Introduction to the Anglo-Saxon Model of Municipal Lawmaking

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Kivételes megtiszteltetés és büszkeség számomra, hogy Torma András Professzor Úr 65. születésnapja alkalmából megjelenő ünnepi kiadványban publikálhatok. A megtiszteltetés és a büszkeség mellett nagy örömömre is szolgál ez a "szereplés", ugyanis – remélem nem cáfolja az Ünnepelt – évtizedes baráti kötelék is összeköt minket, a 2000-es évek elejére visszanyuló szakmai kapcsolat mellett. Torma András engem minden alkalommal, minden találkozásunkkor, beszélgetésünkkor, oktatói előmenetelem valamennyi főbb állomásánál, már pályám legelején is bátorított, támogatott, hasznos tanácsokkal látott el, és lát el a mai napig. Elmondhatom, hogy önzetlen segítségére mindig számíthattam. Több bölcs megállapítására azóta is támaszkodom. Azt is ki kell emelnem, hogy vele (és tanszéki csapatával) mindig könnyű volt továbbvinni a miskolci és a pécsi közigazgatási műhelyek kollaborációjának lassan félévszázados hagyományát. Ennek ez együttműködésnek Torma András mindig az egyik motorja volt. Torma Professzor Úr sokat foglalkozott helyi önkormányzatokkal, tanulmányomban – angol nyelven – a helyi jogalkotás angolszász modelljének főbb jellegzetességeit törekszem bemutatni. Dolgozatom tisztelgés az ember és a jogtudós előtt. Kedves András, mindent köszönök, az Isten éltessen!

1. Introduction

The lawmaking by the local self-governments is one of the most characteristic of their activities. We can say, that municipal lawmaking is a universal part of the local self-government's operation. This function is recognized by the Charta of Local Self Governments also. But, when we analized the scope of the lawmaking of the local self-governments in several countries, we will find as many differences, as similarities. This paper's goal is to present an overview on the lawmaking of local self-governments of the Anglo-Saxon type (United Kingdom, USA, Canada), to point

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out those elements in the represented countries, which elements can highlight the main objects, legal meaning and background of local self-government's lawmaking.

2. United Kingdom

In the *United Kingdom* local government legislation is present in fewer areas than in continental European countries in general, since numerous public services are provided not by local governments, but other state/public administration organizations. The district councils and London borough councils are authorized by Act to issue byelaws, but these are subject to confirmation by the competent Secretary of State. Pursuant to the Local Government Act 1972 Section 235, local legislation may take place "for the good rule and government … and for the prevention and suppression of nuisances".

Notice of the intention to apply for confirmation is to be given in minimum one local newspaper, and for at least one month before application for confirmation is made, a copy of the byelaws is to be deposited at the offices of the authority so that it is open to public inspection during the official opening hours without payment and so that any person may receive a copy of the byelaws. Any violation of the above rules of procedure will result in the invalidity and ineffectiveness of the byelaw.[1]

Compared to continental systems of local government, byelaws regulate peripheral matters: prohibition of climbing upon bridges or skateboarding; playing next to or near highways; interference with life-saving equipment or public signs etc. In addition to this, local governments are delegated legislative powers also under other Acts, although in less significant matters (e.g. local public hygiene, the order of libraries).

At the beginning of the 2000s numerous local governments in England and Wales made byelaws to regulate the requirements relating to the licensing of sexual entertainment venues, after the Policing and Crime Act 2009 had made repeated references to the importance of local circumstances with regard to licensing.[2]English (district) councils have similar regulatory powers to municipalities in their scope of responsibilities: maintenance of pavements, designating parking areas, rules relating to cemeteries and parks, tourism etc.

Apart from this, byelaws play a role in establishing the internal organization of local authorities, since the local council defines the range of committees by byelaw.[3] However, in every case the issue of byelaws is subject to ministerial confirmation, and central review concerns not only legality, but also aspects of content.[4]

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[1] David FELDMAN.: Error of Law and Flawed Administrative Acts, *Cambridge Law Journal*, 2014/2., 279.

[2] Phil HUBBARD – Rachela COLOSI: Sex, Crime and the City: Municipal Law and the Regulation of Sexual Entertainment. *Social & Legal Studies*, 22 (2013) 1., 68.

[3] SÜKÖSD Ferenc: Az angol önkormányzatiságról, rámutatva a mechanikus összehasonlító módszer buktatóira, in: Petrétei József (ed.): *Emlékkönyv Bihari Ottó egyetemi tanár születésének 80. évfordulójára*, PTE ÁJK, Pécs, 2001, 386.

