

CHINA  
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# Responsibilities for Public Service Provision at Different Levels of Government

FACHBEITRAG ZUR KONFERENZ "BUILDING UP PUBLIC SERVICE SYSTEMS IN CHINA" VOM 08. BIS 09. JULI IN HAIKOU/HAINAN

## I. PUBLIC SERVICE PROVISION AS LEGAL TERM

**The modern and in particular the democratic state is not only a state which watches the maintenance of law and order through commands and their enforcement. In fact it is a state which provides its citizens with those services which are essential for the individuals' physical existence.**

It was Ernst Forsthoff who named this public duty 40 years ago as „Daseinsvorsorge“, i.e. as public service provision. The supply with gas, water, electric power, the waste water and waste disposal, the public transport, the medical care, the care for the elderly and the disabled and the public nursery schools are only some examples for public service provisions. Roadmaking, housebuilding or public banks can be named as further examples. And as last example the allocation of information seems to be the most modern kind of public service provision, given the fact that we are living in an information society. A final and complete definition of public service provision seems hardly possible. In fact it depends on the concrete form of government and on the concrete state of the society as well as on historical tradition, which services are and should be provided by the state and which services are provided by the society and that finally means by private players. For this has to be pointed out right at the beginning: not every service which is essential for the individuals' physical existence has to

be provided by the state itself. Only by thinking about the food supply it soon gets obvious, that also the society, that also private players can be considered to provide certain services. At least in Germany neither state owned food production nor government-fixed food prices do exist. The food supply is rather secured exclusively by the free market, which, however, is subject to the national and European competition authorities' control.

## II. DIFFERENT LEVELS OF PUBLIC SERVICE PROVISION

In case that a free market has not developed adequately (yet) the state holds a particular responsibility for providing the citizens with the basic needs. Especially in federal states different levels of government can be considered responsible for the service provision: in Germany these levels are the federation, the Länder and the local authorities. In the more expanded Länder also the administrative regions and the counties may as well undertake certain tasks. Each of these levels of government can fulfil its task of providing certain public services alternatively by using public, state-ruled instrument (e.g. public institutions) or by using private instruments. In both cases the public service provision can get in conflict with European Union Law. Public service provision through state-ruled instruments can be seen as forbidden aids, public service provision through private instruments has to match the European Competition Law. Therefore also the European Union as

superposing level has to be considered when providing public services. However, it has to be pointed out that the EU rather sets boundaries and principles for the public service provision but doesn't provide these services itself. Hence, it shall remain out of consideration in the following.

### III. PRINCIPLES OF DIVISION OF RESPONSIBILITIES

Speaking about responsibilities for public service provision at different levels of government without concretising the exact public service seems to be impossible. Of course there are other rules for organising the provision of security (for to name a further example of public service provision) than for waste disposal or childcare. I therefore have to look in a very abstract manner which levels of government in a multi-level system of government shall be responsible for the public service provision. At least three several different and in part contradictory principles can be identified:

#### 1. Subsidiarity principle

According to the subsidiarity principle the individual's own responsibility and the responsibility of that administrative unit being closest to it principally takes priority over the superior unit. This actually means, that public services principally have to be provided by the local authorities. Only as an exception the counties, the Länder or the federation may fulfil this task. However, the subsidiarity principle is no formal axiom, but also includes substantial valuations. The inferior level is in fact only responsible when the relevant service can really be adequately provided on this level and when the service could not be provided in a better way on a superior level. However, even on behalf of this substantial view on the subsidiarity principle it acts as a competence using limit for the superior levels: they can only use their competence, when the relevant service cannot be provided adequately on the inferior level (negative criteria) and when they can be provided in a better way on a superior level (positive criteria). If these conditions are not fulfilled, the inferior level stays responsible for the public service

provision. The subsidiarity principle aims to effect the public service provision as close to the citizens as possible. This for two reasons: First it strengthens the democratic elements and second and above all it leads to appropriate solutions. On the inferior level problems can be recognised and solved more effectively than on the superior level, which is in general not directly concerned.

