

Ein systembedingter Nachteil ist, dass Patente, die der Zuständigkeit des Einheitlichen Patentgerichts unterliegen, einem größeren Risiko einer zentralen Vernichtung ausgesetzt sind, wohingegen es im Falle von nationalen Patenten zu abweichenden gerichtlichen Entscheidungen in verschiedenen Mitgliedstaaten kommen kann. Nichtigkeitsklagen und negative Feststellungsklagen werden zudem bei der Zentralkammer - also in den meisten Fällen im Ausland - geführt werden müssen, und zwar in der Verfahrenssprache des Patents, die häufig nicht Deutsch ist. Für die Attraktivität des Einheitlichen Patentgerichts wird es schließlich auch auf die Höhe der Kosten eines Patentverletzungsprozesses ankommen.

Über die Höhe der Gerichtsgebühren ist noch nicht entschieden. Höher zu Buche schlagen dürften die Anwaltskosten und sonstigen Aufwendungen, insbesondere wenn ein Rechtsstreit bei der Zentralkammer geführt werden muss - beispielsweise am Gerichtsstand London. Insgesamt ist davon auszugehen, dass die Prozesskosten beim Einheitlichen Patentgericht höher liegen als bei einem nationalen Gericht - allerdings weniger hoch, als wenn in mehreren Mitgliedstaaten geklagt werden müsste. Dass die Kosten für Patentschutz in Europa deutlich gesenkt werden können und dass das neue Patentsystem für die viel beschworenen kleinen und mittelständischen Unternehmen attraktiv ist, kann bezweifelt werden.

Ulrich Karpen\*

## Legislation Plan to Strengthen Local Finance

*Die Auswirkungen der Finanzkrise seit 2008 und die chronische Unterfinanzierung der öffentlichen Haushalte werden für die Bürger sichtbarer. Straßen, Brücken, Schulen, Hochschulen werden nicht ordentlich unterhalten, die Sozialhaushalte explodieren. Die Finanzierungsengpässe zeigen sich in Bundes-, Landes- und Kommunalhaushalten. Auf der Gemeindeebene sind sie aber besonders fatal. Denn die Bürger bewerten „gute“ oder eben „schlechte“ Politik vor allem aus der Sicht ihrer täglichen Umwelt, und das ist die Gemeinde- oder Stadtverwaltung. Sie messen Politik an den Maßstäben Leistungsfähigkeit, Partizipation, Vertrauen und finanzielle, nachhaltige Stabilität. Das gilt nicht nur für unser Land, sondern auch für andere Länder, auch auf anderen Kontinenten. Deshalb wird weltweit überlegt, wie man die verfassungs- und einfach-rechtlichen Regeln so verbessern kann, dass die „untere Ebene“, eben die kommunale, finanziell gestärkt wird. Zu diesen Überlegungen hat der Verfasser auf dem diesjährigen Kongress des Internationalen Städte- und Gemeindetages in Seoul/Südkorea beigetragen.*

### I. Introduction: Standards of Governance and Finances

Governments and administration on central and local levels today are put through difficult trials, namely – but not only – as far as their financial situations are concerned: sufficient revenues are endangered, demands – and hence expenditures – are increasing, treasuries are

empty. Infrastructure and energy costs are exploding, research and technology require input from private and public sources and expenses of up to 50 % of the national budget are (in developed countries) devoted to social programs, including education, health care, unemployment and beneficiary activities. Budgetary deficits and public debt are the logical consequences! This is true for all levels of government in a state, but local communities are the level where citizens are primarily aware of financial shortages and unsolved (or badly solved) problems. It is crucial, therefore, that local governments are provided with sufficient financial resources, while continuing to strive for rational, effective and efficient administration and management. Only by better organization, procedures, financial resources and excellent budgeting can local administration adjust to old and new needs and fulfil the ever-growing expectations of self-confident citizens.

