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Safeguarding Municipal Autonomy by the Supreme Court

The title of this article implies that the supreme court of a state, and that of Estonia in particular, plays a role, and perhaps a central one, in safeguarding municipal autonomy. Potentially, this is indeed the case, but is it factually so? The central normative–theoretical question behind this is, of course, that of the position of the autonomous municipality *vis-à-vis* the nation-state, for which the supreme court, systemically part of the latter, has — arguably — a particular responsibility. But the question that logically precedes this is whether the relevant state’s constitution properly and sufficiently guarantees municipal autonomy to begin with.

I.

The need for municipal autonomy is brought out nicely as early as 1834, in Georg von Brevern’s thesis, *Das Verhältnis der Staatsverwaltungsbeamten im Staate*¹, arguably the most important early Estonian contribution to the topic. The author, a Baltic-German nobleman, who later held high positions at the Tsarist court and in the St. Petersburg administration, for political reasons stays very vague in indicating when he is dealing with local matters and when with general ones. Nonetheless, arguing as he does for an organic², citizen-centred image of the state³ — in his context, a rather brave stance — he points out that the municipality comes into existence before or, at best, together with the state, so municipalities derive not from the state but, rather, like the state itself, “from the natural development of human society”.⁴ In Estonia, obviously, municipal autonomy is much older than the nation-state (rather young in its current form); the great city of Tallinn, then called Reval, could boast Lübeckian Law, and thus a high degree of municipal autonomy, since 15 May 1248, when the King of Denmark, Erik IV Plogpenning, conveyed it to her.⁵ But already in noticing this, we find that an important

¹ G. v. Brewern. *Das Verhältnis der Staatsverwaltungsbeamten im Staate*. Leipzig, Riga, Dorpat 1835. On v. Brevern, as his name was spelled later on, see his autobiography, *Über mein Leben. – Zur Geschichte der Familie von Brevern*, vol. 4. Berlin 1885, pp. 137–173.

² On the organic metaphor of the state, see most recently A. Koschorke et al. *Der fiktive Staat. Konstruktionen des politischen Körpers in der Geschichte Europas*. Frankfurt/Main 2007.

³ G. v. Brewern (Note 1), § 17.

⁴ *Ibid.*, § 6.

⁵ Cf. W. Drechsler (ed.). *Die selbstverwaltete Gemeinde: Beiträge zu ihrer Vergangenheit, Gegenwart und Zukunft in Estland, Deutschland und Europa*. Berlin 1999.

issue presents itself — Tallinn was not a city of the Estonians, nor was it to be so until many centuries later, and it has had Estonian domination of the citizenry for perhaps 150 of the last 750 years.⁶

In the spirit of subsidiarity, the state's task, according to v. Brevern, is the co-ordination and to some extent control of the municipalities and the management of those affairs that the municipalities cannot cope with themselves because they are missing the larger national perspective.⁷ As is usual in this kind of literature, v. Brevern does not deny the necessity of central administration, he only resents its excess.⁸ The state is based on municipalities but subordinates them.⁹ In essence, this is the approach that most municipal autonomy scholars would still agree with today.

This, precisely, is also already the perspective of the most important European establishment of municipal autonomy, one that is of direct importance for Estonia and the Estonian Constitution, which is based on it: Heinrich Friedrich Karl vom und zum Stein's Prussian municipal reforms of 1808, whose bicentennial will be celebrated next year (Stein's own 250th birthday is this year). These reforms, too, were clarifying in scope, simplifying municipal administration and certainly not interfering with legitimate central administration.¹⁰ The impetus for the reforms was motivation of the citizens such that they would take care of their own business¹¹ and thus see the city and also the state again, or newly, as 'us' and not as 'them'.¹² This was based on vom Stein's insight into the "necessity to give to the cities a more autonomous and better constitution, to legally form for the citizens' community a firm place of unification, to convey to them an active influence on the administration of the municipality, and to create and maintain community spirit through this participation".¹³ This is the role of the municipality as the cradle or school of democracy.¹⁴

