4th TED

9-11 February, Vienna, Austria, 2011

Law and Public Management Revisited

Call for papers

The question of the linking of a legal and a managerial rational seems to be a challenge, especially in periods of rapid reform. Law with PA was much discussed during the times of CEE early transition; it is generally one of the key issues of Continental European PA. It is also a central theme in Western European countries, especially the continental ones, where the State of Law, the Rechtsstaat, or the Napoleonic states, are embedding public sector reforms. But a tension between lawyers, managers and policymakers remains.

The discipline of public administration was first developed in the 19th century by lawyers, especially in continental European countries — and political scientists —in Continental Europe, the UK and the USA. Max Weber was a sociologist but also a lawyer, and only in the second half of the 20th century, following Herbert Simon in particular, sociology and organization theory switched the emphasis on the study of public administration, with an ever-growing tendency to talk about *public management* rather than *public administration*. Consequently, disputes between disciplines followed, especially in American universities, over the use of these two expressions.

Somehow, public administrators and lawyers have gone separate ways. 30 years ago, lawyers were a natural species in public administration. They invented the field of public administration and developed the first questions and problems for research of a multidisciplinary character. To date, the lawyers seem to be lost in the technicalities of law and rights and duties of businesses (and to a lesser extent) citizens in their relations to different public administration bodies and organizations and office holders and civil servants. The administration of law seems to have grown far away from practices in public administration, where organization, project management, targeting, efficiency, and political accountabilities seem to have taken the place of law and justice. From their different perspectives however, courts and judges continue to assign responsibilities and accountabilities to administrative bodies and individual citizens and organizations. From managerial and organization development perspectives legal accountabilities seem to be an alien phenomenon. Law is considered an instrument for policy development and not primarily as a normative grid within which and through which the administration may act.

In Europe, in different countries there appear to be different positions for lawyers and managers in public administration. In some countries, the rule of law prevails as a quite recently reclaimed domain of civil society against the state. Policymakers and managers complain that law's inflexibility, procedures and rights prohibit the development of an effective and efficient public administration. In other countries, policymakers have sought for ways to make proceedings for decision making more flexible and to circumvent established rights. This also has found expression in the position of lawyers and managers in Public Administration. Being lawyer by training still is a prerequisite for senior positions in some countries where managers have obtained such top positions in other countries. Therefore, the debates on policymaking and policy implementation in public administration are dominated by lawyers in some countries, but by managers in other countries. Both positions and backgrounds have led to different perspectives on public administration, but a complaint still is that lawyers in public administration tend to maintain a different language and see obstacles instead of solutions for new policy developments and therefore are considered more of a hindrance than as a support. On the other hand, lawyers are inclined to apply legal reasoning and complain about a lack of respect of policymakers and managers for rights of persons and business while developing new policies. While there are certain trends regarding the entire structure of regulations affecting the patterns of lawyers' and public administrators' working behaviors as well: detailed imperative norms tend to replace

traditional dispositive civil law logic that provide framework for due behaviors. Thus law as "art boni et aequi" appears to give way to a sort of mechanical law engineering. Additionally, the quantity of regulations raises new questions since legislative bodies tend to act like law mass-producers. Is this how it should be? Do mass-modifications add to the regulatory purposes? Does the enormous quantity of law require new approaches of dealing with it? Do we need a "New Law Management"? In short, there appears to be a struggle between different languages, perceptions and aims in public administration. The question for this conference is, how a dialogue and cooperation can take shape, without compromising the rights related to the rule of law but also without giving in too much on efficiency and effectiveness in public administration.

The fourth TED therefore will not only be a dialogue between Eastern and Western Europe, but also between lawyers and policymakers & managers.

There are several topics to address for this debate:

1. Theories and Practice of Law versus Management:

Do they have converging or diverging values/logics/etc, are they compatible/consonant or incompatible/dissonant in theory and in practice (e.g. due process versus time management; equal treatment versus citizen orientation; position pay versus performance pay)? What is necessary to make law management proof, or public management legally proof? How did the whole public sector reform movement affect the legal frameworks? How can or should legal science contribute to public administration development?

The dilemma of the new democracies: what should be pursued first: NPM or a strong rule of law or the third way (neo-weberian approach)? Is it possible to pursue NPM and rule of law at the same time? Should NPM be regarded as a (hard) tool for upgrading democratic making (Ferlie, Lynn jr., Pollitt, 2007) or rather a tool mostly for stimulating the effective and efficient ways of democratic making in general, and only later on for modernization and adaptation purposes (Dunn, Staronova, Pushkarev, 2006)? Is it necessary to follow all so called democratization turning points (Lane, 1995: 1) transformation; 2) consolidation; 3) modernization; and 4) adaptation)one by one or is it possible to speed up the development? In western democracies, the resurgence of public law against the dominance of public management is a clear sign of a more balanced approach to reform in public administration. The debates target now the relation between NPM and the legal protection of citizens, as the rule of law is powerful here. In the new democracies, on the other hand, where the rule of law is not so much developed, the debates are still centered on the basic question how to develop a functioning system of public administration by taking into consideration the experience of western states. Should it be done through soft law and other techniques shared by public managers or should a rule of law system be developed first and then fall back on such relaxed approach? The practical experiences from CEE countries illustrate both the risks of soft law mechanisms and those of over-regulation.

