

Public Institutions and Legal Principles - Who Determines Who?

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Abstract

People's problems are not so caused by a lack of technical equipment, or lack of knowledge of the natural or engineering science (by these tools they can be many times even enhanced), as by the lack of effective, efficient and ethical social science, especially by the lack of (good, better, effective, etc.) administration that cannot be given or embraced solely by principles (or values) as the fully-established concepts. Administration must first embrace the notions of community, institution and regulation that give weights to principles and values. Within these three notions also human reasoning takes place, that cannot be satisfied solely with the elaboration of problems without solutions. Public employees' opinions can be in the present time the fastest indicators or sensors of changes and their effectors in the environment. They give them content in their implementation; thus, also principles obtain their value.

Keywords: regulation, institutions, legal principles, complexity, public employees

The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of their mental expansion and elevation, to a little more of administrative skill...a State which dwarfs its men, in order that they may be more docile instruments in its hands even or beneficial purposes— will find that with small men no great thing can really be accomplished
(Mill, 2002, p. 128).

1. Problem

All major problems in the world are connected with problems of administration, with institutions that (do not) prevent or do not know how to prevent financial and other social crises, how to end wars, prevent poverty and provide the access to clean water, safe food, and similar problems. Holmberg and Rothstein (2012) go even further and claim such factors are caused by the *dysfunctional government institutions* in which the majority of the world's population lives. Although 705 million people were still in extreme poverty in 2015 (the measure of 'one dollar per day') (Roser & Esteban, 2017), the enormous rise of applications allocated to a judicial formation of the European Court of Human Rights from 1999 (8.400) to 2016 (53.600) (with the peak in 2013 with 65.800) (ECHR, 2017), and more pipelines in the world for the gas, liquid petroleum gas, oil and refined products, and not for water as the basic ingredient of life (CIA, 2016), on average people live better than in the past. Despite the negative conclusions on development, on average people live better than in the past. Changes are sometimes slow but are the permanent element in human societies and also in public administrations – they are happening continuously, but the problem in most cases is their incremental nature (they are not spotted immediately) due to the public administrations' existent path dependencies. Dysfunctionality or legitimacy thus depends on criteria, perspectives and the time frame in which institutions/things are evaluated.

The same goes for CEE countries: *Public Administration Reforms in Eastern European Union Member States: Post-Accession Convergence and Divergence* (Kovač & Bileišis, 2017) presents the overviews of public administration reforms of 9 of 11 post-communist EU member states. Among several conclusions made, only two are here

presented to make a point:

There was no common conceptual model underlying the reforms that took place in Central Europe. Reforms were initiated only if they were really needed based on external pressure, but not out of a coherent reform model, such as New Public Management, New Public Governance, Value-Based Governance, New Public Administration, and the like...Reforms in Central Europe were not based and also were hardly done on behalf of the interests of the population, but rather on the interests of administrators and politicians (Vries, 2017, p. 31).

Existing political institutions at the national level have, in most of EEU-11, hardly changed since the early 1990s. The path dependence on the initial conditions of any institutional setup is the cornerstone of the historic institutionalised theory...Similarities between the EEU-11 countries do not seem to be a result of a new administrative tradition, but rather all of these countries have built political institutions that limit their ability to introduce comprehensive administrative reforms, and an incremental process of new practice adoption is taking place which creates increasing differences among these countries (Kovač & Bileišis, 2017, pp. 479, 490).

Both quotes are focused on systems (concepts/institutions) but see the (unwanted) practical changes only in the bottom-up approach (agency-based vs. institution-based explanation): in the interests of administrators and politicians and incremental processes. Reforms in CEE were apparently based on the interests of administrators and politicians, that were able to retain the existing path dependencies. The agency-based frame prevailed over the institutional one. There is a common sense in putting public institutions – as the most relevant user of public resources (the people, things, finances and legal competencies) – at the heart of administrative analysis (Lowmpes, 1996), but as was also seen from the above-given quotes, institutions ‘operate as intervening rather than independent variables between the interaction of actors and corresponding outcomes. Agency-based approaches explain institutional developments (their continuity or change) by reference to the prevailing actor constellation in a given institutional context’ (Knill, 2001, p. 23). A better could be the up-bottom approach where new “constellations” or “rules of the game” are not only given, but also enforced: the effective ‘institution-based concept of adaptation pressure can hardly be applied in order to account for different patterns of administrative change in cases where European policies prescribe no concrete model for institutional compliance’ (Knill, 2001, p. 227).

This paper’s presumption is that – the changes, their incremental nature, different interests, incremental processes, and other elements of PA’s work – can be seen in the basic work of administration, in its *decision making (as an established frame of communications)* that is the lifeblood of every organization. A presumption is that the needed conceptual changes can be achieved only in new concepts, in decision-making different from the existent one.

Changes can be thus observed in decisions, but the latter are not necessarily taken within evidence-based management (OECD, 2011, 2012, 2014; D. M. Rousseau, 2013).¹ Along the (more or less) unchanging decision-making procedures, there is also a

¹ Among other things, stronger regulatory governance for the OECD will require *evidence-based* impact assessments to promote effective regulation in support of policy coherence; more attention to the *voice of users* who need to be part of the policy process; a renewed emphasis on consultation, communication, co-operation and collaboration across all levels of government; reviewing the role of regulatory agencies and the balance between private and public responsibilities for regulation, to secure accountability and avoid capture; and tools to evaluate and measure performance and progress and to communicate the costs and benefits of reform (2011, p. 15). The evidence-based management is the systematic, evidence-informed practice that incorporates scientific knowledge in the content and process of making decisions.