Initially, this was not appreciated by the beneficiaries, both citizens and (potential) politicians and administrators, and it needed some 20–25 years to work at all, which is an important lesson for all municipal reforms that argue the inability and/or unwillingness of the locals to commit themselves and participate.¹⁵ In fact, as recent research once again has underscored, indeed it did work — the option of commitment preceded actual commitment.¹⁶ This is actually the model that goes beyond the concept of civil society and of governance without supplanting it, in that it re-includes the citizen directly into government and the policy process.¹⁷ In a time of political alienation, this is an aspect well worth remembering.

But if this is so, why is municipal autonomy in constant danger, always under threat? Why does it need a supreme court to protect it? In order to answer this, we have to face the central question of the matter: Why does the state exist at all? Only then can we judge the municipalities' role in context. If we believe with Aristotle that "a state comes into existence for the purpose of ensuring survival, and it continues to exist for the purpose of the good life"¹⁸ and continue with Marsilius of Padua that the good life "is the perfect final cause of the state"¹⁹, then there is no question of the importance of the municipality — and this is also the role of the municipality itself. This is especially crucial in a time of globalisation, when the municipality becomes the citizens' genuine home; it is also the municipality in which the citizen meets the state in everyday life.²⁰ Its working or not working conditions the citizen's attitude toward the state to a decisive extent. And so, especially in multicultural times, in that of the EU and the possibility of moving, there are plenty who identify with a

⁶ Cf. G. v. Rauch. *Geschichte der baltischen Staaten*. Stuttgart 1970, p. 19.

⁷ G. v. Brewern (Note 1), § 7. This is the idea of subsidiarity as developed by Christian Wolff; see J. Backhaus, C. Wolff. *Subsidiarity, the Division of Labor, and Social Welfare*. – *European Journal of Law and Economics* 1997 (4) 2, pp. 129–146, pp. 135–139.

⁸ G. v. Brewern (Note 1), § 12.

⁹ *Ibid.*, § 15.

¹⁰ H. Duchhardt. *Stein. Eine Biographie*. Münster 2007, pp. 199–203; see G. Ritter. *Stein. Eine politische Biographie*. 4th ed. Stuttgart 1981, pp. 196–199.

¹¹ *Ibid.*, p. 196.

¹² *Ibid.*, p. 198.

¹³ *Ordnung für sämtliche Städte der Preußischen Monarchie mit dazu gehöriger Instruktion, Behuf der Geschäftsführung der Stadtverordneten bei ihren ordnungsmäßigen Versammlungen*. Vom 19ten November 1808, Introduction, § 2; new text ed. as *Die Preußische Städteordnung von 1808*. Stuttgart, Köln 1957, p. 45.

¹⁴ H. Drechsler. *Kommunalpolitik*. – H. Drechsler, W. Hilligen, F. Neumann (eds.). *Gesellschaft und Staat. Lexikon der Politik*. 10th ed. München 2001.

¹⁵ H. Duchhardt (Note 10), p. 267.

¹⁶ *Ibid.*, p. 202; s. also H.-J. Vogel. *Die bundesstaatliche Ordnung des Grundgesetzes*. – E. Benda, W. Maihofer, H.-J. Vogel (eds.). *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*. Berlin, New York 1983, pp. 809–862, p. 858.

¹⁷ Cf. W. Drechsler. *Governance, Good Governance, and Government: The Case for Estonian Administrative Capacity*. – 'Governance and Good Governance', theme issue of *Trames* 2004 (8) 4, pp. 388–396.

¹⁸ Arist. *Pol.* I 1252b.

¹⁹ Marsilius of Padua. *Defensor Pacis* I iv 1.

²⁰ Cf. F. Stern. *Europäische Union und kommunale Selbstverwaltung*. – M. Nierhaus (ed.). *Kommunale Selbstverwaltung. Europäische und Nationale Aspekte*. Berlin 1996, pp. 21–44, esp. p. 43.

city but not with the country.^{*21} This is the old idea that one could even say that countries, that nation-states are constructed^{*22} — while cities are ‘real’.