#### 2. Equal living conditions

On the other hand the public service provision can and shall guarantee equal living conditions throughout the federal territory. Principally every citizen shall be provided with the same services in every part of the country. Of course the conditions may vary due to historical developments and political views. In principle, however, it is necessary for the democratic equivalence and the social peace that the most important public services are equally provided throughout the federal territory. Therefore this principle – aiming primarily on equivalence – also has a strong freedom providing component: the citizens shall be free to choose their residence due to their personal wishes and ideas without having to be forced by the fact, if and how public service is provided. Of course differences according to the character of the relevant public service can and have to be made. For example for the postal and telecommunication system, however, art. 87f par. 1 BL requires, that adequate and appropriate postal and telecommunications services have to be provided throughout the federal territory. Therefore these services are also called universal services. The objective to ensure equal living conditions can but does not have to collide with the subsidiarity principle. Though it principally seems self-evident that poorer local authorities can fulfil their duty of providing public services only worse than richer local authorities, this fact does not automatically lead to the conclusion that the state has to provide the relevant public service instead of the local authority. Rather the financial conditions of the local authorities can as well be adjusted through a financial equalisation.

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### 3. Division of responsibilities

A last principle concerning the responsibility for public service provision at different levels of Government is of a more formal nature: The distribution of the responsibilities for the public service provision has principally to be based upon a strict division of responsibilities. Mixed competencies conceal the concrete responsibilities and complicate the tasks' fulfilment as well as its control. Only a clear structure and precisely contoured boundaries between the different level's competencies can assure transparency and do assign political responsibility. In this context the assignment of competencies does also touch the single citizen effectively namely in two ways: Being part of the democratic sovereign he can participate in the political process only through elections and therefore only if he knows about the competencies of the relevant political body he can elect. Being subject of the state power at the same time he is interested in knowing about who is responsible for a concrete measure.

#### IV. DIVISION OF RESPONSIBILITIES IN GERMANY

Obeying the different principles of the responsibilities' division public service provision in Germany is mainly effectuated by the local authority and only to a lower extent by the Länder and in part by the federation. The principles explained above, particularly the subsidiarity principle, are incorporated in the guaranty of local self-government (art. 28 par. 2 GG), in the principle of Länders' competencies (art. 30, 70, 83,92 GG) and in the necessity clause in art. 72 GG. According to this regulations, to anticipate the result, the public service provision is principally part of the local authorities concerns, only in part the Länder may act. The federation is competent for public service provision only if the basic law provides it explicitly with this competence and if a federal regulation is necessary to assure equal living conditions throughout the federal territory.

### 1. Local authorities

Though the subsidiarity principle has not been lay down expressly in the Basic Law (in opposite for example to the Treaty of the European Community), the public service provision in Germany is mainly effectuated by the local authorities. This fact makes the German local authorities different from the local authorities in many other member states of the European Union, especially from those in the more centralistic states. The constitution guaranties the local authorities in art. 28 par. 2 BL to regulate all local affairs on their own responsibility, admittedly within the limits prescribed by the laws – I have to come back on this later on. Consequently the establishment of nursery schools, green spaces, social and cultural offers are subject to the local authorities' competencies as well as the water supply and waste water disposal, public transport, hospitals, electric power generation and electric power supply. Even if the local authorities do not personally effectuate this competencies but let private player effectuate them, they nevertheless keep the responsibility for these tasks. By this even the democratic component of the subsidiarity principle stays aware: local self-government means creation of the local circumstances by the citizens themselves. Which tasks are fulfilled, which quality the fulfilment has and which financial means are provided is subject to the democratic autonomy and control. However, the local authorities have to obtain the necessary funds if they shall provide public services. According to art. 28 par. 2 BL the guaranty of local self-government therefore also includes the base of financial autonomy and the right to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed. In fact this regulation in practise causes a lot of quarrelling between federation, Länder and local authorities.

### 2. Länder

Apart from the local authorities the Länder are the most important players in the field of public service provision. In part they do provide direct services, e.g. in the field of

traffic infrastructure, schools and hospitals – you will have remarked that schools and hospitals can be provided as well from the local authorities as from the Länder, so there is a kind of competition between various public players in providing public services. Furthermore the Länder govern the local authorities' public service provision by enacting relevant laws.

For the guaranty of local self-government does only exist within the limits prescribed by the laws (that's what I mentioned before), the Länder (and even the federation) can enact uniform regulations for all local authorities on their territory. Besides, the Länder do exercise the legal oversight (however, normally not the substantial oversight) over the local authorities' activities. Furthermore they are responsible for the construction and maintenance of federal highways, the federal waterways and the rail transport on federal commission.

Considering this interlocking of local provision and the Länder's influence the balance between the subsidiarity principle on the one hand and the demand of equal living conditions can be pointed out clearly: the local authorities as the smallest political bodies are responsible for the public service provision, but may neither undermine certain minimum standards being set up by the Länder (or the federation) nor act illegal. Similar rules apply on the relationship between the Länder and the federation.

