

## THE THEORY OF SELF-GOVERNMENT IN THE FIRST CSR

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**Abstract:** *In the first CSR, mainly under the influence of normative theory, several legal scientists began to focus on the public-law branches of law. Administrative law and self-government were not exceptions. The main subject of the dispute in terms of self-government consisted of the different view of its status and purpose in society. On the one hand, in the first CSR we are confronted with the political concept of self-government and, on the other, the legal concept of self-government. The theory of a political concept of self-government was based on the historical origin of self-government before the state, and on the idea that self-government is a collective equivalent of an individual with natural and inalienable rights. From this statement, several theorists have inferred that self-government is necessarily an existing union with the original power. On the contrary, the theory of the legal concept of self-government was based on the fact that, despite the historical origin of self-government, the state is the only sovereign on its territory. Therefore, self-government is only an entity with delegated power and a clearly defined sphere of competence, therefore self-government is a union created by the state.*

**Keywords:** *autonomy, legal and political concept of self-government, state, self-government*

### INTRODUCTION

The basic attribute of self-government as a concept is that we always inevitably associate it with the existence of a certain community. The state is linked to the existence of a society. The fundamental difference between a community and society, according to F. Tönnies, is that while the community is characterized by organic life and every member of the community has a specific role in it, this is not the case in society. Another difference is that a community is a homogeneous unit of values, but in a society a rivalry of individual value systems can be observed.<sup>2</sup> Giddens sees the difference between community and society in the fact that in a community we are confronted with cultural uniformity, but in a society we encounter cultural diversity.<sup>3</sup> He perceives society as a condition for the possibility of existence of a certain culture, and thus also a subculture in the form of a community. However, he adds that as culture cannot exist without society, society cannot exist without culture.<sup>4</sup> However, we think that his definition of the relationship between society and community is not strict. He uses the word community to express both qualitative and quantitative sub-units of society. Therefore, in his interpretation, national states sometimes appear as communities and sometimes as societies.<sup>5</sup> We don't agree with this position of Giddens completely. We don't perceive community as some qualitative or quantitative sub-unit of society, and we can use that designation arbitrarily as we move from

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<sup>2</sup> TÖNNIES, F. *Gemeinschaft und Gesellschaft*. Leipzig: Hans Vuste Velrag, 1935, pp. 3-6.

<sup>3</sup> Giddens understands culture as a set of values, norms, and material property. He understands society as a system of mutual relationships that connect individuals. GIDDENS, A. *Sociologie*. Prague: Argo, 1999, p. 32.

<sup>4</sup> *Ibid.*, p. 32, 38 and pp. 75–83.

<sup>5</sup> *Ibid.*, pp. 76–77.

one level of interpretation to another. Despite our partial disagreement with Giddens' theory, the common attribute of both sociological views is the fact that a community is in its essence different from a society. Thus, self-government, which is an expression of the legal existence of a certain form of community, is not only legally but also sociologically distinct from the state in its essence.<sup>6</sup>

From the point of view of historical development, it's possible to perceive the present existence of self-government as a result of the "historical effort" of communities to make independent (autonomous) decisions about the interests of their own community. Self-governing communities prospered mainly in the feudal period. Public power was not concentrated in the hands of the individual in the medieval estates. The ruler and the estates stood against one another as two sharply defined legal entities continually struggling for a share in public authority in the state.<sup>7</sup> Only with the arrival of the absolutist state and the police state regime did the fragmented public power among the various legal entities become the sole and original deposit of the state as such.<sup>8</sup> The state began to be considered as the only sovereign entity of public law. A theoretical as well as practical consequence of the unification of public power under one entity was that historically more original communities than the state ceased to be the original rights holders and their status in public law changed from subject (creator of obligations) to object (recipient of obligations). The gradual break-up of legal particularism, both personal and territorial, launched a new phase of struggle for autonomous competence of not only territorial communities.

Revolutions demanding participation of individuals in the administration of the state have gradually weakened the position of the absolutist state. The idea that an individual but also other legal entities are not just recipients of legal obligations has led to a reduction of the state's absolute power and to a rejection of the police regime. The law has ceased to guarantee to a certain person with a hereditary claim to the throne the status of the legal entity that is the origin of all power in the state and at the same time stands above any law.<sup>9</sup> The opportunity to talk not only about the democratization of the state, but also about the democratization of public administration had opened. The legitimacy of the state's power started to be derived from the consent of the individual forming part of the people. Although the state was theoretically still considered to be the only legislator and sovereign, it was bound by law in the same way as other legal entities. The extent of its power was given by the legitimacy of its power, and thus by the explicit or implied consent of the controlled in regard to who governs them, and at the same time provides functions,

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<sup>6</sup> The existence of the state is always associated with the existence of a society, or with its means of regulating social interaction. BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva*. Prague: ASPI, a. s., 2004, pp. 291–292. However, the current government studies differentiate between society and the state. Power relations knowingly maintained by the state apparatus are only a single and usually narrow layer of social relations. PROCHÁZKA, R., KÁČER, M. *Teória práva*. Bratislava: C. H. Beck, 2013, p. 14.