Yet precisely this is a problem from the state perspective, where not all of this may be appreciated and indeed, systemically, it would not be. Especially if the state exists for the nation and the nation is more important than the citizens and their well-being, the autonomous municipality may appear as an obstacle, a problem, and nothing else. This is all the more urgent a consideration if the state is seen as under constant threat or attack, so that the political is always existential.^{*23} And such a state is, after all, far from being just a theoretical construct. However, we may think back to vom Stein and his insight that the autonomous municipality, far from endangering it, strengthens the nation-state — the democratic nation-state, of course, not the authoritarian one.^{*24} The Estonian Constitution can be said to combine the two approaches, in that its preamble arguably connects them to each other in an additive way (“to strengthen and develop the state which [...] shall protect internal and external peace, and is a pledge to present and future generations for their social progress and welfare; which shall guarantee the preservation of the Estonian nation and its culture throughout the ages” — since 21 July 2007 (RT I 2007, 33, 210), “Estonian nation, language and culture”).^{*25}

The Estonian Constitution places municipalities on the same level as the German ones — this is no accident, as the respective paragraphs are based on the German ones, but in a weaker form^{*26}. This is very likely no accident either, arguably for three classic reasons: Too much municipal autonomy may give a power base to the opposition party or parties, which is a good thing in a democracy but not really appreciated by the majority in the government.^{*27} It may do the same for an ethnic minority if that minority is concentrated in specific municipalities or regions. It may thus indeed be that one reason for keeping municipalities from being stronger was the prevention of loci of minority — *viz.* Russian(-speaking) — power.^{*28} In relation to this, one can hypothesise the specificity of small countries where another level of government might be seen as superfluous. Note that all three of these reasons tend to go against the idea of devolved government and speak for unity as a primary national goal.

However, it seems that in any context, not only in that of a state that puts the nation before its citizens, the conflict between municipality and state is a logical and systemic one, and there are legitimate rights on both sides. The state as such has a tendency toward unity, the municipality toward autonomy. This tension cannot be resolved; it needs to be borne.^{*29} In the end, it is better for the state, even a very traditional nation-state, to have autonomous municipalities, but the self-logic of the central administration, especially if its officials lack a genuinely larger perspective, goes against the communities. Yet ‘naturally’, it is the cities that are weaker and should indeed be championed and protected if the tension is not to be resolved in favour of only one party. This is, then, the task of the supreme court, all the more because it is functionally part of central government and thus institutionally biased in its favour. (Placing the Estonian Supreme Court away from the capital is a physical recognition of that fact.)

²¹ Cf., e.g., E. F. Isin. *Being Political: Genealogies of Citizenship*. Minneapolis 2002; <http://www.ucalgary.ca/agf/caloyouth/city>.

²² See, e.g., B. Anderson. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Revised ed. London 1991.

²³ See C. Schmitt. *Der Begriff des Politischen*. 7th ed. Berlin 1996.

²⁴ This actually was the problem with vom Stein’s reform from the perspective of the ‘reactionary’ Prussia; cf. H. Duchhardt (Note 10), pp. 198–199, 202–203 *et passim*.

²⁵ Preamble of the Estonian Constitution, as translated at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus>.

²⁶ Estonian Constitution, Chapter XIV, §§ 154, 160 (guarantee of municipal autonomy § 154); regarding the interpretation, see Ü. Anton. *Kohaliku omavalitsuse garantii Eesti Vabariigi 1992. aasta põhiseaduses* (Local Government Guarantee in the 1992 Constitution of the Republic of Estonia). – *Juridica* 1998/6, pp. 305–313 (in Estonian), with further references (including the German advisory opinions); cf. also Narits. – K. Merusk, R. Narits. *Eesti konstitutsiooniõigusest* (On Estonian Constitutional Law). Tallinn 1998, pp. 149–159 (in Estonian); V. Olle et al. *Põhiseaduse XIV ptk kommentaar* (Comments on Chapter XIV of the Constitution). – Panel of editors led by E.-J. Truuvali. *Eesti Vabariigi põhiseadus: kommenteeritud väljaanne*. Tallinn 2002, pp. 639–669, esp. p. 641 (in Estonian); pp. 639–642 argues that there is a strong guarantee of municipal autonomy.

