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LIBERALIZATION OF AUTHORITY: ADMINISTRATIVE TASKS' PRIVATIZATION IN THEORY AND COMPARATIVELY

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Abstract

Besides the traditional forms of liberalization of public services and authority, public administration reforms also involve the privatization of (state) administrative tasks. In some countries, including Slovenia, private holders perform public tasks in such a way based on “public authority”. The main reason for granting public authority is increased efficiency of administrative tasks, which private entities achieve through liberalization of political influence and rationalization of work. However, due protection of public interest has to be maintained by strategic control of public authority. The article addresses by theoretical analysis aspects of administrative tasks' privatization based and analyzed on the example of multiple OECD and the EU countries, especially Slovenia, in the context of good governance concept in order to offer guidelines for similar reforms in other countries.

Key words: liberalization; privatization; administrative tasks; public authority; Slovenia

INTRODUCTION

The reform of public administration – perceived as a social subsystem that needs to constantly adjust to the environment in which (and because of which) it operates – has been implemented worldwide as a project or process of modernization since the late 1980s, reaching Slovenia in the mid-1990s and the rest of the post-socialist countries along with their respective independence processes (Dunn et al. 2006, Kovač 2013). Therefore, each stage of the reform is characterized by a specific trend, the most recent – observed both in the states members of the Organization for Economic Co-operation and Development (hereinafter: OECD) as well as in Slovenia and other countries – being liberalization and privatization (more in Bouckaert and Pollitt 2004, Goldfinch et al. 2009, Goltz 2014). These two terms should not be understood as mere capital privatization or simple deregulation of the state's functions. Quite the opposite, they represent a complex functional and organizational restructuring process aimed at creating a regulatory and efficient state. Parallel to the primarily economic understanding of the role of the state and administration in the society, there are also other, more politology and sociology related trends, such as the doctrine of good governance (see its forms in general and in Eastern Europe in Kovač and Gajduschek 2015). It seems, however, that the theory and practice of good governance only prosper in the countries that have successfully completed the previous round of privatization.

The article deals with the concept and forms of privatization of public and, specifically, authoritative administrative tasks intended to improve apolitical work efficiency, which is the primary or predominant reason for the transfer of such tasks to private holders (Bevir 2011, 237). Namely, authoritative and non-authoritative actions cannot be fully separated, neither organizationally nor functionally, as the functions of the state administration at the same time involve the exercise of state powers as well as of non-authoritative professional activity. But despite such dual character one cannot speak about two different roles of the administration, but rather about two aspects of the same role. The non/authoritativeness of an individual body or function can only be assessed based on predominance. In such regard, the main emphasis is given to the question whether the declared objective of the transfer is being pursued, like managerial autonomy and competence (cf. Pollitt in Ferlie 2007, 377), as well as to the lack of *ex-post* evaluations regarding the accomplishment of the objective of liberalization of political influence and better efficiency.

PRIVATIZATION OF ADMINISTRATIVE TASKS GLOBALLY

General on privatization of administrative tasks

Since the late 1980s, the purpose of any reform of the public sector worldwide – and particularly in OECD countries – has been liberalization, which in the strict sense of the word means transformation of administrative tasks into open-market activities, whereas in the broad sense it is understood as: (normative) deregulation, (predominantly organizational) decentralization and (predominantly economic) privatization.

Similarly, as regards forms of privatization in terms of organization, property, substantive law and finance, Schuppert (2000, 354–370) defines ‘public’ much broader as any form of cooperation between state and private. Such views are rather confusing, despite their integration in terms of functionality, i.e. at the level of powers, but connected nevertheless as given on the basis of the complexity within the phenomenon of ‘hollowing out the functions of the state’ (e.g. Rus 2001, 25). It does not mean that such functions are no longer exercised but rather that they are delegated to other parties, whereby the state aims at keeping its administration lean by minimizing the tasks to be performed in such context. The functions and tasks specified by law should in fact provide for an optimal organizational structure and rational use of public finance. According to international financial organizations (see particularly the World Bank 2015), only those organizations which provide public goods and services and contribute to achieving the main goals can act as public sector organizations, while other tasks should be delegated to parties outside the public sector or at least outside the public administration since they are able to use public funds on the market more rationally. This brings value for money, which is achieved either by suspending certain tasks or activities, by divestiture, by privatization, or by delegation to other government levels.

