Socialist) countries.63

One of the most delicate issues regarding the models of good governance is whether its notion shall be interpreted from the side of the result or the process; in the former case, governance which is the most effective in the distribution of public goods and the enforcement of public good is good governance, which imposes the question how to handle effective, but – in line with our present expectations – not democratic models, state formations (e.g. Singapore).[64] This dilemma is extremely relevant today – at the time of expansion of neo-Weberian concepts strengthened by the crises – especially in relation with the division of public and private interests.

The most often mentioned element of the notion of good governance is the program of handling democratic deficits appearing at different stages; the main goal of the creation of the document 'On good governance' published by the European Commission in 2001 to transform the EU's

60 These ideas often appear in detail under the explanation of the expression good administration, formulating recommendations for the existence of different types of organisations and the principles of proper office operation and behaviour at the same time. [see e.g. Váczi 2011, 9-22.]

61 Gellén 2012, 13.

62 Hosszú 2010, 53.

63 Bevir 2009, 95.

64 Hosszú 2010, 53.

governmental system in order to bring the EU's institutional system closer to citizens through the coherence of common and community policies.[65]

Even though in the primary sources of EU law the provisions which directly regulate the state organisation of member states or structures of their public administration, are rare, it is undoubted that it has 'continuous, broad and increasing effect on it: implicitly through *acquis communautaire*, community law, and *expressis verbis* through the EU law, more precisely via Article 4 paragraph (3) of the EU Treaty',[66] in so far as the latter one formulates the obligation to enforce community law (a need to provide results), which cannot be interpreted in other way than the state public administration shall be reliable, transparent and democratic.[67]

Another important issue is that the European Union tried to react on growing international economic processes – among others – with the possibility of establishing a (partially) supranational 'EU state', and some states have believed that the reorganisation of the destroyed balance of economy and state power may be possible through the creation of a 'strong nation state'. This process, which was significantly strengthened by the years around 2000 was completed by the financial crisis which started in 2008.[68]

The negative effects of globalisation happening in the world economy, financial crises and Western public power responses given to them tend to indicate that the promotion of *strict* models as the only possible solutions is less and less possible. With some generalisation it may be stated that the OECD and the World Bank have not pushed forward any specific models since approximately 2000, thus the 'context matters' approach is becoming stronger. This is true even if the (economic) policy of Hungary, called – partly officially – 'unorthodox' made several international organisations react harshly to it after 2010.[69]

One of the most important questions of the past decades was how much the narratives of the more or less unified Transatlantic legal and political trends – sometimes embodied in specific administrative models – may be spread to the other two-thirds of the world. This idea has become especially relevant within expectations about the handling of terrorism with the tools of law, because – seemingly theoretical, and herein analysed – aspects, such as the maintenance of the operability of law, 'the suppression of its negotiative features', and eventually the need for 'contentual justification' has put classic, liberal legal concepts and expectations about their further

65 Torma 2011, 325.

66 Article 4 parapraph (4) of the TEU:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

67 Torma 2011, 317.

68 Kökényesi 2012, 251.

69 About this see for example Rixer 2012, 81-82.

expansion under extreme pressure since the beginning of the 2000s.[70] Moreover, the post-2008 crises further emphasise the sustainable and necessary nature of these needs, although we cannot make definite statements about the existence and future of unified Transatlantic narrative(s)…

Nevertheless – in summary – it may be stated that while due to the different – more and more intensive – crises occurring around the world the establishment and strengthening of catastrophe-prevention (legal) policies may be observed, and at the same time there is a greater need than ever for balance, negotiations and sustainable solutions. During severe crises discussion, partnership and de facto cooperation between determinative players are evaluated – which, obviously, has consequences in positive law.[71]

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70 Bainbridge 2006, 170.

71 Miszlivetz 2011, 133.

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