paradox present in the quality of decisions: the latter are more rigorous at adjudication (where one or small number of citizens as parties in a procedure is involved) than at general rulemaking (that affects all or a larger number of people). The mentioned “lifeblood” is tightly connected with the above-mentioned major social and methodological changes; in the field of implementation, PAs are usually focused on questions of why, what and how organizations or tools could be constructed or used to accomplish goals effectively and efficiently, while their focus could be also in *how (general) decisions are made (how communications are established), how they respond to social problems*. In that manner also regulatory approaches were developed (e.g. impact assessment, different clauses, new legal principles), but most problems are still addressed in the classical regulatory frames, (more or less intuitively) developed in the 18th-19th century – despite the known methods, developed in other fields like the mathematical Bayes theorem (Ayres & Nalebuff, 2015; Carrier, 2012; Finkelstein & Fairley, 1970; Hacking, 2001), statistical sampling (Dodge & Romig, 1959; Fiedler & Juslin, 2006; Schilling & Neubauer, 2009; Wetherill, 2013), decisional analysis (Edwards, 1999; Edwards, Jr, & Winterfeldt, 2007; Keeney & Raiffa, 1993; Raiffa, 1994) and risk analysis (Black, 2012; Franklin, 1998; Hood, Rothstein, & Baldwin, 2001; Molak, 1996; Slovic, 1996). Our decisions are also often obfuscated by erroneous or incomplete analyses that e.g. use relative risks instead of absolute ones (Gigerenzer, 2003; Rifkin & Bouwer, 2007), heuristics and biases (Kahneman, 2013; Terje, 2003; Tversky & Kahneman, 1974), with no real, scientific evidence that results in a measurable reduction of risk or improvement in decisions (Hubbard, 2007, 2009), with the lack of good communication and confrontation of risk management solutions with reliable partners (Beck, 1992; Lynch, 2009). This makes the human factor sometimes heavier than its tangible and technological counterpart (Trevisani, 2007).

It is challenging to apply the above-mentioned methods based on the objective and systematic evaluation or assessment that is different from an intuition that something is wrong, and that clearly shows how, when and where to act, as well as why.² Given all possibilities, it seems along institutional questions also a *human character* within them, i.e. descriptive (behavioural) analysis has its part. The above-mentioned conclusions from CEE countries are a clear example of this problem: people want changes, but they do not happen within the existent frames. It seems the latter, and/or the existent decision-making slows down bigger changes. The research question is here focused on *pre-arranged conditions in which people live and work; direct our wills and actions* in front of concepts that are customarily used in the public administration’s studies.³ These conditions were so far mainly present in the legal principles that enable some flexibility in otherwise static rules, but it matters if or how these conditions are spotted – they affect decision-making more than people usually think.

2. Predispositions for a New Decisional Frame

The assumption is that **people’s problems are not caused by a lack of technical equipment**, or lack of knowledge of the natural or engineering science (by these tools

² The main difference between our intuitive conception of risk and a more formal treatment of it is the use of statistics to define the extent and potential cost of any exposure (Crouhy, Galai, & Mark, 2006, p. 5).

³ These concepts include bureaucratic autonomy, administrative styles, bureaucratic entrepreneurship, administrative expertise, bureaucratic budget-making, and multilevel administrative coordination. Together, the concepts cover the central theoretical and analytical advances of comparative PA research (Bauer, Knill, & Eckhard, 2017, p. 6).

they can be even enhanced), **but by the people themselves**. In a public sphere it could be said by the lack of effective, efficient and ethical social science, by *the lack of (good, better, effective, etc.) administration* that cannot be improved solely with new names,⁴ and cannot be embraced neither with e.g. principles⁵ that form the European Administrative Space (SIGMA, 2014) for which the principles' elusive nature is even emphasised.⁶ All big problems in the world are in the majority of cases caused by the lack of good administration or good decision-making. Problems emerge due to bad decisions in social science not in natural science. This stands also for legal principles as the basic foundations of legal science. Despite of their usual importance for almost every principle one can find an equally plausible and acceptable contradictory principle (Simon, 1997). Notions (whatever their content may be) must be thus first addressed in places where they emerge and grow; the second predisposition is that **people live and prosper within institutions** be them family, *community, state institutions or regulation*⁷ – they give weights to principles or values. Within these notions (or mental frames) human reasoning takes place; decision-makers should thus not be satisfied neither with the elaboration of problems, nor with the presentation of solutions, but with their focus and tests in *practice*.⁸ The first element of focus should therefore be *practice* that emerges in pre-given (institutional) frames. *If practice is changed also institutions can slowly change*.

In order to explain the state of public policies and to pursue public goals, we need to know the origin of policies, *i.e.* their elementary element from which institutions are constituted as binding mental frames of human thinking, frameworks that affect us “from the outside” and contribute to the way people behave (*e.g.* family,

⁴ Le Bon, as the pioneer of the new “psychological crowd” entity, warns against new images as being only a disguise of old ones: “[o]ne of the essential functions of statesmen consists, in baptizing with popular or, at any rate, indifferent words things the crowd cannot endure under their old names” (Bon, 2002, p. 64).

⁵ Like ‘getting it right, being customer focused, being open and accountable, acting fairly and proportionately, putting things right, seeking continuous improvement’ (Parliamentary and Health Service Ombudsman, 2017) or ‘maintain accurate, comprehensive and accessible records, place adequate controls on the exercise of coercive powers, actively manage unresolved and difficult cases, heed the limitations of information technology systems, guard against erroneous assumptions, control administrative drift, remove obstacles to prudent information exchange with other agencies and bodies, promote effective communication in your own agency, manage complexity in decision making, check for warning signs of bigger problems’ (Commonwealth Ombudsman, 2017).

⁶ Administrative law principles and civil service are at times difficult to define. Frequently they seem to contradict each other in a given situation. This elusive nature of administrative law principles is one of the reasons why “blank concepts” are so common in administrative law and civil service regulations (SIGMA, 2014, p. 8).