However, privatization is also not suitable for all public services since some are exclusive and others are not, and privatization is only possible in the first case. Moreover, some areas have specific burdens, such as a large number of free riders in social assistance or undefined service quality in the privatization of health care, as well as monopoly (infrastructure), dependence on the economies of scale, accumulation of negative externalities, etc. (more Dollery in Goldfinch 2009, 18). Also characteristic is the transition

from deregulation to privatization, particularly in the former Eastern European countries which – (too) eager to make up for the decades-long suppression of the natural development of capitalism – went straight from socialism into capitalism, whereas the majority of developed industrial societies opted for post-capitalism. Thus, if administration is responsible for decision-making and implementation, at least the control function is not located therein but is separated and designed as a parallel to the administrative centre. In such regard, the efficiency factor of the agencies is evident. This may be explained through the definition of efficiency in the performance of public tasks. In such case, efficiency is perceived as the fulfillment of one or more of the following requirements: lower costs or higher quality of service, or higher quality of organization as a result of better management (Goldfinch et al. 2009, 177).

Privatization involves the transfer of functions and parallel resources outside the government sphere, or the use of work procedures based on the model applied by private parties (see for UK or Denmark in Goldfinch et al. 2009, 141, 287). In sum, we can distinguish several groups or forms of privatization, starting with real privatization which concerns the manner and the extent of the provision of services while control is still exercised by the state/municipality, and similar capital or property privatization of the state or municipal property, followed by privatization of financial resources involving private financing of public tasks.

More interesting for the topic dealt with herein is the privatization of functions, particularly the privatization of the provision of public services at the local level while the design of public policies and control, and thus accountability, remains within the competence of the public sphere. The same applies to the privatization of processes and procedures, referring mainly to the enterprization of operations. Finally, there is the formal or status privatization involving, in addition to the transfer of tasks to the private sphere, the takeover of a private form of operation where, however, the influence of the state is preserved (e.g. transformation of a state body or legal entity under public law into a company where the government exercises founding rights or a part thereof). Hence, we can summarize privatization by its forms and impacts as follows:

- economic or traditional privatization, i.e. sale of public resources;
- liberalization or corporatization of individual parts of administration by transfer thereof into market regulation,
- enterprization of public administration by transfer of managerial methods from private into public sector under the new public management (cf. Ferlie et al. 2007);
- granting of concessions or public authority (cf. Rus 2001, 116).

Thus, in defining privatization, authors modestly differentiate between capital privatization and privatization of public services. Given the actual forms of privatization and from a legal perspective, however, mention should also be made of the privatization of administrative tasks, which needs to be distinguished from the privatization of public services. The forms of ‘real’ privatization of administrative tasks (i.e. where the status is also evident) include three types of privatization. First, capital privatization or deregulation, with the same impact on the nature of the administrative task; second, privatization of public services, mainly by means of concessions or capital investments; and third, privatization of administrative (mainly authoritative) tasks by means of public authority.

A distinction between the latter two is necessary since according to the law in various countries the task of the state administration is not to perform public services but only to provide them. In accordance with the Slovenian constitution, public authority may only be granted for the tasks defined as 'tasks of the state administration'; the performance of public services is therefore not subject to public authority but rather to concessions. Several differences exist between the privatization of public services and the privatization of administrative tasks, the main being that the latter involves much more restrictiveness of the state which is reluctant to give up its power, as demonstrated by practical experience in individual countries albeit public authority and concessions might also intertwine when the concession holder also decides on the rights and duties of the users.

Analysis of administrative tasks' privatization in selected countries

Privatization in its broadest sense – both in relation to public services and administrative tasks – is characteristic of all countries that in the last two decades of the 20th century were affected by the wave of the new public management, but is more accentuated in the Anglo-Saxon world. The British privatization comprised above all the introduction of concession contracts between the state and private organizations, the development of the internal market, and the individualization of employment contracts. It was based on two approaches. First, at the macro level by deregulation or liberalization (equalizing the market status of public and private organizations), and second, at the micro level by denationalization of state enterprises (British Telecom, Gas, Rail, etc.).

Globalization accelerated the spread of ideas about decentralization and privatization, and changed the needs, the expectations, and the influence of citizens (cf. Rusch 2013). This is suggested particularly within a notion of distributed public governance (see OECD 2002, Goldfinch et al. 2009, 224, 263, 280). It needs to be underlined that the OECD definition of agencies, in addition to organizations outside the state administration, also comprises government i.e. state bodies. The most typical and most often quoted example of government agencies with a certain degree of autonomy yet still under the authority and administration of the state are the British and Dutch executive agencies. The latter are deemed to be a preliminary step toward the introduction of competitiveness and thus improvement of quality. In the Netherlands there is a range of agencies the number of which has grown significantly under the process of privatization since mid-1990s as a result of the partial independence of parts of the ministries, additionally there are several independent administrative bodies, both following either lower costs or better management. The UK presents various forms of decentralization: executive agencies, non-departmental public bodies, nationalized public corporations, etc. Since higher productivity was a key indicator, the quality thereof was often disregarded in labor intense activities of the public sector, mainly education and health care. Given the high growth and the resulting lack of control and coordination, the British system is strongly criticized (OECD 2002, 216). On the contrary, privatization in Germany seems to be characterized by corporatism of public institutes (transfer from budget financing to market regulation), while in Sweden it is marked by decentralization of powers to public agencies.