<sup>7</sup> In addition to the estates, there are also towns, guilds, universities that acquired some autonomous status towards the sovereign. GIERKE, O. *Das deutsche Genossenschaftsrecht*. Vol. I. Berlin, 1868, p. 332, 337, 437 and 460.

<sup>8</sup> MATĚJKA, J. *Pojem veřejnoprávní korporace*. Prague: Knihovna Sborníku věd právních a státních, 1929, p. 5.

<sup>9</sup> The position of the absolute monarch can be found in J. Bodin, who characterizes his power as absolute and permanent, which is not limited by any human laws. BODIN, J. *Six books of the Commonwealth*. Oxford: Basil Blackwell, 1955, pp. 40–48.

for the fulfilment of which individuals gave up part of their freedom.<sup>10</sup> In the period of development of liberal concepts, we have historically found ourselves at the threshold of contemporary thinking about the rule of law.<sup>11</sup> Under these conditions, the concept of self-government as a public corporation was created. This primarily prevented the re-fragmentation of public authority into non-state entities. Public power did not cease to be derived from a single source, which has delegated it to the state as a whole. Therefore, in a unitary state we are confronted with one constitutive power establishing the sole power centre of the state. Secondly, self-government became a body incorporated into public organization in the state. The power of self-government forming a subset of public power began to operate in parallel, in accordance with, and on the basis of, state power. It was characteristic of the resulting position of self-government that it acted as:

- 1) A state body (normative scope) on the one hand,
- 2) A non-state body (self-government as a subject of rights and obligations) on the other.

Even today, self-government in the legal theory is understood as part of the state organism, but also as a public corporation similar to the state, but as an entity different from it and standing against its bodies. Its definition as a public corporation is, according to Karel Klíma, an expression of direct democracy and the degree of decentralization,<sup>12</sup> whereas the fundamental difference from the state is that as a public corporation it does not arise directly through a social contract, but only by expression of will – through the rule-making of the state.<sup>13</sup> The state is in essence legally, factually and theoretically superior to self-government.<sup>14</sup> Similar opinion stabilized during the existence of the first CSR in the form of the so-called legal concept of self-government. For example, according to J. Matějka, who was among other things the author of the term public corporation in the Dictionary of Public Law (*Slovník veřejného práva*), self-government was a corporation of a public type and it acted as a legal entity performing a part of public administration entrusted by the state in the oldest sense<sup>15</sup> – that is, as its own right.<sup>16</sup>

<sup>10</sup> PROCHÁZKA, R., KÁČER, M. *Teória práva*, pp. 28–29.

<sup>11</sup> Even today, every state that seeks to be considered democratic and lawful must strike a balance between centralization and concentration of public power and its de-concentration and de-centralization to the lower state and social components, so that this organization matches the character of the nation, its mentality, in order to be effective and contribute to social stability and satisfaction.

<sup>12</sup> KLÍMA, K. *Teorie veřejné moci (vládnutí)*. Prague: ASPI, a. s., 2006, p. 87.

<sup>13</sup> See also BERAN, K. *Právnícké osoby veřejného práva*. Praha: Linde, 2006, pp. 62–70.

<sup>14</sup> While an individual or a nation as a whole may be a party to the social contract, it is probably unprovable for the community to also be a party to the social contract. J. J. Rousseau expressly says that “*If we exclude from the social contract that what is not essential to it* (Author’s note: he also means collectives), *we will see that it is reduced to the following words: Each of us puts his person and all his power under the supreme direction of the general will; and we receive each member as an indivisible part of the whole.*” J. J. Rousseau refuses the existence of any intermediary between the individual and “*volonté generale*” (general will) in the form of community or other stakeholders. Rousseau’s state is therefore individualistic, where there are no other entities between the will of the individual and the state that would be able to corrupt this relationship. ROUSSEAU, J. *O spoločenské smlouvě*. Dobrá voda: Aleš Čeněk, 2002, p. 25.

<sup>15</sup> MATĚJKA, J. *Pojem veřejnoprávní korporace*, p. 68, 70. Similar opinion can be found in HOETZL, J. *Československé správní právo*. Prague: Melantrich, 1934, p. 161, but also in WEYR, F. *Československé právo ústavní*. Prague: Melantrich, 1937, pp. 57–58.