Therefore the subsidiarity principle and the demand of equal living conditions are mainly balanced by the combination of two instruments: by the possibility of determining the content of public services on the one hand and by the legal supervision, an important facet of control, on the other hand.

### 3. Federation

The federation itself barely provides public services itself. However, through relevant legislation competencies it influences their content and the way of providing them.

#### *a) Direct Public service provision*

Concerning the direct provision of public services by the federation, only the postal and telecommunication systems are to be mentioned (abstaining from the responsibility for military security which does not play an outstanding role in western Europe at the moment). However, both areas of public service meanwhile are completely (telecommunication) or in part (postal system) privatised, so that the federation is not personally responsible for the provision itself but only has to guarantee the provision by someone.

#### *b) Federal legislative competencies*

Nevertheless, the federation is not completely irrelevant for the public service provision. It rather has vast legislative competencies, with which it can in part govern the public services provided by the local authorities and by the Länder. Its exclusive legislative power contains amongst others:

- art. 73 no. 1 - protection of the civilian population
- art. 73 no. 6a – federal railways
- art. 73 no. 7 – postal and telecommunication services.

Further on, its concurrent legislation contains amongst others:

- art. 74 par. 1 no. 7 – public welfare
- art. 74 par. 1 no. 11a – nuclear energy
- art. 74 par. 1 no. 13 – educational and training grants
- art. 74 par. 1 no. 17 – the adequacy of the food supply
- art. 74 par. 1 no. 18 – housing, settlement, and homestead matters

- art. 74 par. 1 no. 19 – measures to combat dangerous and communicable diseases
- art. 74 par. 1 no. 19a – economic viability of hospitals and the regulation of hospital charges
- art. 74 par. 1 no. 22 – construction and maintenance of long-distance highways,
- art. 74 par. 1 no. 23 – non-federal railways,
- art. 74 par. 1 no. 24 – waste disposal.

Two things have to be pointed out, however, in this context: Firstly it shall be stressed once again that the public services in the mentioned fields of policy are not provided by the federation itself, but that the federation is just empowered to set up rules in these fields which have to be obeyed by the Länder and the local authorities. And secondly it has to be emphasized that according to art. 72 par. 2 BL, according thus to the so called necessity-clause, the federation has the right to legislate on these matters only if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest. This clause aims at materializing the subsidiarity principle as it can be easily seen. According to the will of the constitution changing legislator and to the constitutional court's jurisdiction these requirements set up a high limit relatively difficult to pass.

#### **V. FROM RESPONSIBILITY FOR PROVISION TO RESPONSIBILITY FOR GUARANTEE**

Let me cease with an outlook on the dislocation from the states' responsibility for provision to their responsibility for guarantee: Irrespective the question, which government level does provide public services, in the last few years more and more of those duties, which at least in Germany tra-

ditionally belong to the public service provision, has been or are being privatised. This development is mainly caused by the growing influence of European Law as well as by the bad financial situation of the public authorities.

Even before the beginning of this development it was well-known, that public services do not necessarily have to be provided by the state itself but that the state as well may use private instruments. However, the ongoing privatisation is accompanied by the possibility to completely transfer its duties to private players. Nevertheless by this the state does not free itself from his liability against the citizens. This responsibility just changes its nature: the state does not need to fulfil the task itself, it just has to guarantee the task to be fulfilled. Especially in the field of postal and telecommunication the state does not provide these services anymore but just guarantees their provision by regulating the free market.

In the field of railway traffic the responsibility for guaranteeing a (private) service provision is completed by a responsibility for the infrastructure, an idea, that might also be transferred to the whole transport network, maybe to all public services, at any rate however to the information sector: Public service provision in that sense could mean above all ensuring information or at least access to information – which again does not mean that the state itself has to deliver any information but quite the contrary that it has to create an information regularity under which a free market can develop.

To sum it up it can be stated, that with a growing privatisation of public service provision in the end the idea of subsidiarity, according to which the existential goods and services should be provided by private players, is fully implemented. The state copes with his responsibility already by creating general conditions, which render the fulfilment of the people's needs by private players possible. In this respect especially the competition law and its efficient control can particularly be understood as public service provision.

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Picking up the subject in the end, the responsibility for public service provision at different levels of government, it is quite obvious that the most important players in the field of public service provisions are the local authorities. But as much as the privatisation demands a responsibility for guarantee more than a guarantee for provision, the superior levels and within them the federation becomes more and more important. Public Service Provision, to end in a final thesis, should be provided by privates or by local communities and should be guaranteed by the Länder or by the Bund.