In some countries, the term privatization is used to denote various approaches, such as the decentralization of social regulation, exclusion of individual units of administration from the government sector, expansion of the market regulation of public

services, moving financing and control from input to output values, withdrawal of state bodies from decision-making on the account of the establishment and participation of the users of public services, etc. But regardless of the difference between Anglo-Saxon, German, Francophone, Scandinavian and other countries, the common denominator in transferring administrative tasks outside the government sector is the changed role of the state, moving from interventionism and coercion to service-orientation with emphasis on efficiency and democratization. The final finding is therefore, that every country has a system of its own which cannot be compared to others. Nevertheless, the processes of privatization and decentralization spread from public services to (authoritative) administrative tasks, while occasionally the (exaggerated) decentralization of the past decades consolidates in the form of further centralization.

The EU law, on the other hand, only regulates the delegation of powers to EU institutions rather than the Member States. According to Hartley (2003, 118–124), delegation of powers takes place at various levels, depending on the parties involved, whereby privatization of administrative tasks only means the delegation of powers from the Commission to outside bodies. In the event of delegation to outside bodies, both the powers and the procedural rules must be highly specified in order to avoid abuse. Considering their powers, these bodies mainly perform technical and consulting tasks rather than regulatory or executive tasks, playing their role particularly by means of financial measures (Schwarze 1992, 1208). It is also possible to delegate regulatory functions, i.e. to adopt regulations, but only in specific cases and not in general. The leading case on delegation of powers to outside bodies is still *Meroni vs. Commission* (Case 9-10/56). The Court ruling paid particular attention to the most basic question – does the Commission have any right to delegate at all since the powers have been granted to it based on confidence. The Court ruled that the possibility of delegation is very limited and has to meet the following criteria: (1) clearly defined executive powers, and (2) the exercise of powers, must be subject to strict rules based on objective criteria.

The international comparison of selected countries and the EU indicates a high degree of relatedness among the reasons for delegating tasks outside the government sector or state administration. The most frequent reason is the improvement of efficiency and effectiveness of operations, including specialization of functions and activities which allows better focus on clients' needs. Another factor decisively contributing to better expertise is the independence of the government and of the ruling political option, reflected in the professional autonomy of independent decision-making, financial autonomy, etc. On the other hand, it is not recommended to establish agencies for areas requiring a high degree of interdepartmental or inter-institutional coordination. There are also so called hidden reasons, such as offering positions for retired politicians, possible drifting public funds through parallel channels, avoiding strict rules of public law, etc. So - is there any such thing as harmonized privatization of the European administrative environment? Based on the examined data, such argument cannot be uncritically advocated. Moreover, particularly in the countries where decentralization and privatization are most evident (UK, Sweden, Netherlands) after several decades of development of the agencies there is an explicit trend of centralization or increased coordination and establishment of political accountability.

Administrative tasks' privatization in Slovenia

In the legal system of Slovenia, public authority is mainly an instrument of administrative deconcentration whereby the state – pursuant to Article 121 of the Constitution and a special law – vests certain duties of the state administration in a diverse group of parties, broadly classified into public law bodies, private organizations, and individuals. The Constitution reads: *'Self-governing communities, enterprises, other organizations and individuals may be vested by law with public authority to perform certain duties of the state administration'*. According to the Constitution, public authority may only be granted by law, meaning that the administration does not delegate tasks by itself but such are delegated by the National Assembly. In terms of their status, these are public law organizations as well as ever more frequently private organizations and individuals engaged in heterogeneous fields of work (e.g. land surveyors, local development agencies or social work centers, the national Pension and Disability Insurance Institute, authorized vehicle inspection offices, public agencies for the regulation of securities or energy markets, notaries, ski run inspectors, private driving schools and security services, the Red Cross, the Chamber of Commerce and Industry, the Medical Chamber, student organizations, etc., more in Kovač 2006).