<sup>16</sup> HOETZL, J. *Československé správní právo*, p. 70.

Essential attributes of self-government as a public corporation include, in general, a summary of the characteristics of its subject and the content of its activity. The subject of self-government can be expressed positively (the legal norm contains a precise definition, self-governing entities).<sup>17</sup> In that case, we are confronted with self-government, which is essentially a different entity from the state. As a legal concept, it is always defined by a legal norm with a separate scope defined by law. Such positively expressed subject of self-government does not conceptually align with a positively expressed subject of state administration. Administration performed by a state body is the opposite of the administration performed by self-government. The reason is the difference in quality of performance of the subject matter of activities of the subject of self-government and the subject of state administration. While the performance of state administration is always functionally tied to the relevant functionally highest administrative body of the state (e.g. the government, the relevant ministry, etc.) the self-government always has a certain scope of powers characterized by autonomy, i.e. independence from the public administration but also from other bodies of public administration. The administration of its assets, the selection of its own bodies, and the issuance of norms relating to the autonomous legal competence of self-government is subordinate exclusively to statutory regulation. This provides the self-government with functional non-subordination and independence as a public administration entity.<sup>18</sup> Legal definitions of the subject as well as the object of the activity of self-government are therefore common and indiscriminate differentiating criteria of self-government from state administration representing the state as well as from other public power holders in the state.

An unresolved problem with regard to the notion of self-government as a public corporation remains the fact of unclear nomenclature: when does the self-government act as a state and when as a non-state body? The problem has become even more acute in the fact that after the organic union of the state administration and self-government, the self-governing bodies also started to perform the tasks of the so-called delegated state administration. For some authors, this meant that the self-government, in the cases where it performed the tasks of the delegated state administration, acted as a state body, and if it performed the tasks of its own administration it acted exclusively as a non-state body. However, this solution made the situation regarding the status of the self-government even more unclear. If it were true that self-government is a public body only if it performs delegated state administration and acts as a non-state entity in the exercise of its own powers, it would mean that the thesis that the state creates the law and the law creates the state would cease to apply because the following statement would apply:

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<sup>17</sup> See Section 1 of Act Art. XXII/1886 on the Establishment of Municipalities, also Section 1 from Art. XXI/1886 on Municipia, Act No. 18/1862 l. r. (the framework Law of the Reich, which sets out the basic rules under which municipal affairs are to be organized) Art. IV and, on its basis, the adopted Land Laws for Bohemia Act No. 7/1864 Coll. Section 28, Moravia Act No. 4/1864 Coll., Section 27, and Silesia Act No. 17/1863 Coll., Section 27.

<sup>18</sup> In this regard, J. Hoetzl adds that it is important for the proper understanding of the subject matter of the report to keep in mind that in administration either in the form of self-government or state administration, it is not the administration of citizens, but primarily the administration of tasks. HOETZEL, J. *Československé správní právo*, p. 16.

- a) the self-government is in the performance of its competency a non-state creating the law or, it would continue to apply, but we would have to admit that
- b) the self-government creates norms that are not legal norms.

In our opinion the concept of self-government explained through the public corporation has brought new arguments to the debate on the concept of self-government, but has not provided a sufficiently clear conclusion to clarify the position of self-government in the system of vertical separation of power.

At the beginning of the 20th Century, as well as in the present, the basic division of self-government consisted of two fundamental groups:

- a) territorial self-government,<sup>19</sup>
- b) interest self-government.<sup>20</sup>

The essence of the internal division of self-government into territorial and interest is that while territorial self-government is characterized by its own territory and the state-defined scope of its competence and the scope of its norms (although the interest self-government also has a certain relation to the territory, the specificity of the territorial self-government relationship is that its power in principle applies to all who are located in its territory), the interest self-government is typical for its personnel competence, while the scope of its norms is related to the personnel, but usually throughout the entire territory of the state. Therefore, the territorial self-government with its attributes (public corporation with its own territory, personnel base, as well as own special legal norms and bodies as the organizational-normative base) is very similar to the legal concept of state.<sup>21</sup>

When examining the concept of self-government in the first CSR and its definition as a public corporation, we can encounter the belief that the essence of self-government was not only in the nature of this entity and the nature of its competence, but also in the fact that citizens administer themselves, and that self-government is the administration of the citizens by themselves, or a so-called “*civil element*”.<sup>22</sup>

Therefore, it follows from the previous interpretation that the common features are and the resulting concept of self-government is always cumulatively dependent on:

- a) Properties of the entity that performs it, its competence, or rights and obligations,

<sup>19</sup> Slovník veřejného práva (The Dictionary of Public Law) defines territorial self-government as: “... for example. the municipality is a kind of microcosm of the state: it is the universality of jurisdiction and power of authority, all the people are subject to the municipality and through them all the things in its territory.”; HOETZL, J. *Slovník veřejného práva československého*. Volume I, p. 1.