⁷ Regulation is in this text is understood broadly, referring to the ‘diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and *informal* orders and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to which governments have delegated regulatory powers’ (OECD, 2012, p. 25), or as ‘the totality of all mechanisms of social protection and control (Jordana & Levi-Faur, 2004, p. 3).

⁸ Solutions are nowadays still presented more in the form of models than as real experiments. A full understanding of notions cannot give the literature review as it is usually presented in scholars’ papers: notions are used in different contexts with different intentions, predispositions and effects. There is an author who claims such approach could be correct. For him, language *per se* (and thus also notions) is not separated from and relates only to reality, or the meaning in its *use*. This approach is known as Wittgenstein’s language games; he rejected the paradox of following and breaking the rule by treating action in accordance with the rule as its *practice*: ‘there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call “obeying the rule” and “going against it” in actual cases... And hence also “obeying a rule” is a practice’ (Wittgenstein, 1986, p. 81). The entirety of the language-game ‘consists of the language and the actions into which it is woven’ (Wittgenstein, 1986, p. 6).

religion, organization). Many theories want to legitimise public authority in hands of unelected officials; their decision-making is – due to their official competences and their consequences – very important and takes place within different (cultural, political, legal, etc.) frames, while they all are represented through national institutions. While politicians (and even public servants) come and go, institutions stay. *They, i.e. their ways of behaving, communicating* define what is (not) similar and by this also the rule of law. For Rousseau many differences that distinguish men are the result of life in society, especially ‘as a result of instituted inequality’ (1993, p. 53), which ‘owes its force and growth to the development of our faculties and the progress of the human mind, and finally becomes stable and legitimate by the establishment of property and laws’ (1993, p. 79). The law comes to life in institutions: when people speak about the rule of law to Waldron they are looking something other than these formal elements: ‘instead I have in mind elements of legal procedure and the institutions like courts that embody them’ (Waldron, 2011, p. 4); it is very relevant how information is processed in institutions, how they manage actions, their relations and transfer knowledge. The planning of “models of reality” (which regulation basically is) in the first place implies an influence on an institutionalised pattern of behaviour, i.e. on a (regulatory) system that is flexible (responsive to change), complex (consisting of vertical and horizontal parts), autonomous (independent of major or minor external influences) and consistent (consistency of parts toward a common goal) set of information (on cohesion, differentiation, competences and resources). The third element of research frame can be *institutions* in which different (informal routines or) *administrative styles*⁹ are applied.

On the other hand, institutions are the subject of formal enactment and implementation, where the public administration has a large role. The essence of the public administration is *implementation* – it is focused mainly in final results (lat. *fructo cognoscitur arbor* – “a tree is known by its fruit”) and they are primarily achieved by the public administration’s parts, *i.e.* institutions, or more specifically by public employees. If ‘[a]dministrative changes can be defined as administrative reforms only when they end in certain improvements of a public administration’ (Koprič, 2017, p. 36), then these changes are tightly connected with a human factor, with public employees. There is a gap between a formal enactment of rules and their *de facto* implementation. One of the main cybernetic laws is Ashby’s law of requisite variety: *only variety can destroy variety*.¹⁰ A goal can be thus achieved with diverse responses which are as distinctive as diverse problems expressed: diverse PAs/human elements can be addressed by distinctive PAs/human elements. On the European and on the national level by distinctive public servants. When people deliberate, they strive towards consensus, as the best way to achieve results, but the latter can be reached also when individual opinions cancel each other out through aggregation processes of one-way or biased ideas and cognitive illusions. These ideas are known as random errors or fluctuations in the measured data due to the precision limitations, but averaging over a large number of observations can reduce them. The very process cancels opposing opinions by the

⁹ Administrative styles 'basically describe the basic features of administrative behavior in the interaction between public authorities and the society (e.g., anticipatory vs. reactive, legalistic vs. pragmatic, interventionist vs. mediating patterns of intervention, or open vs. closed, and consensual vs. adversarial relationships between public and private actors)' (Bauer et al., 2017, p. 44).

¹⁰ If the variety of the outcomes is to be reduced to some assigned number...variety must be increased to at least the appropriate minimum. Only variety...can force down the variety of the outcomes (Ashby, 1957, p. 206).

process of negative correlation and retains ones that are upgraded by diverse (and similar in specific points) opinions.¹¹ Respondents from different institutions can enlighten the state of affairs of their institution, and hence show the institution's condition. The fourth element of the research frame is employees, in the public administration, *public servants*.

Many papers were written on the PAs' models, but in reality, there is *none*. Decision-makers can observe facts directly or indirectly through models, but from them no universal regularity can be logically made. Facts are independent from models: the first can be present in the second, but they have "their own lives". This still proves the unsolvable Hume's "is-ought" logical problem (2007), and the same stands for models: no specific model cannot proceed from its singular statements to an assertion on universal laws. It is possible that physical system can be approached and analysed with a simplified model of a physical system by means of simulation. But this kind of model is solely a system's representation, and can be studied as a real system's substitute (Schut, 2007). The (good, better, effective, etc.) administration cannot be embraced solely by models, and they can be only the practical representations of various underlying processes that are present in models or are present "outside of a model's radar". A model can be useful if it explains some data better than other approaches; a model is constructed mostly of knowledge and experience to integrate the various data together into a coherent and consistent pattern, but the latter changes in time. Due to the environmental complexity, numerous interactions, combinations and modifications, models should always be also open to prevent shutting themselves off from the possibility of further changes. Decision-makers should be aware on a one-way relation between the public administration and its model: a specific public administration can resemble some properties of a model (Weberian, neo-Weberian, governance, network, digital etc.), but the latter cannot be used as a frame in which the public administration *must* work. If a model does not address the reality of a "system" that operates in a particular environment (i.e. institutions) the first will not address properly the reality of the observed environment.¹² Another element of research frame should thus be *a process that reflects its surroundings* as the living practice of institutions,¹³ as a process that records real communications (like recorded eye tracking vs. formally expressed words about some picture).