²⁷ In my own experience outside of Estonia, certainly the same was the case: A Latin American president who had asked me to look into the establishment of a municipal autonomy think-tank because he wanted to devolve the country’s government structure cancelled these plans after a local election put many representatives of the opposition party into power. See W. Drechsler. *Wissenschaft, Politikberatung und Verantwortung*. – M. Sutrop, U. Sutrop (eds.). *Teadus ja teadmistepõhine ühiskond / Wissenschaft und wissenschaftsbasierte Gesellschaft*. Tartu 2005, pp. 109–117, p. 115.

²⁸ Thus M. H. Wiegandt. *Grundzüge der estnischen Verfassung von 1992*. *Jahrbuch des öffentlichen Rechts der Gegenwart*. – NF 1997 (45), pp. 151–175, pp. 158–159.

²⁹ Cf. W. Drechsler. *Kollektivismus*. – H. Drechsler, W. Hilligen, F. Neumann (eds.) (Note 14); C. Schmitt. *Verfassungslehre*. 5th ed. Berlin 1970, pp. 370–379.

II.

But, perhaps as often as not, safeguarding of municipal autonomy by the supreme courts is endangered not by ill will on the side of the courts but by following fashion and ideology.^{*30} The most important instance in our context concerns the ‘right’ of the state to reconfigure, and especially merge, municipal units against their will. In Estonia, as is generally the case elsewhere, this is constitutionally legitimate.^{*31} (Another example is the right of the state to interfere with municipal autonomy by means of the State Audit Office, which will be addressed in the subsequent paper.^{*32}) While this has been tried many times in Estonia, it is one of the most fortuitous aspects of Estonian public administration reform that no full-scale municipal unit reform ever took place, because not one of those attempts would have been helpful.^{*33}

The application of erroneous social-scientific assumptions by supreme courts is a serious general problem, but it is difficult to prevent, because the social sciences share their tendency toward fashion and ideology with the courts, just as with government. This is why reliance on expertise is such a tricky business, and, while it may be said that going beyond it is the task of courts as well as government^{*34}, this is very difficult to accomplish. Such erroneous uses are not as rare as one would like to believe.^{*35}

Regarding municipal autonomy, an almost identical fallacy is to think that larger municipal units increase efficiency, and it is not unusual to argue this way — the otherwise very important *Rastede* decision of the *Bundesverfassungsgericht*, for instance, *en passant* proclaimed the same view.^{*36} But this is completely erroneous and really only a combination of 1970s and 1990s fashion and ideology, of the former’s social-engineering progressivist reform-mindedness and faith in ‘doability’, with the latter’s efficiency creed and unsophisticated transfer of business and managerialist principles to the public sphere.^{*37} In fact, however, we know, among many other things, of

- efficiency losses through size;
- the lack of savings in personnel costs associated with the amalgamation of municipalities;
- the increased viability of small communities because of ICT solutions;
- ideal company size, which may be very small according to the tasks; and
- the possibilities of co-operation in specific areas beyond forced unification.

We know as well that bigger communities serve less as schools of democracy, lead to less civic commitment, and the list goes on. And, once again, sometimes this is desired: emasculated municipalities are a hallmark of authoritarian and totalitarian regimes.^{*38} Again, we have no reason whatsoever to believe that increased municipal unit size automatically increases efficiency, and we do know that there is a tendency for it to weaken democracy and citizens’ identification with the community.