<sup>20</sup> “Also the interest self-government has its own territory, but its power of authority or attendance concerns only a certain group of persons: members of certain professions (estates)”. Ibid., p. 1.

<sup>21</sup> G. Jellinek defines the legal concept of state as “a corporation with the original government power of settled people, ... a territorial corporation (*Gebietskörperschaft*)”. See JELLINEK, J. *Všeobecná státověda*. Prague, 1906 p. 18. J. Prusák describes the state as a form of societal organization, which “was created on the basis of the social contract, it is characterized by it... as well as personnel, material, and organizational - normative base”. See PRUSÁK, J. *Teória práva*. Bratislava: Publishing Department of the Law Faculty of CU, 1995, p. 56; In self-government the fiction of its creation on the basis of a social contract does not apply and therefore is not the bearer of the original power.

<sup>22</sup> The above-mentioned term is found in various periods (lay element, etc.) in multiple administrative law experts of those times.

- b) Ultimately, the ability to assert its own will formed by the members of the self-government against the will of the state through directly elected and not state-appointed bodies.

Also, in the first CSR we can find several authors trying to define self-government by defining its subject and delimiting the scope of its activities and powers. In principle, legal scientists have asked two questions about self-government. On the one hand, they asked whether self-government as an entity was the state itself or identical to the state? The second question, the answer to which depended on the answer to the first, was whether the activity of self-government is an activity of the state or its own activity. The answer to both questions depended on whether the self-government acted as an entity creating the law of the state or as an entity that was the recipient of the legal norms created by itself or by other bodies of the state. And it was the blending of the two views of self-government in which, on the one hand, it acted as a purely theoretical normative entity and, on the other, as a true public corporation that obscured the nature of the concept of territorial self-government.

### Legal and political concept of self-government at the turn of the 19<sup>th</sup> and 20<sup>th</sup> Centuries in Bohemia and Slovakia

At the turn of the 19<sup>th</sup> and 20<sup>th</sup> Centuries, as well as in the period of the first CSR, the derivativeness of self-government and therefore its conceptual subordination to the state and its legal order, was not as unshakably accepted as it is at present.<sup>23</sup> According to J. Matějka the concept of self-government in the 19<sup>th</sup> Century was one of the most controversial legal concepts.<sup>24</sup> Theoretical anchoring of the concept of territorial self-government was polarized in the state, and the basis of controversy was based on the distinction between the so-called political and legal concept of territorial self-government.<sup>25</sup> F. Weyr stated that *“the correct assessment of the nature of the so-called self-government is corrupted by the very political significance it has. As a result of special political conditions in the former Austria, its legal meaning (compared to the political, especially the national one) has been obscured. Here the question arose as well, as to whether the jurisdiction (public authority) of self-governing bodies – namely territorial ones, as opposed to professional (estate) ones – is a certain own law, independent of state power, or whether this jurisdiction also comes from the state, i.e. from the provisions of the legal order. It is understood that the notion of some “own” law in self-government independent from the state, i.e. from the legal order, makes no sense.”*<sup>26</sup>

<sup>23</sup> See e.g. HENDRICH, D., et al. *Správní právo obecná část*. Prague: C.H. Beck, 2003, p. 410.

<sup>24</sup> MATĚJKA, J. *Pojem veřejnoprávní korporace*, p. 68.

<sup>25</sup> The political and legal concept of self-government deals with the type of self-government which is characterized not only by the independence of its own bodies from the state, which is a typical feature of every self-government, but mainly by trying to define the rights of a group of inhabitants living in a particular territory. We mainly want to define the legal or political concept of territorial self-government as a special type of self-government, which differs from other types of self-governments by its territoriality – territorial delimitation. Use of the term legal and political concept of self-government without adding the attribute territorial, should therefore reflect contemporary designations. For the sake of clarity, we have to state that the following interpretation will focus always on the territorial form of self-government, although in the article the word self-government will not appear together with the attribute territorial in its grammatical forms.

<sup>26</sup> WEYR, F. *Soustava československého práva státního*. Prague: Fr. Borový, Nakladatelství v Praze, 1924, p. 239.