Predispositions for an effective decisional frame can be thus i) practice that emerges in pre-given (institutional) frames, ii) a model that reflects/adapts to its surroundings as the living practice of institutions, iii) institutions in which models are applied and iv) public servants. The more decision-makers can record

¹¹ Already for Aristotle change is continuous, and action is change. In all cases the mean relative to us is best; for that is as knowledge and rational principle prescribe. And in all cases that also produces the best state. And this is evident from induction and argument. For opposites rule out one another; the extremes are opposed both to one another and to the mean because the mean is each one of the opposites in relation to the other: the equal is larger than the smaller but smaller than the larger. So it must be the case that virtue of character is concerned with certain means and is itself a certain mean state (Aristotle, 1992, p. 16).

¹² The effectiveness of any model used to describe and understand behavior of a particular system ultimately depends on the degree to which that model accurately represents that system (Ackoff, 1999, p. 30).

¹³ This model can be reflected also in legal principles used for the law-making and law-enforcement; in the European Administrative Space (EAS) they are used for the convergence of national public administrations towards the capacity to implement the EU law. EAS thus achieves organisational element through principles, EAS is »institution« through which administrative capacity is reflected.

communications/relations between these conditions, the more they can align wanted goals with real results.

3. Institutions

Because practice is different in each country and the models of public administrations are known (Weberian, neo-Weberian, governance, network, digital etc.), the importance of institutions will be addressed here. In the above-mentioned statements their denominator can be found: *institutions*. They existed before the planned research/study; for Wittfogel the success of ancient hydraulic societies (the administration of large quantities of water) was in *the division of labour, cooperation on a large scale, counting and record keeping*; taken all together, they basically – *through power to organise* - developed an effective system of *communication* (1959). Eisenstadt in *Comparative Civilizations and Multiple Modernities* claims

‘institutional order develops, is maintained and changes through a process of continuous interaction, negotiation, and struggle among those who participate in it... [so] social behaviour cannot be explained in terms of norms or roles, but above all in terms of interaction between social actors, especially individuals, acting rationally in terms of some combination of utilitarian considerations and punishment-reward system, in pursuance of their goals’ (2003, pp. 8–9).

Political institutions usually do not change overnight (one exception could be the fall of the Berlin Wall in November 1989). For Durkheim, as the first sociologist of social integration, the institution is a social fact or ‘a set of beliefs and ways of behaviour created through collectivity that serves to maintain general awareness’ (1984, p. 60). The institutions for Douglas create similarities between things embedded in certain classifications and categories that are supported by the moral energy of its members (Douglas, 1986, pp. 64–72). Institutions are ‘stable, valued recurring patterns of behaviour’ (Huntington, 1968, p. 12), they are ‘persistent rules that shape, limit, and channel human behaviour’ (Fukuyama, 2014, p. 6) and are important entities that live beyond one person’s lifetime. Institutions even “think” - they define sameness and *a contrario* - ‘[s]imilarity is institution’ (Douglas, 1986, p. 55). Although for Sen the role of *public reasoning* is central for the understanding of justice which gives a connection between the idea of justice and the practice of democracy (“government by discussion”) also

institutions cannot but play a significant instrumental role in the pursuit of justice. Together with the determinants of individual and social behaviour, an appropriate choice of institutions has a critically important place in the enterprise of enhancing justice. Institutions come into the reckoning in many different ways. They can contribute directly to the lives that people are able to lead in accordance with what they have reason to value. Institutions can also be important in facilitating our ability to scrutinize the values and priorities that we can consider, especially through opportunities for public discussion (this will include considerations of freedom of speech and right to information as well as actual facilities for informed discussion) (Sen, 2009, p. xii).

Institutions’ cultures, their *ethos* decide what is similar, different, complex, chaotic or (un)changeable. Institutions are social structures with the intertwined and interconnected expectations stabilised in time. They have emerged through habit or repeated use (e.g. a family, a club) that shares common goals for which it is presumed to be good to pursue them, or through formal set up (a country, ministry, the PA). Institutions regulate interpersonal relations or establish the authority in a community.

An institution is characterised by stability and steadiness and tends to repeatedly orient, steer and general human behaviour. Institutions are influenced by the habits, expectations, values, norms and actions which as the “path-dependencies” are usually very hard to change. Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. They have often the life of their own, known as organisational culture or ethos. It is therefore difficult, if not impossible, to initiate radical changes in the institution or to eliminate it in a short period of time. When more complimentary institutions are set up, as usual in societies, it becomes costly to radically change them or to abandon them because changing one institution *always* has implications for other institutions.¹⁴ The performance of each is affected by the existence of others; this intuitive reasoning corresponds with one of the basic elements from systems theory: correlated parts form a complex or unitary whole, and can be administrated only from the standpoint of a *whole*. This holistic thinking understands institutions as systems in their mutual influences and intertwining. To establish a new path, institutional path-dependences and/or their systems should be addressed with changes in systems, or to have an effective decision, a system and its relations must be first known. This is the task of the next chapter.