[4] IMRE Miklós – KOI Gyula: *Az Egyesült Királyság közigazgatása*. in: Lőrincz Lajos (ed.): *Közigazgatás az Európai Unió tagállamaiban,* Budapest, Unió, 2003, 79.

3. United States of America

In the *United States* local governments are established by the states. The federal Constitution does not deal with municipalities; therefore, the legislatures of the individual states have full authority with regard to the organization and functions of local governments. This concept is supported by the so-called Dillon principle of 1868, according to which state legislature "breathes life" into city bodies, which cannot exist without this.

The essence of the Dillon rule is that an undebatable and general starting point of American law is that local governments may exercise exclusively certain competences and no more: these competences include, firstly, those that are expressly defined by law, secondly, those that are necessarily understood as included in the competences guaranteed expressly, and thirdly, those competences that are indispensable for the implementation of the expressed objectives of the local government. In comparison, it is considerably more difficult to define Home Rule, so it has no unified definition in the USA. The essence of the concept is the ability of the local government to proceed concerning all matters that are not classified as being of state relevance by federal law, or a constitutional provision, an initiative or referendum of a state.[5]

Local governments may exercise their powers within the frames set by the state legislature, with the exception of so-called home-rule cities. Some local governments are granted a charter (city charter), which constitutes the constitution of the settlement effectively. In numerous states, larger cities have a wider autonomy as a result of the authorization contained in the so-called home-rule charter. Consequently, the essence of the rule is practically the opposite of the Dillon doctrine, namely, that the municipality may do anything that does not conflict with a state law or its own constitution."[6]

As for the Dillon rule, it is followed by 39 states, but for example the Constitution of the State of Wyoming guarantees to municipalities home rule competence: they can determine their local affairs, local administration, they may make generally binding rules, and they may prescribe the extent of indebtedness of a local government. However, the counties do not have such legislative powers in this state. Not even the municipalities can regulate such matters that are exhaustively covered by state regulation or concerning which uniform application is required. As a matter of course, a local regulation cannot be in conflict with state law; otherwise the local regulation is invalid.[7]

Municipal and county governments may be found in each state, but there are significant differences in their organization and functions. From the aspect of responsibilities and competences – generalizing and simplifying to a great extent –

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[5] Jesse J. RICHARDSON: Local Regulation of Hydraulic Fracturing, *West Virginia Law Review*, 117 (2014) 2., 609.

[6] JÓZSA Zoltán: *A helyi és területi önkormányzatok szervezeti struktúrái és funkciói* SZTE ÁJK, Szeged, 1997. available at: http://acta.bibl.u-szeged.hu/37757/1/juridpol_052_fasc_005.pdf (March 6, 2020).

[7] Alan ROMERO: Local Regulation of Mineral Development in Wyoming, *Wyoming Law Review*, 10 (2010) 2., 465.

one may say that smaller municipalities (towns, townships) typically carry out tasks relating to the operation of the settlement (e.g. maintenance of local public roads), while the counties provide community services for the local population.[8] In the United States of America local legislation is afforded a marginal role, American legal theory has – traditionally – treated the role of local governments "unkindly" anyway. The public law ideology regarded as the prevailing one looked upon local governments as the extended arms of state authorities. This concept has become a lot more refined by today, but it is a dominant starting point even today.[9] It is typical that local government legislation is governed by both (state) legislation and case law.

For instance, the Local Government Code of the State of Texas provides that "a municipality may adopt an ordinance, rule, or police regulation that is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality and is necessary or proper for carrying out a power granted by law to the municipality".[10] Superior court practice in Texas regards settlements with over 5000 inhabitants (so-called "home-rule cities") as having "full powers of self-government" from the aspect of legislation as well.[11] It is a condition for the exercise of local public authority that in its basic statute, in the so-called charter, the "home rule city" should provide for the responsibilities and competences including its legislative competences, through which the city (a settlement of over 5000 inhabitants) wishes to achieve its objectives. As a matter of fact, these provisions are rather similar in the different cities of Texas: a municipality shall adopt regulations provided that they are necessary for the governance, interests, well-being, public order of the city or the well-being, health, morals, convenience or safety of its inhabitants.[12]

On the other hand, all types of settlements in Texas may regulate so-called "nuisances", the content of which has been formulated by judicial practice: e.g. the drilling of an oil well in general is not considered a "nuisance", but in the given settlement there may be such individual circumstances (e.g. if drilling were to take place in an inhabited area) due to which there it is deemed a "nuisance" and therefore it may be regulated locally. On the other hand, the drilling of local wells, the pumping of drinking water, its bringing to the surface and use fall within the range of "nuisance" without any further conditions.[13]