What is the difference between the legal and political concept of self-government<sup>27</sup> then? The idea of the rule of law in Anglo-American legal jurisprudence or the concept of the legal state in the continental Europe<sup>28</sup> at the turn of the 19<sup>th</sup> and 20<sup>th</sup> Century clearly presented the position of self-government as a creation of the legal order. It did not perceive self-government as a primary entity separate from the state that would be a holder of its own original power. Thus, the legal concept of self-government in the rule of law was based on the assumption that the exercise of public administration by self-government is an expression of the organic connection of the state's essence of power and, at the same time, its legislative capacity to determine who is the subject of public administration and what will be the subject matter of its activity. In other words, self-government perceived as a subject is different from the state, but the activity it carries out is determined by the state and takes place exclusively within the boundaries of the law. F. Weyr was ultimately convinced that, for this reason, any other meaning of the concept of self-government referring to the separation of self-government from the state would be meaningless, since only the legal order always determines the content of the concept of self-government and its status in the structure of the state.<sup>29</sup> Similar opinion can be found in P. Laband,<sup>30</sup> O. Mayer<sup>31</sup> and H. Herritt,<sup>32</sup> who saw self-government as a public corporation providing administrative matters independently and in the public interest, and this activity had to be guaranteed by the legal order to the self-government as its own right. This allowed self-government to act independently, but only within the boundaries defined by the legal order of the state. The term own and independent is guaranteed only by the legal order of the state and a directly derived right of the self-government to perform a certain area of administration.

<sup>27</sup> The dispute over the content of the political and legal concepts of self-government was not unified. Even within the first CSR, opinions can be found that are different from the mainstream idea. One of them is the concept of J. Hoetzl. According to him, the political concept of self-government means only the organizational principle of state administration: not only civil servants but also citizens provide state administration. In his opinion, the legal concept of self-government indicates that the administration is carried out by someone other than the state – a public union, and in the event of a violation and unlawful interference by the state in its jurisdiction, the union may claim its right in court. HOETZL, J. *Československé správní právo*, p. 161 a 178.

<sup>28</sup> Fleiner speaks of the rule of law as a state in which all life, whether private or public, is within the limits of law. FLEINER, F. *Stát úřednický a lidový. Správní obzor*. 1916, Vol. VIII, p. 338.

<sup>29</sup> F. Weyr ultimately, after assessing the legislation of public administration in the former Austria, held the opinion that the former autonomy of the self-governing authorities of territorial corporations was unsuitable compared to a similar hierarchy of state authorities. See WEYR, F. *Soustava československého práva státního*, p. 241, This opinion was supported by J. Hoetzl, who, in one of his contributions stated that in science, self-government is considered a state administration. HOETZL, J. *Nová organizace politické správy*. Prague: Spolek československých právníků, 1928, p. 10.

<sup>30</sup> P. Laband states that the autonomy of sub-state entities is dependent on the will of the state and its bodies. According to him, self-government only exists where the state power does not exercise its power directly, because certain powers have been “reserved” under a treaty or a state legislative act for sub-state entities. P. Laband tried to disprove Haenel's concept of independence and difference of the subject of self-government from the state. Compare: LABAND, P. *Staatsrecht des Deutschen Reiches*. Freiburg und Leipzig: Akademische Verlagsbuchhandlung von J. B. Mohr, 1895, pp. 102-103 and 107; HAENEL, A. *Deutsches Staatsrecht*. Duncker&Humblot, 1892, p. 817.

<sup>31</sup> Compare the definition of self-government by O. Mayer: MAYER, O. *Deutsches Verwaltungsrecht*. Leipzig: Duncker und Humboldt, 1895, p. 373.

<sup>32</sup> Compare the definition of self-government by H. Herritt: HERRNITT, H. *Grundlehren des Verwaltungsrechtes*. Tübingen: Mohr, 1921, pp. 187–188.

The political concept of self-government, which can be, for example, found in B. Rieger, presented self-government as a “*personality with natural fundamental rights, so that the state should not touch them, but respect the free self-determination of the municipality, its natural scope of activity, which is actually a foreign sphere to the state.*”<sup>33</sup> The political concept of self-government has operated with a qualitatively different view of its autonomy, as can be found in the above-mentioned authors. It understood self-government as a separate political unit similar to an individual that had a certain range of natural rights, which the state had to respect and not interfere with. The content of the political concept of self-government was based on the notion that municipalities are natural associations of people who, in an organic connection, create a special type of personality with natural political rights. B. Rieger added that the foundation of all the municipal political rights is the right to self-determination of the municipality. He based it on the provision contained in Act No. 18/1862 l. r.<sup>34</sup> Among the other political rights of the municipality, we could include the right to independently exercise the sphere of its own administration and to be controlled by state-independent bodies – the administrative judiciary.<sup>35</sup> The political concept of self-government, contrary to its legal concept, did not derive the rights of the self-government from the legal order, but instead referred to its natural rights.