4. Institutions are the System’s Parts

System (gr. *systema*, “an arrangement, sistem”, from *synistanai* to combine, from *syn* “together” + *histanai* “cause to stand” (Merriam-Webster, 2017)) is an assemblage or combination of correlated things or parts forming a complex or unitary whole. In the system, each part is connected with all parts (try to lift one part of spider’s net without shaking other parts), and the overall system’s behaviour cannot be predicted from a behaviour of one part. Connected parts produce – in their relations – new results that parts *per se* do not have. When all parts run smoothly with all other it can be said the system is optimised, but this can be done in a closed system. The system’s effectiveness and efficiency can be only partially improved up to some point by improving its parts, but by this, the system is changed as a whole. All is not only more than the sum of its parts, but what is or could be “all” in open systems cannot be known in advance; it emerges *ex-post* only through interactions. A further characteristic of emergent property is its ‘complex behaviour [that emerges] from simple rules. Those rules imply general regularities, but the working out of an individual case exhibits special regularities in addition’ (Gell-Mann, 2002, p. 313). Traditional regulatory thinking neglects the basic system’s predisposition of *interconnections*. Instead, it only looks towards final goals (regardless of how they are assembled) and assumes a single (of few) cause(s) rather than the multiple interrelated causations.¹⁵ Traditional regulatory thinking often disregards that amount of information can nowadays be enormous (now even filled with post-truths). To Simon (1996) in the “information-rich” world of information oversupply, now **attention**, not information is the scarce good. Actions are based not on information, but on our attention which “collects” the first. Humans usually give attention to one thing at a time, but this kind of agenda cannot provide us with a full picture.

¹⁴ The value of personal elements is of course not denied, but to change/direct persons a change of institution is quicker and easier than to change each person separately.

¹⁵ The traps of non-systems thinking lie in two simple dimensions; firstly avoiding the inevitable interconnectivity between variables – the trap of reductionism, and secondly, working on the basis of a single unquestioning perspective – the trap of dogmatism (Reynolds & Holwell, 2010, p. 6).

Many times, new terms/institutions are developed to embrace the past non-effective practices, which can be seen as *good* administration, *good* governance, *responsive*, *better*, *smart* regulation, etc.¹⁶ New names with the same predispositions and building elements will probably not be very different than the past ones. To the common-sense the right and intuitive idea (“if you want to accomplish your goals, you must have appropriate tools to do so”, and “if you want to determine your goals, you must have appropriate facts established with proper tools”) could be wrong when *personal* goals are subordinated to external environment, and not contrary (the external environment should be a focus of our interest in which we “find” things as “facts”). This kind of (causal) thinking disregards the mental, internal processes of *living* organisms, which are able to *control* aspects of their external environments.¹⁷ If systems were completely open to their surroundings, they would scatter in them and become unrecognizable, so they must have internal structures to maintain their unity. Systems are “cognitively-open” (inputs), but “operationally-closed” (the communication of meaning is defined in the system’s own language).¹⁸ Information does not enter in the system from the “outside” – it is *internally constructed* (like a pot’s size or a strainer’s density determines the amount of water or particles in it that pass through the strainer). What data is recognised as information is determined by the system’s structure in a specific moment (input/output is replaced with non-causal *structural coupling*). This leads Luhmann – maybe contrary to Dworkin’s *Taking Rights Seriously* (1978) (where rights of the individual against the state exist *outside* of the written law and function as “trumps” against the interests or wishes of the majority) to observation that ‘[t]he theory of autopoietic systems could bear the title *Taking Individuals Seriously*...[because] taken as individual, no human being can be part of any other systems’ (1991, p. 1422)). On the other hand, also the individual is a part of a larger system called collective and even of larger called society. Within these frames (legal and other) reasoning takes place: for Friedman ‘legalism is rule following...The interesting sociological questions are, what are the rules, how they are made, and of what does “following” consist? When we speak of legalism we are describing, rather roughly, a type of reasoning’ (1966, p. 148). A discussion about legal reasoning can begin with Hart, for whom ‘[t]he use of unstated rules of recognition [the rule by which any member of society can discover what the primary rules of the society are], by courts and others, in identifying particular rules of the system is characteristic of the internal point of view’ (1994, p. 102) but when ‘the question is raised whether some suggested rule is legally valid, we must...use a criterion of validity provided by some other rule’ (1994, p. 107). A rule *per se*, therefore, cannot provide criteria for the assessment of its own legal validity, because the latter is always framed in *other* criteria, categories and their combinations. For Habermas, rationality consists not so much in the possession of particular knowledge, but rather in ‘how speaking and acting subjects acquire and use knowledge’ (1985, p. 11), because – in Luhmann’s way – ‘positive law can no longer derive its legitimacy from a higher-ranking moral law but only from a procedure of presumptively rational opinion- and will formation’ (Habermas, 1996, p. 457). This can be named as **the challenge of reality construction**.

¹⁶ See n. 4.

¹⁷ If people want e.g. better regulation it cannot *per se* be found in reality; the first is imagined, and the second is accommodated to this goal.

¹⁸ Between cognitive and normative expectations even “facts” that are relevant for the legal system are not facts for everybody...they have to be certified facts (Luhmann, 1991, p. 1430).

Thinking about the rule of law and other legal principles means thinking about *institutionalized practices* in which these principles are used; to understand principles we must understand arguments that evolve in institutions. There is also another caveat present: arguments do not evolve in abstract institutions, but in their specific context in their parts or units. The usual understanding of legal principles puts them on top from which other rules are derived further down under the principles, while systemic one sees principles connected with all rules and on each specific occasion, and contrary: as principles reflect rules, the latter reflect the first. They both are in both places at the same time – principles are rules and rules are principles; rules give through practice to principles the life power, and principles give rules their importance, all in causal circles. This is not a theoretical debate, but a presentation taken from system theory that principles are not unitary wholes to which nothing can be given or taken away, but an assembly of parts. And the most important – if parts change, also principles change, and parts change through the mutual interaction between public servants and clients in and outside of an institution, with servants and clients from other institutions.