One of the most important general restrictions on local government legislation in the USA is the so-called "implied pre-emption" doctrine. This principle means that state legislation and regulations also include local regulation as long as general (state-level) regulation is sustainable concerning the given matter for appropriate practical reasons. To put it more simply: if central (state) regulations deal with the

[8] ROZENCRANZ, A. – CHAPIN, J. B. – WAGNER, S. – BROWN, B.: *American Government, (*New Jersey, Holt, Rinehart and Winston). 1982, 144-145.
[9] Daniel B. RODRIGUEZ: Localism and Lawmaking, *Rutgers Law Journal,* 32 (2001) 3., 631.
[10] Texas Local Government Code Art. 51.001
[11] Ross CROW: Municipal Regulation of Groundwater and Takings, *Texas Environmental Law Journal,* 44 (2014) 1., 4.
[12] Ibidem 5.
[13] Ibidem 7.

given matter, then they are to be considered as having "occupied" that field of regulation from local government legislation. This doctrine which has been elaborated by judicial practice has produced numerous negative consequences: it points to inadequate judicial protection for local governments and has a coercive influence on the shaping of local will and innovation.[14]

In the view of the Supreme Court of Colorado, four circumstances need to be examined to establish "pre-emption":

whether there is a need for uniform state-level regulation of the given matter;

whether the local regulation may have an extraterritorial effect (beyond the boundaries of the settlement);

whether the matter subject to regulation is traditionally "governed" by the state or the local government;

whether the Constitution of Colorado refers the regulation of the matter to the state or to the local government.[15]

"Implied pre-emption" is also interpreted in relevant case-law as a natural restriction on the otherwise wide-ranging local "legislative" autonomy: the local government may regulate the given matter also if it has already been regulated by state law provided that no pre-emption has taken place ("by express language"), the local law is "reasonable" and it does not conflict with national law, but rather supplements it.[16] For instance, in a judgment of 1952 the Supreme Court of Wisconsin came to the conclusion that most local matters have some relevance to the state ("state-wide effect").[17] If "the local affairs aspect of the activity is paramount", the local rule may diverge from state law, but the legislator may also provide that the given matter is of state relevance, therefore the local government cannot proceed in a manner that would conflict with state law.[18]

Typical areas of regulation by American local governments are: local healthcare, public safety in the settlement, social provision; local public order (local rules of conduct); regulation of legal requirements with regard to agreements, franchise, and licences where the local government is involved as a party concerned; settlement development; rules of organization and operation; local government finances and economic management; housing and construction. Furthermore, the local government may regulate by local regulation the amount of financial resources needed by it, and how it wishes to ensure them for itself, but it does not have independent powers to levy taxes or to take out loans.[19]

In 2014, more than 400 local governments laid down restrictions or bans on the local application of the mining procedure called hydraulic fracturing or stratum fracturing. Out of these local regulations more than 200 were issued in the State of

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[14] RODRIGUEZ: c.w. 632.

[15] Board of County Commissioners, La Plata County, Colorado v. Bowen/Edwards Associates Inc. 830 P.2d 1045 (1992)

[16] Thomas P. SOLHEIM: Conflicts between State Statute and Local Ordinance in Wisconsin, *Wisconsin Law Review,* 1 (1975) 3., 843.

[17] see Muench v. Public Service Comp. 261 Wis. 492, 53 N.W.2d 514

[18] Van Gilder v. City of Madison 222 Wis. 58, 73-74, 267 N.W, 25.

[19] Benjamin BAKER: *Urban Government,* New Jersey, D. Van Nostrand, 1957, 142-143.

New York. These local regulations came before a court in several cases due to complaints that the local government had exceeded its legislative authority.