The political concept of self-government as a theoretical construct was partially a reflection of the legal status or the legal status was a reflection of the notion of the political concept of self-government. Whether the original theory was the political concept of self-government or the legal order governing the municipality as a political body with natural rights, the fact remains that a system of self-government through territorial public corporations was introduced in the Austrian part of Austria-Hungary. It was based on the principle that “*the foundation of the state is a free municipality*”<sup>36</sup>, which created the legal basis for a double-track system of public administration.<sup>37</sup> It was a different type of self-govern-

<sup>33</sup> RIEGER, B. *O vedoucích myšlenkách naší samosprávy*. Prague: Self-published, 1902, p. 7.

<sup>34</sup> *Ibid.*, p. 11; Code Act No. 18/1862 l. r. Art. V: “*Autonomous competence, that is, the one in which the municipality, respecting the laws (imperial and provincial), can freely decide by itself on everything and accordingly order and take action, contains in itself everything that first and foremost benefits the community and within the limits of its own power may be achieved.*”

<sup>35</sup> See HLAVAČKA, M. *Zlatý věk české samosprávy: Samospráva a její vliv na hospodářský, sociální a intelektuální rozvoj Čech 1862–1913*. Praha: Libri, 2006, pp. 100–108.

<sup>36</sup> MATĚJKA, J. *Pojem veřejnoprávní korporace*, p. 92.

<sup>37</sup> The legal basis of the double-track system was in the division of offices into political and self-governing ones. The system of political offices as state bodies with general competence was regulated by Act No. 44/1868 l. r. on the Organization of political offices and later amended by Act No. 52/1873 l. r., Act No. 164/1886 l. r., Act No. 43/1897 l. r., at the district level, district councils were established by it headed by the district hetman. At the level of the lands, the governorate in Prague served for Bohemia, the governorate in Brno served for Moravia, and the provincial government in Opava for Silesia. The highest level of political administration were the Ministries. The powers of the individual lower-ranking political offices were very broadly defined. Section 3 of Act No. 44/1868 l. r. laid down that the scope of competence of the political offices at the national level was determined by the scope of competence of the superior Ministry. In addition to the above-mentioned political administration offices with general competence, there were also offices with special competence (e.g. school, mining, customs, railway, postage). After 1848 and the end of Bach's absolutism, a system of territorial self-government was introduced in Bohemia, and the municipality became the lowest territorial unit of these territorial corporations separated from the political - state administration, based on Act No. 18/1862 l. r. For the individual lands, the following Acts on establishment of municipalities were issued: Bohemia Act No. 7/1864



ment than existed in Hungary, as the Hungarian self-government bodies were partly made of elected laymen and partly of appointed officials. Although we will address the so-called authority self-government in the following explanation, we note that the Hungarian public administration was carried out by the territorial self-government in the form of municipia and municipalities. Pursuant to Act Art. XXI/1886 Municipal Law and XXII/1886 on the Establishment of Municipalities,<sup>38</sup> although these were public corporations as well, but contrary to the public administration in Bohemia, they also performed the functions if state administration (they performed delegated state administration). Therefore, in Hungary, the state administration and self-government were not organically separated and the tasks of general state administration (with the exception of certain special tasks entrusted to the administrative committee) were performed by self-governing public corporations. The “freedom” of self-government had a different content in Hungary than in the Austrian part of Austria-Hungary.

The double-track system of public administration in the territory of Bohemia was often even more confusing compared to the Hungarian public administration. At the end of the 19th Century, its reform was energetically discussed,<sup>39</sup> and a change in the status of self-government according to the Hungarian type was considered a model.<sup>40</sup> In this regard, A. Bráf stated that it was necessary to separate the ideas and the actual needs in regulating the status of self-government in the state. By analysing various competence conflicts and uncertainties, he concluded that the idea of autonomy of self-governing collectives, stemming from their mythical natural right to exercise their own administration and the right to self-determination, was a relic.<sup>41</sup> He saw the reason for the progress and the inevitable change in the status of territorial self-government in the state (gener-

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Coll., Moravia Act No. 4/1864 Coll., and Silesia Act No. 17/1863 Coll. The higher level were the representative districts in Moravia (Act No. 38/1877 l. r.) Silesia (Act No. 37/1868 l. r.) and the so-called “road districts”, and the highest level of territorial self-government was represented by the lands. See also MOSNÝ, P. *Podkarpatská Rus: nerealizovaná autonómia*. Bratislava: Slovak Academic Press, 2001.

<sup>38</sup> For more detail see MOSNÝ, P., HUBENÁK, L. *Dejiny štátu a práva na Slovensku*, Košice: Aprilla, 2008; ŠVECOVÁ, A., GÁBRIŠ, T. *Dejiny štátu, správy a súdnictva na Slovensku*, Plzeň: Aleš Čeněk, 2009.