2. Law versus Public Management, the reform agenda:

Legality vs. discretion: the role of courts and the pressure of public managers. From a public law perspective, discretion is a residual concept, meaning, "what is left out of judicial control" (Caranta, 2008). Judicial systems compete in having different approaches towards courts' powers of controlling discretion, with two principles in the background: rule of law and separation of powers. Discretion is one of the concepts that divide and in the same time bring together public managers and lawyers. Is it possible and desirable to develop public administration practices based on principles of proper administration instead of base public administration entirely on legal rules? Does such flexibility bring rights at risk?

Deregulation: Related to this issue is the question if and how deregulation may be a critical factor for public management? Are policy making and implementation of policies

in PA inevitably legally based and designed? Is the legal framework the real source of administrative overload? Maybe (quasi) markets may be a solution sometimes, but the financial crises shows that this maybe not the right solution to all problems. Civil law versus public law? Does Public Management need private sector law rather than public sector law (administrative law) to have successful reforms? What is the impact of a public sector that increasingly uses private sector law to deliver public services?

Transparency and public administration. What are the effects of the enhanced transparency and of enhanced media exposure of all actors in public administration? How should public administration react from legal and organization & management perspectives?

Speeding up administrative proceedings for effectiveness: who remains to defend good administration? Proceedings against state agencies take too much time. Not the courts, but democratically elected bodies should take important decisions. The assumption of this theme is that pressure from public managers (intensified by the economic crisis) is leading to speed-up administrative proceedings, which can be sometimes detrimental to good administration and human rights. Recent legislative developments, like the Crisis and Recovery Act in the Netherlands, Federal Emission Control Act in Germany, Planning Act in UK, Expropriation Act in Romania, etc, are signs of the fact that the imperative to speed up administrative procedures takes preeminence over the protection of citizens' rights and interests. In this field, the tensions between public managers and lawyers are surfacing at an alarming rate, as in states with a strong rule of law, the legal protection of citizens law is considered a hindrance to economic development (or at least to efforts towards surpassing the economic crisis). Related questions: What is especially the role of administrative law, in the respect of administrative procedure and dispute presenting a constitutional protection against misuse of an authority on one side and basic business process on the other side, needed to be rationalized and modernized?

The issue of "Better regulation" raises questions worth discussing. There are a series of initiatives concerning the theme like the EU Better Regulation Initiative, Bertelsmann, EIPA and others. The question is: Are these really helpful? Is it the right approach to further bureaucratize legislative processes? And at the end: how do we measure progress? Are the applied methods correct? Regulatory impact assessment is really the Excalibur for better law? If so than why do states tend to avoid it in practice?

3. Institutional issues:

The institutional issues are interrelated with issues of PA reform.

A first issue concerns the organization of conflict resolution between citizens, organizations and social interests and public administration. What works best: Formal administrative conflict resolution by administrative courts with a Council of State as a highest court, or informal mechanisms of conflict resolution? (mediation, ombudsman).

Another issue concerns the functioning of independent courts of audits versus audit offices integrated in the public service organizations. Formal checks and balances or reporting under full political accountability?

What is the influence of the historical heritage (like the one of Austrian state from 19th and 20th centuries which has strongly influenced especially some CEE countries) to incorporate "*Juristenmonopol*" in their regulation framework?

A new development in the relation between public law and public management is the proliferation of bottom-up approaches in solving administrative disputes, which endeavor to compete with the traditional top-down models. One of these is mediation, extended more and more from private law to public law. Only that in public sector settings, the mediation receives new valences and faces new challenges, as the parties

of the mediation do not necessarily pursue the same goals. The question here is whether public authorities can conclude an agreement of mediation with a private party when the public interest is in stake. Can public authorities "negotiate" the public interest, taking into account that presumably they act on it all the time? It would be very interesting to see the public managers' take on this issue, as mediation techniques are more in line with the philosophy of public management than the hard core of judicial review techniques used traditionally in administrative disputes. It provides for effectiveness and speeds up the resolve of conflicts, on the other hand bringing tensions as to the protection of third parties' interests and the public interest. Another question is whether courts can contribute to the enforcement of such techniques, by subjecting parties to alternative dispute resolution methods.

Host Organisation : Chancellerie, Vienna, Austria. Vienna, with its very specific Legal tradition – both in PA scholarship and PA practice – and the Austrian managerial experience as well, would be very suited to host a TED on this topic.

Target Group (recruiting and selection will be done by EGPA and by NISPAcee)**:**

- top experts - responsibles from research institutes and some practitioners,
- young PhD students from EGPA and NISPAcee.

Format of the meetings:

- There's going to be a limited number of participants (app. 30).
- There is a focus on dialogue and discussions. Therefore, there are no formal presentations of papers; there are some keynotes to start a debate and participants contribute with the elements of their research. There is a selection of people based on research conducted and paper proposals. A selection of these papers will be published.
- In principle, there is a series of topics to be covered with co-chairs for the debates after a key note per topic.