5. The Challenge of Emergence in Reality Construction

All forms of complex adaptive systems as the ‘systems that involve many components that adapt or learn as they interact’ (Holland, 2006, p. 1) have a characteristic element known as *emergence*: ‘[a]n emergent property is a global behaviour or structure which appears through interactions of a collection of elements, with no global controller responsible for the behaviour or organization of these elements. The idea of emergence is not reducible to the properties of the elements’ (Feltz, Crommelinck, & Goujon, 2006, p. 241). It emerges only through interactions, by the emergent, new combinations that exponentially rise with numerous parts or relations. The concept of emergence can be helpful to describe the end of a decision-making process: what is usually understood as a final decision, is usually the result of numerous, intertwining combinations that interact between rational arguments and emotions, and strive for the largest proportion of their content in a final decision. A simple statistical average or correlation is the example of emergence, not present in a specific part. If people take them for granted they still not embrace the fact that also other parts form unity which parts cannot have. A number of combinations between parts *exponentially* increases with the complexity of the problem, not proportionally. There are many combinations, each solution has more than the beginning, each solution represents the exponential result of the best result, which we usually do not know until it happens. All the rest are just (good/bad) predictions. This is all that remains for the decision maker - to decide as carefully as possible on a particular path towards goals, to constantly correct errors in terms of changes in the environment, and according to predefined thresholds that require different reactions. Reality is from many view-points our mental construction, and as such it could be also changed. The same stands what is good or bad or what or when the rule of law principle transforms into some other principle. This determines (mental) parts and their weights according to context, i.e. how a difference (in a form of information) is spotted.

5.1. Emergence as the Cause for the Rule of Nobody

The concept of emergence can explain the shortcomings of the classical legal principle of accountability. When the end result is assembled from many small ones, no one is

accountable for the end result, because no one de facto made it: each had just contributed in its small part, without having the end result in his mind. One of the best descriptions of this phenomenon gives Arendt's Rule by Nobody or the banality of evil as the effect of the first, which she saw in Eichmann (the German officer on trial):

except for extraordinary diligence in looking out for his personal advancement, he had no motives at all...He merely, to put the matter colloquially, never realised what he was doing...It was sheer thoughtlessness - something by no means identical with stupidity - that predisposed him to become one of the greatest criminals of that period. And if this is "banal" and even funny, if with the best will in the world one cannot extract any diabolical or demonic profundity from Eichmann, that is still far from calling it commonplace...the essence of totalitarian government, and perhaps the nature of every bureaucracy, is to make functionaries and mere cogs in the administrative machinery out of men, and thus to dehumanise them. And one can debate long and profitably on the rule of Nobody, which is what the political form is known as bureaucracy truly is (Arendt, 2006, p. 210).

From a collective's point of view, the same situation described Bauman, who placed it on the ability of modern, rational, effective, technologically advanced and routine-based, but morality-silenced bureaucracy.¹⁹ *The network of intertwined institutions and powers, a thorough and complex system of rules, a system with no fundamental management elements, result in the even stronger rule of nobody.* There are so many failures but no one can be directly blamed for them, no one is (legally) accountable. This result intuitively demands the accountability of public institutions or officials should be used more strictly, but this will produce even more unwanted consequences.

5.2. Impotent Classical Accountability in Dynamic Environments

The concept of emergence places the political and legal accountability in a different light: accountability is possible only in cases where sufficient regularity in causal relations is established; only on this basis the prediction of consequences (accountability) with high probability can be done. The final decision involves a number of factors that are not included in the initial idea (the beginning is not the same as the end); a decision is only a distant consequence of an original idea, and sometimes even a new phenomenon, which has no direct connection with the beginning (e.g. no minister of the government can be directly connected with the elections, i.e. that elections will take place in a way that a precisely determined person will become a minister). The classical (mechanical) accountability (who did what, where, when, how and why) is thus not appropriate in the dynamic, complex environments. A solution that seems to be "self-made" or self-evident is usually found as the result of a longer adaptation to the environment and the practice of using a particular idea or object. Another solution that could be quicker takes a holistic, systemic view on final goals that views all parts in their interactions or patterns in a system's structure, with the parts' relations with the structure. Patterns based on thresholds and different possibilities to react with different tools/rules can be more appropriate. Systemically-accountable is thus a decision maker,

¹⁹ The technical-administrative success of the Holocaust was due in part to the skilful utilisation of "moral sleeping pills" made available by modern bureaucracy and modern technology. The natural invisibility of causal connections in a complex system of interaction and the 'distancing' of the unsightly or morally repelling outcomes of action to the point of rendering them invisible to the actor was most prominent among them. Yet the Nazis particularly excelled in a third method, which they did not invent either, but perfected to an unprecedented degree. This was the method of making invisible the very humanity of the victims (Bauman, 2013, p. 27).

who does not assemble a system that could give him a clear state of affairs in a given time and place.

6. Legal Principles Seen Through Emergence

The general legal principles of law recognized by civilized nations are at the top of the legal systems.²⁰ The first found their origin in the domestic legal systems, so it would be fruitful to find out how this origin emanates. A new principle is based on the methodologies of framing,²¹ designing and developing data collection methods (usually from the case-law); from the latter, directions can be for the future extrapolated or predicted. This approach is more domestic in marketing management (Diamantopoulos, Fritz, & Hildebrandt, 2013; Morden, 2012; Ord & Fildes, 2013) that based on data and advanced prediction methods indicate types of consumer-market relationships than in the law, where the legal principles are exhaustively only enumerated. A similar methodological approach is used in SIGMA's document:²² *The principles of Public Administration* defines what good governance entails in practice and outlines the main requirements to be followed by countries during the EU integration process. The principles also feature a monitoring framework enabling a regular analysis of the progress made in applying the Principles and setting country benchmarks. In the 1999 Paper no. 27 SIGMA – in the attempt to state shared principles of public administration among the EU Member States that constitute the conditions of a “European Administrative Space” – systematised the main administrative law principles common to western European countries in the following groups: 1) reliability and predictability (legal certainty); 2) openness and transparency; 3) accountability and 4) efficiency and effectiveness.