Slovenia thus pursues various objectives, among which better efficiency in performing administrative tasks, fulfillment of the need for self-regulation and/or the necessity to isolate the performance of tasks from day-to-day politics (see Kovač 2013). Public authority in Slovenia always means that the tasks of the state administration are delegated to organizations and individuals outside the organizational structure of the state administration, which is only possible if the relevant law provides for such possibility and determines the status form of the delegated party (either a specific public law body or several possible private parties). Owing to public interest, public authority cannot be granted to everyone and in every case, but is 'entrusted' or 'conferred'. Therefore, the reason for conferring public authority must be grounded and legitimate, and is formally expressed in the constitutional requirement whereby the tasks of the state administration may only be delegated on the basis of law. Since the state has monopoly over executing authority, authoritative tasks may be entrusted by means of public authority only when absolutely necessary, either on grounds of independence or of the need for self-regulation by establishing a public law body to exercise such tasks entirely, or for implementing the basic tasks of the authorized party. In the latter case, the authoritative task subject to public authority must be so close to the basic function of the bearer of public authority that it cannot be exercised without public authority. This is the principle of connectedness of public authority. In case of non-authoritative tasks, such close connection is theoretically not necessary – the usual and at the same time indispensable rationale for the delegation of tasks is that the delegated organization performs them more efficiently or economically for both the administration as a whole as well as for the users of public services.

A constitutive mark of public authority in the sense of privatization of administrative tasks is the delegation of authoritative tasks to private organizations or individuals, normally for several years following a selection procedure and with a subsequently defined contractual relation (similarly as in the case of concessions, this involves a mixed public and private law relation between the state and the bearer of public authority). The delegation of tasks of the state administration implies in case of broader privatization (1) general legal acts whereby the bearer of public authority defines the

relations to the parties are issued less frequently and (2) most often, authoritative and unilateral decisions based on the law are taken in individual cases under administrative procedure concerning the rights and duties of individuals (cf. Goltz 2014). Yet the relation to the clients should be ensured primarily by the relevant ministries (cf. Bevret al. 2011, 245, 265, 339), in the most extreme case by delegating tasks back to the state.

Despite the fact that it is regulated by law, public authority is characterized by a dynamic dimension which defines it a social phenomenon. Public authority evolved in the Slovenian social context from the Yugoslav tradition of self-governing activity to the contemporary definition of public authority as an instrument of modern reform of public administration, with the purpose – as mentioned above – of reducing public spending as a share of GDP or ensuring better access of the parties. The social-political aspect is of course present already at the time of granting public authority, taking into account the priorities of the ruling coalition (such as rationalization, political neutrality, reducing public administration, specialization of functions, better expertise of implementation, etc.). Such aspect is topical from the moment the law granting public authority is drawn up at the ministry to its passing into legislative procedure in parliament. Particularly over the last three decades, the number of areas concerned and of individual bearers of public authority has been rising both in Slovenia and in the EU and abroad, mainly owing to greater extent and complexity of tasks of the state administration (Craig 2005, 270, Bevir et al. 2011, 237, 330). Under the influence of the EU deregulation and liberalization trends, privatization expanded to several new areas (e.g. utility services) yet brought about also possibilities of abuse and withdrawal of authority (more in Kovač 2006, 329, example of private security services). In fact, by delegating administrative tasks to non-state bodies, the state cannot give up its accountability for carrying out the delegated duties. The state or, more precisely, the ministries must still monitor the state of affairs in the areas they cover. The main two phases of the administrative process which ministries must carry out in relation to the bearers of public authority are the above mentioned policy-making in their scope of work and the monitoring and control of implementation of individual policies. The relations between the state and its government and the bearers of public authority are thus stigmatized both politically and professionally.

DRIVING FORCES, CONCERNS AND EVALUATION GROUNDS FOR THE ADMINISTRATIVE TASKS' PRIVATIZATION WORLDWIDE

The objective of the privatization of public tasks, i.e. both public services and administrative tasks, is not the restructuring of public and private sectors as such, but above all efficient spending, better use of existing and potential resources, more freedom and variety of choice for the clients, and greater independence of the individual from the state, which all come with market regulation (Talbot in Ferlie 2007, 491). Nevertheless, the proclaimed objectives often remain unfulfilled since privatization also allows abuse – from technocracy to corruption, monopoly, discrimination, etc.