Following the principles of a modern rule-of-law and social democracy, on the one hand, and the constitutional guarantee of local autonomy on the other, it is vital for the legislator to enable the communities to fulfil their tasks properly, by providing the frame for self-government and fair distribution of means. Of course, legislation has to start from basic conditions which are laid by the cultural and historical patterns of any given nation. On the other hand, the legislator, government and administration have to implement laws introducing new, rational and effective standards of governance which have been developed by international organizations or are the results of comparative studies. No legislator today will draft acts without thorough comparative re-

\* Prof. Dr. iur., University of Hamburg Law School, International Association of Legislation

search. The comparative perspective widens the perspective on topics and possible problems of legislation. One of the well-known aphorisms of the psychiatrist Scott Peck suggests, "that we should share our similarities and celebrate our differences"<sup>1</sup>! There is no need to re-invent the wheel all over again! If we understand why and how others apply common standards differently from us, we are encouraged to compare, to assess and to learn, and we can either improve our methods – or retain our own style of governance the way it is. The national legislator should take into account worldwide standards of governance and finance which are developed by OECD<sup>2</sup> and are widely applied in the European Union.

## II. How Citizens Judge their Government

Citizens mainly judge their governments by four criteria. Firstly, it is policy performance – the ability to improve the social welfare of the citizens and to deliver positive outcomes for the people. The second criterion is the democratic performance of governance, the degree to which government decision-making processes include democratic participation. (This includes access to information and "open government".) The third criterion is trust in all parts of government, which are supposed to work for the collective interest in a medium- and long term-perspective, to ensure that future generations do not suffer from reduced and unfairly-balanced chances. A vital element of trust is integrity, which refers to the application of values, principles and norms of good government in the daily operation of the public sector. And trust requires a successful combat of corruption. The fourth and final criterion is financial stability and sustainability. The financial demands of the various levels and units of the state are potentially unlimited. It is probably the first responsibility of governance to be a "good family father", who carefully and economically manages the funds which are entrusted to him by the taxpayers.

All in all, modern governance requires a reasonable distribution of responsibilities following the subsidiarity principle, a balance of tasks and expenses (connexity-principle), solidarity between local governments, rationality of public actions (efficacy, effectiveness and efficiency), transparency for and participation of citizens, and a reliable budget system which allows for reliable and safe planning. Let's have a closer look at how these principles can be implemented.

Local governments dispose of two sets of instruments. The first is the so-called New Public Management (NPM), a method to improve personal management by devolving administrative responsibilities to lower institutional lev-

els and individuals, while providing them with financial flexibility. Another essential element is a well-educated and adequately-paid staff. Reasonable salaries, in particular, foster integrity and are an important tool in combatting corruption. E-administration has been introduced widely. A second set of instruments is Regulatory Impact Assessment (RIA). It requires a careful analysis of the costs, benefits and other consequences of any decision, be it on ordinances or (local) taxes.

## III. Local Autonomy and the State

Good governance requires a clear division of responsibilities, tasks and powers between the local and central levels. It is the mandate of the legislature to provide for that. The regulating principle is the subsidiarity principle. This means, in general, governance bottom-up, priority for the smaller units, priority for lower levels, local administration. Consequently only affairs, which are too big, too costly and inappropriate for the autonomous units, belong to the state level. These are issues which require the same standards nation-wide and which need to maintain uniformity of implementation, notwithstanding local uniqueness and affairs concerning mutual information, coordination, cooperation and even integration. From the perspective of subsidiarity, the latter public tasks are exceptions to the general rule, that government/administration is primarily local. This is the feeling of every citizen: I live in Volksdorf, a suburb of Hamburg with about 60.000 inhabitants, and I am also a citizen of Hamburg (2,3 Mio. inhabitants). Above this, I am a citizen of the Federal Republic of Germany, and I am a European citizen. My activities, feelings and participation follow this line of thinking, not top-down.

The scope of activities of local government consists of autonomous affairs within their jurisdiction and affairs entrusted to them by national Acts and subordinate statutes. The latter is the area of mandated and commissioned affairs. Good government, including economical, effective and efficient financing, applies instruments of NPM. NPM entails management by objectives, out-put oriented, no longer budget-input oriented. Quality of governance is measured against the performance of an administrative unit.