³⁰ On the key role of fashion and ideology, and the difference between them, see W. Drechsler. The Rise and Demise of the New Public Management. – Post-Autistic Economics Review 2005/33, 14 September 2005. Available at <http://www.paecon.net/PAERreview/issue33/Drechsler33.htm>.

³¹ Section 158 of the Estonian Constitution demands only that the views of the municipalities concerned be “consider[ed]”.

³² Mihkel Oviir, this journal issue *infra*.

³³ See W. Drechsler. Kommunale Selbstverwaltung und Gemeindegebietsreform: Deutsche Erfahrungen, generelle Erwägungen, estnische Perspektiven. – W. Drechsler (Note 5), pp. 119–135; W. Drechsler. Eesti kohaliku omavalitsuse haldusterritoriaalse reformi põhimõttelised küsimused (Principle Issues of the Administrative-Territorial Reform of Estonian Local Governments). – Riigikogu Toimetised / Journal of the Estonian Parliament 2000/2, pp. 145–150 (in Estonian); W. Drechsler. Eelmärkusi teisele, eestikeelsele väljaandele (Preliminary Comments to the Second, Estonian-language Edition). – P. Schöber. Kohalik omavalitsus. Tänapäevase kohaliku omavalitsuse idee (Local Government. Idea of the Modern Local Self-Government). 2nd (Estonian) ed. Tallinn 2003, pp. 5–8.

³⁴ H.-G. Gadamer. Die Grenzen des Experten. – Das Erbe Europas. Beiträge. Frankfurt/Main 1989, pp. 136–157.

³⁵ In Estonia, a good example is that of the Supreme Court’s decision regarding e-voting. While acknowledging that the law would actually make the e-votes in some sense more ‘valuable’ than the others because they could be altered by the voter during the e-voting period, the court argued that this would be outweighed i.a. by increased participation in elections (and the implementation of new technologies. See decision 3-4-1-13-05 of 1 September 2005 of the Chamber of Constitutional Review of the Estonian National Court; cf. Ü. Madise. Elections, Political Parties, and Legislative Performance in Estonia: Institutional Choices from the Return to Independence to the Rise of E-Democracy. PhD thesis. Tallinn: Tallinn University of Technology, 2007, pp. 18–19), although there is no scholarly reason to think that e-voting would indeed cause this (see W. Drechsler. E-Voting: Dispatch from the Future. – The Washington Post, ‘Outlook’ section, 5 November 2006, p. B01). And in fact, even the most ardent promoters of e-voting admit that the Estonian case shows that this is not the case. See F. Breuer, A. H. Trechsel. E-Voting in the 2005 Local Elections in Estonia: Report for the Council of Europe. Strasbourg 2006. Available at http://www.coe.int/t/e/integrated_projects/democracy/02_Activities/02_e-voting/00_E-voting_news/FinalReportEvotingEstoniaCoE6_3_06.asp#TopOfPage; cf. Ü. Madise, pp. 20–21.

³⁶ BVerfGE 79, 127: “In many respects, however, a centralistically organised administration could work more rationally and cheaply”, p. 153. On the positive aspects of *Rastede*, see E. Schmidt-Abmann. Kommunale Selbstverwaltung ‘nach Rastede’ – Funktion und Dogmatik des Art. 28 Abs. 2 GG in der neueren Rechtsprechung. – D. Franßen, E. Redeker, K. Schlichter, O. Wilke (eds.). Bürger – Recht – Staat. FS Sendler, München 1991, pp. 121–138.

³⁷ See W. Drechsler (Notes 30 and 33, respectively).

³⁸ In detail and with further references, W. Drechsler (Note 33), pp. 101–107.