<sup>39</sup> K. Laštovka divided the proposals for reform of the provincial administration in Bohemia into: 1. introduction of regions and 2. organic merger of autonomous administration (self-government) with the landowner administration (state administration). According to him, E. Hácha, J. Hoetzl were in favour of the reform under point 1. The reform under point 2 was supported by H. Herrnitz, Rauchberg and others. K. Laštovka himself was opposed to an organic merger of self-government and public administration. The reason was that the self-government in the system of Austrian public administration offered possibilities of own development and growth to the individual nations. According to him, advocates of the organic merger created a certain a priori concept of the state with its own needs and tasks to accomplish through governance, and they sought to force this concept onto a nationally fragmented population. LAŠTOVKA, K. *Autonomie zemí, Správní obzor*. 1917, Vol. IX, pp. 250–254.

<sup>40</sup> A similar type of the so-called authority self-government was present in England under the name “self-government”. See KLAPKA, O. *Samospráva a župní zřízení*. Prague: Parlament, 1923, pp. 17 – 18; BRÁF, A. *Idey a skutečnosti v samosprávě*. Prague: self-published, 1902, pp. 35–41; but also in Prussia, where Gneist was considered its founder, under whose influence the principles of the functioning of the English public administration were reciprocated in the Prussian legal order. BRÁF, A. *Idey a skutečnosti v samosprávě*, p. 33.

<sup>41</sup> A. Bráf rejected the opinion that the natural rights of the municipality and the consequent requirement of self-government should lead to the restoration of the sovereignty of the Kingdom of Bohemia. See BRÁF, A. *Idey a skutečnosti v samosprávě*, p. 25 and 32.

ally not only in Bohemia) in the realization that the exercise of self-government is an exercise of public duty.<sup>42</sup>

The gradual push of the opinion that self-government is not as an entity absolutely or conceptually separated from the state and that the autonomy of exercising its powers does not imply detachment from laws and the constitution, has led to a refusal to perceive self-government as a natural legal entity that had to be granted rights by the state. The qualitative change of the status of self-government in the state did not mean its demise, but by performing tasks deemed to be state-owned and deriving the performance from delegation by the state, it ceased to be regarded as an entity entirely separate from the state. Although O. Gierke himself promoted the concept of the natural rights of the municipality and towns according to the medieval model, realizing that “*the municipality (author’s note: territorial self-government) is itself an organism and an element of a higher organism*”.<sup>43</sup> H. Preuss applied Gierke’s idea to the description of the public administration system in Prussia as “*the subordination of municipalities under higher collectives does not violate their individuality and their nature as self-governing bodies.*” Their own activities derive from their functions, which are natural to the self-governing organism, and not from those that belong to them when acting as state bodies.<sup>44</sup> His aim was to explain Gierke’s concept of a higher organism and thereby isolate the self-governing bodies with natural rights into their own system. In the Romantic period, however, the “highest organism” became the state representing a national society, whose will became organically superior to individual smaller territorial communities.<sup>45</sup> The historical-legal school imagining the law as a reflection of the period, in which we can include O. Gierke, ultimately resulted in the theoretical unsustainability of the concept of the natural rights of self-governing bodies and the idea of self-government as necessary social unions.<sup>46</sup> In this regard K. Kormann states that “*a certain opinion may ultimately be more seemingly than actually historically true, yet dogmatically flawed.*”<sup>47</sup> His thesis is based on the fact that it is not possible to deduce the theoretical origin of power from the historical origin of self-government. However, on the other hand, the historical fact of the priority of self-government before the state is not completely dismissed. Therefore, both levels of research are important in formulating the concept of self-government and cannot be neglected.

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<sup>42</sup> At the same time, he adds that it is essential that the citizenship - a lay element - be involved in the exercise of self-government. For more details, see BRÁF, A. *Idey a skutečnosti v samosprávě*, pp. 51–56.

<sup>43</sup> GIERKE, O. *Rechtsgeschichte der heutigen Genossenschaft*. Berlin, 1868. In: *Archive.org* [online]. [2013-01-13]. Available at: <[www.archive.org/stream/dasdeutschegeo05giergoog#page/n5/mode/1up](http://www.archive.org/stream/dasdeutschegeo05giergoog#page/n5/mode/1up)>. p. 824.

<sup>44</sup> However, H. Preuss immediately adds that self-government and state administration and their tasks are mutually interconnected: “*However, we must not forget that both of these functions are not separate from each other, but are mutually intertwined.*”. See PREUSS, H. *Gemeinde, Staat, Reich als Gebietskörperschaften Versuch einer deutschen Staatskonstruktion auf Grundlage der Genossenschaftstheorie*. Berlin, 1889, p. 223 et seq.