This covers

- personal management, assessing the administrator no longer according to years of service and position on the career-ladder, but according to his/her ability to adjust to new tasks, guiding quality and/or specialization;
- flexible budgets to adapt to strengths and weaknesses of a given unit;
- reduction of supervision in detail to foster self-induced creative work on each level of administration;

<sup>1</sup> See W. Voermans, Styles of Legislation and their effects, (2010) 32 Statute Law Review 38.

<sup>2</sup> Government at a Glance 2009, Paris 2009.

- the use of e-government tools as well as the dissemination of computers and other information-processing devices.

As mentioned above, namely personal management urgently requires good education, further and recurring education, training on the job and integrity. Corruption is one of the worst diseases in administrations worldwide.

RIA is a most successful instrument to control goal-oriented, effective and budget-saving governance. It is a key policy tool to provide decision-makers with detailed information about the potential effects (and side-effects) of regulatory measures on the economy, environment, social arrangements and citizens in general. Furthermore, it assesses their effects on administrative bodies and their staff. RIA looks at all potential consequences of regulation, including costs and benefits, as well as sustainability. It enables, as a preceding RIA (RIA ex ante), the evaluation of intended new regulations, and, as a consecutive RIA (RIA ex post), to assess the capacity of government agencies to implement and enforce regulations and the capacity of affected parties to comply. The latter allows for an assessment of whether regulations are functioning as expected.

#### IV. Stability and Sustainability of Local Finances

Financing is a means of government which is always too scarce in view of public needs and activities, and a certain degree of unjust distribution within the society: “private wealth, public poverty”. To properly administer their tasks, local communities need a solid, reliable and sustainable basis of financial resources. This is a constitutional right of local government versus the state. The income in the form of local taxes, fees, general assignments as well as ear-marked subsidies from the state must cover the expenses for activities, as commissioned by the state as well as a minimum of autonomous activities, which allow for local political decisions. Financing needs to follow the principle of connexity of tasks and financing expenditures for executing them. Connexity requires a balanced distribution of income of public budgets to state and local authorities according to their tasks. The principle of solidarity, in addition, requires a fair balance and distribution of funds between local communities. What is needed, is a minimum of vertical and horizontal equalization of financial resources. The financial basis of local government must be sound, which means it must be self-sufficient and follow a balanced ratio of receipts and expenses. Funding must follow the cause principle: “He, who orders the task, must pay the bill.” The “power of the big purse” (i.e. the state one) may be tempting for local units to tap, but certainly may also be an encroachment into the constitutionally anchored distribution of tasks.

The allocation of taxing competences as well as revenue-distribution to state and local units is an entirely national issue and usually regulated upon in the constitution. Very often state and local units share, to a given percentage, the income of property and consumption taxes. And even more often, the revenue of land and trade taxes goes to the locals (according to a local rate of assessment which allows for self-actualization between local governments). There is no constitutional guarantee for percentages of distribution and special local taxes. Generally speaking, there are three categories of local sources of finance: vertical equalization of finance between state and municipalities, local revenues, and a horizontal equalization between municipalities.

First of all, there are general allocations from the state to the municipalities, that are not bound to financing special tasks. This is the financial basis for commissioned and autonomous activities. Then there is a compensation from the state purse for additional expenses of these municipalities, for instance for administering social benefits, as regulated on by the state, or special funds for emergency expenditures.

Secondly, there is an income from local sources. It consists of local taxes, user fees, contributions, bonds, borrowing, charges and subsidies, for instance for doing clerical work for the state. Usual revenues from expenditures and local consumption belong to the municipalities as well. They are raised on local rates of assessment.

Thirdly, there are various investments for equalizing social funds in order to approximate the economic and social living conditions for all citizens. Some (larger) municipalities have greater demands because they have more tasks to fulfil in constructing and maintaining infrastructure, culture, schooling, kindergarten a.s.o. Horizontal distribution on local levels is mandated by solidarity. In realizing this principle, general allocations of state funds are taking into account not only the mere number of local citizens, but their economic and social conditions as well. In many countries we find a local collection for associations of municipalities, like counties. It is, however, not permitted to overcharge individual local units and to level down their strength for competition.