The problem may be traced back to several causes. Since no express statutory regulation exists relating to the competence of local governments, so the possibility of application of both the Dillon rule and the Home Rule principle arises. On the other hand, several local governments stated their legislative powers by adopting the so-called "zoning" regulation. ("Zoning" means a legislative power which is still based on the Standard State Zoning Enabling Act of 1926 and the essence of which is that local governments may lay down in a regulation what built infrastructure may be established in their territory or a part of it (a zone) in the interests of promoting public wellbeing.[20]

Anyway, judgments relating to local bans of hydraulic fracturing are not homogenous. At the end of 2013 the Court of Appeal of New York affirmed the local ban, while in 2014 a local court in the State of Colorado quashed the ban, similarly to a 2011 decision of a local court in West Virginia. As a matter of course, the courts relied on pre-emption in several cases.[21]

Some people see the solution in the analogous application of the Federal Communications Act of 1996, since this Act defines exactly local and national competences relating to the placement of cellular communication antenna towers. Based on this, local governments cannot make such regulation that would ban the building of cellular communications antenna towers in the given settlement.[22]

4. Canada

In *Canada* the Local Government Act (2015) regulates in detail some questions of making byelaws (Chapters 10 and 12). Section 335 authorizes local governments to regulate by byelaws some questions of local services. Pursuant to Section 342, a byelaw cannot enter into force without the approval of the body inspecting legality.

The local board may by byelaw lay down an oath or affirmation (or maybe several ones) that are necessary before a local officer can take office. In the absence of local rules, the person is to make an oath or solemn affirmation contained in another legal regulation. (Section 202 (5)-(6))

The local board lays down by byelaw the general procedural rules relating to its own operation and the operation of its committees. This also includes the manner and time of giving advance notice to the population of the date, time and place of board and board committee meetings. (Section 221 (1))

The board may delegate its duties and powers - by byelaw adopted by an affirmative vote of at least 2/3 of the votes cast - to a board committee, with the exception of the making of a byelaw. (Section 228 (2) (a), Section 230 (1))

It is possible to trace back to the Municipal Act of 1881 the rule that the locals and - if "being affected" - also non-locals may apply to the court to quash a local

[20] RICHARDSON: c.w. 2., 595.
[21] Ibidem 595.
[22] Ibidem 595.

regulation with reference to unlawfulness.[23] A result of this legal institution is that the evaluation of the constitutionality of local legislation, the delimitation of its scope of application, and the definition of its subject-matters is based, to a considerable extent, on judicial practice, court judgments and precedents. It is a general requirement that the local government must have statutory authorization to make local regulations; therefore the result of local legislation, in essence, constitutes a statutory provision. Local byelaws – apart from the regulation of public services – mainly settle questions relating to local trade (licensing, opening hours on weekdays and on Sunday), but local governments are not authorized to regulate by byelaw local animal-keeping for example.[24]

5. Conclusions

In every country under analysis the key word is local public affairs ("local affair") but different subjects may be covered by the definition of local public affairs in the Constitution or legislation of the different countries. Despite the significant differences in this respect, the legislature of every country under analysis regards the definition and regulation of the organization and operation of the local government as a local public affair that may/must be regulated.

Local legislation does not have key importance within national legislation in any country examined, but local regulations cannot be considered indispensable anywhere either. In spite of the fact that widening local legislative autonomy could – theoretically - serve as the most obvious means of the socialization of state legislation taken in its general sense, this is not a characteristic of any of the countries examined. Social participation is peripheral in local legislation. Maybe, the territorial unit of New England in the United States is an exception, where the township system is realized in such a form that citizens with the right to vote (may) traditionally attend the meetings of the local government body, they may make contributions to the agenda, they may pose questions and formulate proposals and initiatives, moreover – in this way – they may directly assist with the drafting and adoption of new local legal regulations. It is no wonder that these town meetings are styled as the best example for the implementation of direct democracy in the USA.[25]

Although with different emphasis, but the legislation, judicial practice and legal academic literature of all the local government systems examined point to, or even underline, the fact that local governments are state self-governments, they form part of the state organization, consequently, local legislation is state legislation (of supplementary character), which is to be consistently separated from primary legislation and the normative activity of other legislative organs of the executive. On the other hand, this is what constitutes the reason and theoretical basis for the

[23] J. S. DE VILLERS: Standing for Quashing Municipal Bylaws, *Advocate (Vancouver Bar Association)*, 64 (2006) 1., 43.
[24] Cameron HARVEY: Municipal Law, *Ottawa Law Review*, 8 (1976) 2., 266.
[25] ROZENCRANZ, A. – CHAPIN, J. B. – WAGNER, S. – BROWN, B.: c.w. 143.

establishment of control - usually exclusively from the aspect of legality - by state administration over local legislation everywhere.

The local governments of the countries under analysis adopt local legal regulations in a wide spectre of regulatory subjects, be they regulations relating to organization and operation, municipal management, local public services, local taxation or regulations of policing character. However, it may be noted that all the above-listed regulatory subjects as a whole cannot – usually – be found among the legislative powers of the local governments of a given country. At the same time, examples for each of these subjects may be found separately in the individual countries.