Principles in the jurisprudence of the European Court of Justice are among others: the principle of administration through law, the principles of proportionality, legal certainty, protection of legitimate expectations, non-discrimination, the right to a hearing in administrative decision-making procedures, interim relief, fair conditions for access of individuals to administrative courts, non-contractual liability of the public administration (Schwarze, 1992). This kind of enumeration of principles will always include too much/little, and little can be done if circumstances change in which weights are given to different principles and/or viewpoints. Principles need facts to confirm and to re-establish them as such; they serve as boundaries that should not be crossed in new cases, and – as an example of Ontario Human Rights Commission clearly states –

²⁰ See Article 38, paragraph 1[c] of the Statute of the International Court of Justice; article 8 of the Constitution of the Republic of Slovenia similarly states that '[l]aws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly'.

²¹ Evans (2013; 1996) proposes *e.g.* three principles of hypothetical thinking as one of the hallmarks of human mentality that includes many facets of reasoning, from conditional inference to probability judgment. These three principles frame reality in the various forms of reasoning: 1. the singularity principle: people consider a single hypothetical possibility at one time; 2. the relevance principle: people consider the possibility that is most relevant in the current context; and 3. the satisficing principle: possibilities are evaluated with respect to the current goal and are accepted as long as they are satisfactory.

²² OECD PUMA recommendation Principles for managing ethics in the public service 1998, OECD European Principles for Public Administration 1999, the Commission's White Paper on European Governance 2001, OECD Principles of Public Administration 2014.

could be more usable when given as guidelines than explicit principles.²³ Principles' content is different than facts (to which we can give answers to seven golden questions of what, when, where, who, with what, how and why), because of the above-mentioned emergence as the new result from the combination of parts, or because principles incorporate legal values that are per se *heterarchical*.²⁴ The mapping of values can exist only by crossing over one to another similar one, leaving a map of values in prior situations for future combinations. This can be seen in cases when new preferences are given to different or even to the same values as principles (in different contexts of time and place). For Simon the so-called

principles of administration are only *criteria* for describing and diagnosing administrative situations [that]...must be balanced against each other...a valid approach to the study of administration requires that *all* the relevant diagnostic criteria be identified; that each administrative situation be analysed in terms of the entire set of criteria; and that research be instituted to determine how weights can be assigned to the several criteria when they are, as they usually will be, mutually incompatible (Simon, 1997, pp. 42–43).

It could be *a la* Simon said that principles are merely proverbs, because they can contradict each other in different situations, but they basically *should*: their importance is in their *weights* that parts have proportionally with a degree of different context. Principles' general nature or content is used not only as a deduction from which rules/actions are derived but also as a "general-*induction*" to propose new rules or actions. There is always a room for a new "Black Swan principle" that lies outside the realm of regular expectations because nothing in the past can convincingly point to this possibility (Taleb, 2010). We could only rely on a duty of giving arguments or reasons for every new choice, otherwise, there is only a capricious or arbitrary decision of authority. Although principles are not easily changed, there are occasions when new emerge (e.g. the principle of transparency or the precautionary principle).

The legal principles "emerge" usually in the case law. Emergence cannot be directed per se (because it is not an entity, a process or a thing, but a result that emerges spontaneously). At some point, a human's innate characteristic to look for patterns identify common elements in various manifestations, and groups them into the same group that is distinguished from others by their specific common elements.

²³ According to Ontario Human Rights Commission organizations must consider legal principles when they deal with competing rights situations: 'courts have recognized that the specific facts will often determine the outcome of the case...many of the principles are abstract, and allow for some flexibility in approaching claims on a case-by-case basis... principles...also provide guidance for other types of human rights conflicts: no rights are absolute; there is no hierarchy of rights; rights may not extend as far as claimed; the full context, facts and constitutional values at stake must be considered; must look at extent of interference (only actual burdens on rights trigger conflicts); the core of a right is more protected than its periphery; aim to respect the importance of both sets of rights; and statutory defences may restrict rights of one group and give rights to another' (Ontario Human Rights Commission, 2012, p. 5)

²⁴ With regard to public values, already in 1945 McCulloch – based on situation where A is preferred to B, B to C, but C is preferred to A – established that value hierarchies do *not* exist. For him this value anomaly corresponds to circularity, which is 'sufficient basis for categorical denial of the subsumption that values were magnitudes of any kind. Thus, for values there can be no common scale...Circularities in preference instead of indicating inconsistencies actually demonstrate consistency of a higher order...An organism possessed of this nervous system – is sufficiently endowed to be unpredictable from any theory founded on a scale of values. It has a heterarchy of values and is thus interactively too rich to submit to a summum bonum' (McCulloch, 1945, p. 92). Also, at voting, collective preferences can be cyclic (*i.e.* not transitive), even if the preferences of individual voters are not. McCulloch's values are therefore similar to the voting paradox, also known as Condorcet's paradox.

Principles, therefore, should be supported by empirical evidence, which presupposes the understanding of *conditions* in which empirical evidence is recognised as such, and later grouped into a specific (new) group. Only then officials can consider relevant factors as relevant and give each of them their proper weight. They should avoid making decisions which are based on a brief or vague ground – and what are principles other than vague if they do not contain reasonable arguments? Principles can be more objectively described as steps that represent the system, method, advice, guidelines, prescription, description, condition, cause, effect, interest, and statements, rather than a general statement that depends too much only on the majority of judges in Court. If steps in the evaluation of evidence point at (more/less) the same direction, then we could say there is a possibility for a principle to emerge from the values of society. The same stands for its use and change. In the lines below a process is given by which a principle could come to life.