For the further development of financial contributions some amendments seem to be required:

- Local governments should be included when attempting to set a brake for public debt. The margin of public debt should be about 0,35% of the GNP (like in Germany) or at least not higher than 0,5% (as according to the European Fiscal Pact).
- The allocation of resources according to activities must be sharpened.

- The connexity principle of tasks and financing, in particular, should be implemented with social-state interferences of the state into local affairs. In many cases state acts, which regulate on social services of locals, are missing financial consequences. Autonomous activities of municipalities degenerate to administration by commission without the required financial resources being allocated.
- Similar developments can be observed with benefits regimes, which, in general, are regulated by state as far as into the details of procedures.

## V. The Local Budget

The constitutional guarantee of local government includes the autonomy of the local budget. It is part of the responsibility of municipalities, and their creative freedom, to design their political profile within the financial possibilities of the state. The local budget is not so much – as the state budget is – an instrument of steering economic policy, but definitely the basis of planning local activities. The budget is local policy in numbers. General budgetary principles like clarity, accuracy, completeness, publicity, effectiveness and efficiency, rule-of-law legality, and democratic participation apply to local budgets as well. Since local budgets are part of the national finances, local authorities have to obey the brake of debt and the principles of economic equilibrium of the national economy: stability of level of prices, high employment rate, balance of import and export and adequate economic growth. Local budgets' contribution may be limited, but it has an impact.

The council enjoys the budgetary jurisdiction of the municipalities. It imposes and collects local taxes and revenues; it deliberates and confirms the budget; it approves the settlement of accounts. In the budgetarian cycle, the head of the local government implements and administers the budget. Modern budgets are “open budgets”, i.e. the administration tries to explain the budget, which is based on highly abstract comprehensive and complex data, in a manner for laymen to understand. Open budget gives information in plain language and visualises the numbers and activities. This happens online or in events where citizens are present. More and more, “citizens’ budgets” are based on participation of the people as well. This new process may include three steps of participation. It starts with early and good information on the budget-draft. Secondly, citizens bring in their views, be it as “councillors” or even “co-decision-makers”. They may bring in suggestions for new infrastructure, like road-building, public places, cultural activities or even start discussions for new activities of council and local government. Thirdly, they may require information on implementation of this participation: what has been done, what has been rejected.

NPM has developed instruments for transparent budgets. First of all, it is the product-budget. It is an enrichment of the budget in numbers by information on output – and resources-consuming details, which allows for better planning and steering of the budget. The product-budget is divided into products and performances in detail. The budget is indicating, which expenditures are provided for how many students in institutions of education or higher learning, which expenses for how many police-stations, a.s.o. The “products” of the budget are summarized in groups of products, sectors of activities. Then the budget lists the results of budget investments. It is obvious, that this plan of products mirrors the organization of administration.

As a new tool, the product-budget offers a “double-entry bookkeeping”, which enables to present the financial status, the status of debts and the balance of the community (budget of the “Hamburg-Trust” 10 billion a year). NPM starts from decentralized and individual responsibility for running the budget. This instrument adds to traditional budgets more flexibility up to global budgets on the level of sectors of administration. And finally RIA provides transparent input-outcome-data for decision-makers and citizens.

## VI. And Finally: Good Legislation for Local Finances

This analysis of local finance and budget may be summarized in three remarks:

1. In particular in “hard times” the principles of “bottom-up governance”, connexity of tasks and finance, solidarity of units of local government, rationality of governance, transparency and participation of the citizens are at stake.
2. It is the mandate of the legislator to set the frame for autonomous, vital and creative local governments and to empower them – including the provision of financial resources – to master the problems of their citizens.
3. The elements and requirements of good legislation to strengthen municipalities and local finance are convincing and clear. But solutions for the best sake of communities cannot be found by pure rationality. Dynamic changes and historical developments have to be taken into account.

As John Dickinson said on 13 August 1787 in the Constitutional Assembly of the United States of America in Philadelphia: “The life of the law has not been logic: it has been experience.”<sup>3</sup>

<sup>3</sup> Century of Law-Making for a New Nation: U.S. Congressional Documents and Debates, 1774-1875, Farrand’s Records, vol. 2 (1991), 278.