<sup>45</sup> For more detail see the teachings on the organic state by JELLINEK, J. *Všobecná státověda*. Prague: 1906, pp. 154–157.

<sup>46</sup> For an explanation of the necessary and created unions, see the explanation of MATĚJKA, J. *Pojem veřejnoprávní korporace*, pp. 38–40 and also pp. 90–91.

<sup>47</sup> KORMANN, K. *Grundzüge eines allgemeinen Teils des öffentlichen Rechts, in Annalen des Deutsche Reichs*. 1911, p. 858.

## CONCLUSION

The rejection of the political notion of self-government and the assertion of the opinion that self-government exists only on the basis of law, and therefore is not absolutely separate from the state, has allowed the development of the legal concept of self-government. The rule of law, characterized by an organic connection between its power and legal essence, was manifested as claimed by F. Weyr,<sup>48</sup> in the form of a single sovereign, from which the other externally separate collectives, namely self-government, are directly derived and are created by it. But F. Weyr went even further when he spoke from the position of normative cognition about the legal concept of self-government only as a function of the state in its performance of administration (power).<sup>49</sup> In his framework, self-government was a pure a priori concept. It had a defined scope of law making, which, however, was not its own but the state's law making, because only the state could be the originator of the law. The difference between state administration and self-government was therefore only relative – terminological, not absolute – conceptual.<sup>50</sup> In doing so, F. Weyr completely disregarded the historical development. From our point of view, Weyr's framework represented a borderline position, whose more moderate version (e.g. Laband's or Hernitt's but also Klapka's) accepted the fact that the state did not create certain communities by its law-making activities. During the course of its own development, when the state also began to perform administrative functions, it absorbed the origin of their authority theoretically, but not historically. From this point of view, the existence of self-government was a manifestation of the state's tolerance of its own sovereignty on its territory, because it did not explicitly abolish it, but legally enshrined and confirmed its status.<sup>51</sup> Consideration of historical development shifts the a priori property of the concept of self-government towards empirical reality, and thus also the specific legal regulations of its position. In this sense, we are already moving towards the concept of self-government, which as a legal entity is also the recipient of rights and obligations, and not just their creator.

It is undisputed that there was an idea in the then rule of law which did not understand and could not understand self-government as something primary, original and independent from the legal order. As a general legislator, the state held in its hands the tools to limit, narrow or completely eliminate the sphere of possibilities of action, but also the legal existence of self-government itself and its legal subjectivity in relation to the performance of public administration. An interesting point of view on the whole issue is pro-

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<sup>48</sup> F. Weyr opposes the originality of the power of public corporations involved in the administration also for the reason that it cannot be assumed that they were more original than the rule of law. Compare WEYR, F. *Základy filosofie právní*. Brno: A. Píša, 1920, p. 109.

<sup>49</sup> For more detail see WEYR, F. *Teorie práva*. Prague: Orbis, 1936, pp. 240–241 and 279–280 and 312.

<sup>50</sup> According to F. Weyr: "... in the case of autonomy or self-government, it is the creation of the same normative set of legal order, as in the state administration, or state legislation. From this point of view, every administration, if it is understood as a creation of legal norms, appears to be the state administration and each body called to create legal norms appears to be a state body." *Ibid.*, p. 312.

<sup>51</sup> The current division of forms of self-government, which we believe is most accurately stated by K. Klíma, allows us to understand that the relationship between the legal and political concepts of self-government, stated above, would presently correspond to the effort to correctly define the territorial or political-territorial type of self-government. Compare KLÍMA, K. *Teorie veřejné moci*, pp. 87–88.

vided by the opinion of O. Klapka, which has linked the conceptual unboundedness of the rule of law towards self-government and the actuality, which it presented as an awareness of the historical fact that some self-governing units have existed since time immemorial.<sup>52</sup> O. Klapka basically highlights the fact that the society or community has always performed the administration, but the state did so only from a certain period. The permanent unboundedness of the state in relation to self-government is therefore rather theoretical and valid only for a certain period of the state's existence, and not inductive, acquired on the basis of historical conditionality and necessity. Nevertheless, we must not forget the words of J. Pražák, who claimed that the interests of human society and the state are not different, and therefore both the state administration and self-government carry out public-law tasks connected in the state union.<sup>53</sup>

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<sup>52</sup> KLAPKA, O. *Samospráva a župní zřízení*, p. 10.

<sup>53</sup> PRAŽÁK, J. *O pojme a povahе samosprávy*, Prague: 1899, p. 20.