Furthermore, any form of privatization can jeopardize public interest (see Osborne and Plastrik 2000, 96–98, Deleon in Ferlie 2007, 103). General or social interest means meeting the needs of the society which are identified as individual needs of any member of the society and which the majority considers to be most rationally provided by the state. Yet only the general interest that is legalized based on a democratic procedure can be

considered public interest. The protection of public interest normally prevails over the protection of private interests, and the right of the individual is recognized based on submission to public interest despite not clearly defined public interest in each case separately, but provided by an administrative act to be subject to judicial control (Schwarze 1992, 1464). Given their nature, state bodies are bound by interests and subordinated to certain public interests, which should also be characteristic of bodies performing public tasks. Therefore, rather than the mere economic goals of privatization, in the efforts toward greater efficiency and effectiveness increasing emphasis and attention is given to non-economic goals, such as democratization, legal certainty, equality and solidarity (see Rusch 2013, Kovač and Gajduschek 2015, 12). Likewise, it would be wrong if certain government representatives used privatization to avoid the rules of public law or pursue illegitimate goals, such as avoiding coordination with the trade unions (cf. Cohen and Eimicke in Bevir 2011, 239). In such context, the state and the society are not responsible to eliminate conflicts *a priori*, but rather to systematically, intensively and overall provide for such a procedural confrontation of possible and necessary collisions of interests as to minimize social conflicts. Decision-making in administrative matters thus implies not only gathering information and issuing decisions, but primarily involves value-based work (cf. Magiera et al. 2008). The state is still left with accountability as well as with the actual implementation of the steering or strategic function – which it cannot delegate or privatize. Therefore, despite privatization (delegation from public to private parties), administrative tasks must be performed in public interest, which should be ensured mainly by means of:

- a procedure for granting public authority with access to a large number of candidates and selection of the best candidate based on the objectives and criteria of delegation of administrative tasks;
- standards for the exercise of public authority in relation to the parties;
- control of line ministries and possible withdraw of public authority (Kovač 2006).

To conclude, an overview of privatization worldwide shows that its impacts are less clear than the very ideology of privatization presenting private property as the only efficient form (cf. Cohen and Eimicke in Bevir 2011, 240). Studies reveal that even in the USA with a long tradition of enterprization the provision of public services only within the public sector is about 35-95% more expensive than the provision of services based on contracts, not because of the incapacity of the public sector or the type of property, but because of its monopolistic self-sufficiency in the absence of competition (Osborne and Gaebler 1994, 81–84). Here, it is important to distinguish whether privatization affects a segment with an increasing market or a segment with a decreasing market – in the first case, there is more hope for a successful privatization than in the latter. Thus, the administrative process is gaining legitimacy, since politics and administrative expertise as well as democracy with a participative strategic component in the sense of contemporary theories of participative governance (cf. Deleon in Ferlie 2007, 110; Haque and Schuppert in Bevir 2011, 286, 330).

However, efficiency was first assessed only from the viewpoint of the state (regulator) while today – with the expansion of the circle of legitimate interests – efficiency is assessed also from the viewpoint of the regulated (citizens and other persons). The main problem – the extent of which is hard or impossible to asses – is the evaluation of costs or

burdens deriving from the need for better coordination of the entire system, as noted by the very British experiences (Pollitt 2004). In such context, we speak of trade-off between authoritative efficiency and fair results; (cf. Craig 2005, 271). There is no simple answer to whether priority should be given to the efficiency of powers or of the entire system, but the above problem and the extent thereof certainly need to be considered in the (*ex ante* and *ex post*) evaluation of efficiency of delegating tasks outside the administration. Relevant in such respect is the degree of connectedness between public authority and the organization's main activity, as well as the degree of autonomy of public authority since greater autonomy implies better efficiency of implementation and of the administrative system as such, as well as the promotion of the bearer's central activity. Furthermore, comparative analyses must be considered since it is very likely that a certain task will be implemented more efficiently – individually or as the system as a whole – if evidence thereof can be found in another country.

CONCLUSION

In classic theory, privatization of administrative tasks is aiming to economic efficiency rather than political liberalization. As indicated above, such concept is nowadays considered too narrow since there are also other reasons for conferring public authority besides the efficient implementation of administrative tasks, such as the need for political independence and greater focus on the users of public services. Thus, the main goal of privatization is not (or should not be) the enterprization of public administration but greater quality of service achieved through professionalization and user participation. An overview of the functional and organizational structure of public administration in selected countries indicates a trend of privatization as well as a parallel trend of decentralization and centralization, depending on the nature of the tasks and particularly in relation to the users. Delegation of tasks should not be regarded as fashion suggested by others, the administration's dependence on external parties (monopolies) and the outflow of knowledge and expertise need to be prevented, professionalization should not lead to commercialization, financial impacts of delegation should be assessed, guarantees for user access and the assumption of responsibility of providers upon delegation should be determined. Instead of enterprization and decentralization only, a better solution seems to be a contract-based and responsible privatization. In addition, a very important lesson learned from past experience is that privatization should not drastically reduce the already achieved socialization and principle of equal access to administrative services.

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