Organizing committee:

- Austria: Mag. Michael Kallinger, Head of department III/7 at the Federal Chancellery (BKA- Chancellery) and Prof. Dr. Renate Meyer (Head of the Institute for Public Management at WU)
- EGPA (related to the PSG Law and PA): Prof. Dr. Philip Langbroek (Utrecht University) and Dr. Dacian C. Dragos (Babes Bolyai University Cluj Napoca)
- NISPAcee: Dr. Polona Kovač (University of Ljubljana, Faculty of Administration) and Marton Gallen (István Széchenyi University)

References:

Bouckaert, G., Pollitt, C. (2004): *Public Management Reform: A Comparative Analysis,* Oxford, Oxford University Press.

Caranta, R. (ed) (2008): *Interest representation in administrative proceedings*, Jovene, Milano.

Caranta R. (2008), "On discretion", in S. Prechal, B. van Roermund (eds): *The Coherence of EU Law*, UOP, p.187-215.

Dragos, D, Neamtu, B, *"Europeanisation of Administrative Law in Romania: Current Developments in Jurisprudence and Legislation",* "Review of European Administrative Law", no. 1/2009, Europa Law Publishing

Dragos D, Neamtu, B, *"Reforming local public administration in Romania: trends and obstacles",* "International Review of Administrative Sciences", no. 40, December 2007.

Dror, Y, (1999): "*Transparency and openness of quality democracy"*, in M. Kelly (editor) *Openness and transparency in Governance: challenges and opportunities*, NISPAcee forum, Maastricht.
Dunn, N. W., Staronova, K., Pushkarev, S. (eds.) (2006): *Implementation - The missing link in public administration reform in Central and Eastern Europe*, Bratislava, NISPAcee.
Fabri, Marco and Philip Langbroek (eds)*, The Challenge of Change for Judicial Systems, developing a Public Administration Perspective*, a collection , IOS Press Amsterdam/ Washington DC. EGPA yearbook 2000.
Feldman, D., 'The Limits of Law: Can Laws Regulate Public Administration?', in Guy Peters and Jon Pierre (eds) (2003) *Handbook of Public Administration* (London: Sage), pp. 279–91.
Ferlie, E., Lynn, L. E. Jr., Pollitt, C. (eds.) (2007): *The Oxford Handbook of Public Management,* Oxford, Oxford University Press.
Fluckiger, A (2002): "Le projet de la loi fédérale sur la transparence: transparence de l'administration ou des citoyens?", in Tanquerel T. and Bellanger F (editors), *L'administration transparente,* Helbing&Lichtenhahn: Geneve.
Goodin, R. (1986) 'Welfare, Rights and Discretion', Oxford Journal of Legal Studies 6: 232.
Van Gunsteren H.R. (1998): *A theory of citizenship*, Westview Press, Colorado.
Harlow, C. and Rawlings R. (2009): *Law and Administration,* 3rd edition, CUP.
Harlow C. (2005): "Law and public administration: convergence and symbiosis". *International Review of Administrative Sciences*. Vol 71(2):279–294.
Hawkins, K. (1991) 'The Use of Legal Discretion: Perspectives from Law and Social Science', in K. Hawkins (ed.) *The Uses of Discretion*. Oxford: Clarendon.
Hood, C. (1991) 'A Public Management for All Seasons', *Public Administration* 69(Spring); 3–19.
Hudson B. (2003): *Justice in the risk society*, Sage, London.
Jansen, Oswald and Philip Langbroek (editors and research directors) *Defence Rights during Administrative Investigations, a comparative study into defence rights during administrative investigations against EU fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland*. Intersentia, Antwerp 2007.
Langbroek, Philip and Peter Rijpkema, Demands of proper administrative conduct: a research project into the Ombudsprudence of the Dutch National ombudsman, Utrecht Law Review, December 2006
Langbroek, Philip, Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence**,** International Journal for Court Administration, April 2010.
Lane, J. E. (1995): *The Public Sector,* London, Thousand Oaks, New Delhi, Sage Publications.
Page, E. (2001) *Governing by Numbers: Delegated Legislation and Everyday Policymaking*. Oxford: Hart.
Prechal, S. and De Leeuw, M (2007): "Dimensions of Transparency: The Building Blocks for a New Legal Principle?" *Review of European Administrative Law*, vol. 0, nr. 1, pp: 51-61.
Stewart, R. (1975) 'The Reformation of American Administrative Law', *Harvard Law Review* 88:1667.
Thompson, B, Dragos, D, Neamtu, B (eds), *Transylvanian Review of Administrative Sciences,* special issue EGPA Studygroup "Law and Public Administration", 2009, www.rtsa.ro
United Nations (2008): Public *Enterprises: Unresolved Challenges and New Opportunities*. New York.
Ziller J. (2005): "Public law: a tool for modern management, not an impediment to reform". *International Review of Administrative Sciences* 71(2): 267–277.