In this context, it is interesting to look at a good recent supreme court decision. Just a few weeks ago, the Supreme Court of the Land of Mecklenburg-Vorpommern struck down the county reform for 2009 proposed by the state government, which consisted, in essence, of a radical reduction and fusion of counties, because of its unconstitutionality.^{*39} It is important to note that this was done because the “right to municipal autonomy granted to the counties is violated by the creation of the new mega-counties” and that the citizens would have a right to *überschaubare* counties. The verdict once again does imply that a reduction in the number of counties would generally lead to savings, which, as we know, is not the case^{*40}, but, as the court argues, this would not outweigh the other considerations. By acknowledging that too large structures disenfranchise the citizen, in terms of both service delivery and the possibility of commitment, and that this violation of municipal autonomy outweighs the assumed efficiency gains — even though it was about counties, not cities — the decision can well serve as a model: In the state context, efficiency is not everything, not even the main thing.^{*41}

III.

In sum, municipal autonomy is as important, for state, society, and citizen, as it ever was. But municipal autonomy and the central state are suspended in a necessary institutional tension, and thus the demand for the supreme court to protect the municipalities, which are the weaker side, is and will always be there. This is even more so because the supreme court is part of the central government.

The history and present situation of safeguarding of municipal autonomy by the supreme courts also stresses the danger of following fashion and ideology — indeed, the *Zeitgeist* — rather than carefully studying and evaluating issues, evidence, and options. But this is tough, and there are still movements afoot today that are geared toward the reduction, in number and autonomy, of municipalities, and, even in the face of all the evidence to the contrary, this is still sometimes sold as modern, efficient, and sensible reform, even in such successful countries as Finland and Denmark.^{*42}

That, of course, opens a discussion far beyond the current one, and actually leads into an altogether different direction from that of the conference, which, by highlighting ‘interference with policymaking’, appears to be based on the assumption that policymaking without interference is generally a good thing — a bold assumption indeed. It may, after all, well be argued that such interference is precisely the role of the supreme court in a post-Montesquieuian state, especially in a democracy, the purpose of which as a form of government is arguably as much to prevent as to create or enable — but these would be arguments well beyond the questions currently at hand. In such a case, however, if a supreme court were to follow the one in Mecklenburg-Vorpommern and thus interfere with policymaking that would, to the detriment of the citizens, abrogate municipal autonomy, this would be a good case in which policymaking by the state might be interfered with, not only constitutionally and legitimately so, yet also clearly in the best interest of citizens, society, and the state itself as well.

³⁹ Judgment of the LVerfG MV of 26 July 2007.

⁴⁰ *Ibid.*; F. Pergande. Den Landkreis kennen. Warum die Gebietsreform in Mecklenburg-Vorpommern gescheitert ist. – Frankfurter Allgemeine Zeitung, 28 July 2007, p. 8; see also Neuer Anlauf zur Kreisreform in Mecklenburg-Vorpommern. Innenminister Caffier sammelt Stellungnahmen aus dem Land. – Frankfurter Allgemeine Zeitung, 4 August 2007, p. 4; F. Pergande, R. Burger. Großkreise wird es nirgends geben. Das Greifswalder Urteil über die Gebietsreform interessiert auch anderswo. – Frankfurter Allgemeine Zeitung, 8 August 2007, p. 8, which emphasises the meaning for reforms in other German states.

⁴¹ An almost self-satirical account in favour of the larger counties is an interview with the main expert employed to promote the reform, Helmut Seitz: Rückschlag für Reformen. Landesverfassungsgericht Mecklenburg-Vorpommern kippt die Kreisgebietsreform 2009 – Experten beziehen Position. – ‘Öffentliche Finanzen’ special supplement. Frankfurter Allgemeine Zeitung, 12 September 2007, pp. 1, 6.

⁴² See the respective country reports at http://ec.europa.eu/growthandjobs/key/nrp2006_en.htm; on Finland, see specifically M. Suksi. Sub-National Issues: Local Government Reform, Re-Districting of Administrative Jurisdictions, and the Åland Islands in the European Union. – European Public Law 2007 (13) 3, pp. 379–406, esp. pp. 379–383; on Denmark, [Danish] Ministry of the Interior and of Health. The Local Government Reform — In Brief. Copenhagen 2006, which, e.g., does not even consider the appropriateness question.