Decision-makers should be aware that legal principles are also faced with the challenge of emergence in reality construction. A principle as life, comes to life in institutions (the institutions of marriage, family, public institutions, country, the EU). This requires also the same approach at implementation of principles. There should be **controls present over the *methods* used** in their formation, rather than over specific commands, as Hayek noticed.²⁵ A presumption is that systems and principles in them can be (i.e. changes in a system) systematically monitored and decisions enacted based on several stochastic indicators or sensors (to prevent the bias of decision-makers by focusing only on pre-determined indicators). In the present conditions, these indicators are usually the public employees themselves, their views on certain principles. Although men usually do not know when/why one principle should be used instead of another, they always – based on a context of a matter – give more *weight* to one principle *vis-à-vis* another: [w]hen principles intersect ... one who must resolve the conflict has to take into account the relative weight of each' (Dworkin, 1978, pp. 24, 27). From employees' view extraction should be done that could show the ideal type of things. Indicators should be put on a more objective level. A decisional frame could be seen on a following way:

²⁵ The more complex the order aimed at, the greater will be that part of the separate actions which will have to be determined by circumstances not known to those who direct the whole, and the more dependent control will be on rules rather than on specific commands (Hayek, 1998, p. 50).

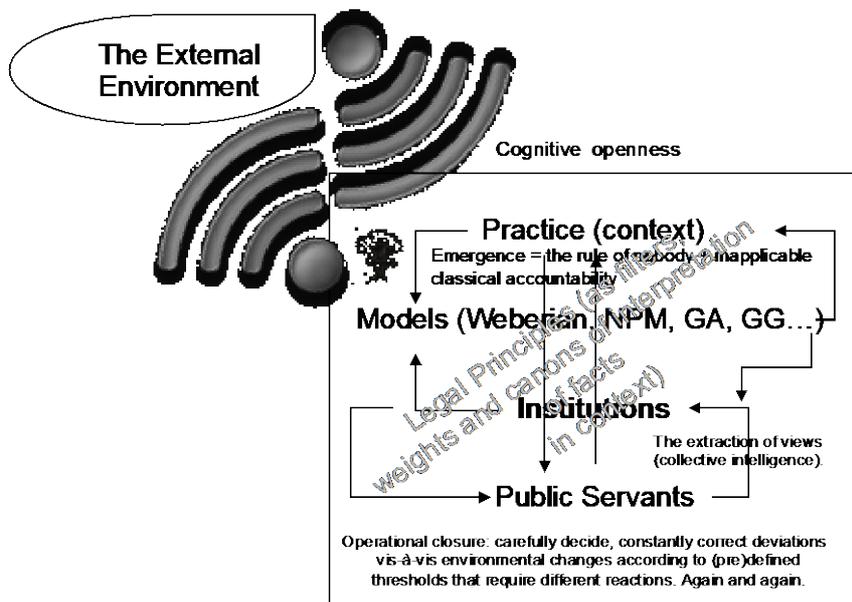


Figure 1: Decisional frame

7. Controlling Questions That Enhance the Systemic Approach

Descriptive or natural laws can be discovered by observation and reasoning, and can be overturned by one exception, while ‘prescriptive laws may be broken and yet remain laws because that merely means that human beings do not do what they are told to do’ (Hart, 2012, p. 187). Hart’s saying holds because despite few violators the majority of people still ‘in the *practice* of courts, legislatures, officials, or private citizens...actually *use* this rule [a rule people recognise and identify as a valid rule of the legal system] of recognition’ (Hart, 2012, p. 107). The majority do what they told to do because it recognises the rule through their common human nature (that stays more or less the same). But this could be on the other hand a brake towards new development.

In the language of this paper human nature “emerges” only in *relations* with other people (a person can sympathize or be immersed in a situation of other only with the presence of another). *People from institutions* are the important element through which criteria are given for the identification of valid rules of the system. Legal principles are only a notion, like anyone else: they receive their substance in *practice*. From the systems point of view and from the standpoint of effectiveness as one of the main principles in public administrations that implements a Legislator’s enacted goals the latter mean or are valid only as *practical effects*. Otherwise also a legal principle is only a dead letter on a paper. Before legislators enact a new law, they should know **how communications, connections emerge within a system**, they should have answers to the control questions like:

Who, where, when and by what method was the factual state of affairs determined?

How will we know this state is changed?

How do we know the real-time condition of this law?

Where and how do feedback loops operate?

What is the function of this law as a whole?

What are its essential parts?

How do they (should and could) relate or connect?
 What are the functions of these parts (also in different combinations)?
 Would this law be operative if some parts and relations were removed?
 Can parts be assembled differently to reach the same goals?
 What (thresholds) determine(s) its effectiveness and efficiency?
 Do we have scenarios for different conditions and what triggers the first?
 From which points and with what tools can the same goals be achieved?
 Can a legislator force a parameter's variable to take a prescribed value and/or can adaptable norms be triggered in the changed environment?
 How can this law be abused and how can this be recognised and prevented?
 How do we know this law works?

Legal effects are relevant as their results in practice; it is thus of utmost importance that also public participation is also respected in decision-making. Various public perspectives (perceptions and relations) can – included in decision – better reflect a real system that works in practice. This is another element that works within the system. Taken together, decision-makers should have more objective indicators (frames of view) of the successfulness of their decisions. The above-given control questions could be seen as an elementary step towards this direction.

8. Conclusion

A constant **attention** must be paid to improve institutions and regulations but one step *behind* them should be taken. Decision-makers should now how institutions interact, i.e. how employees cooperate, communicate, coordinate and *which parts they value and how much*. Principles, their content and effects depend on institutions and people who work in them. All these notions are not only goals that people want, but they are also *tools* through which goals can be achieved (principles as the indeterminate legal notions are not only notions that should be *a priori* valued *per se*, but are such due to their re-confirmation in practice). The largest number of legal decisions are taken within the frame of PAs. Here, principles basically mean how public employees as the adjudicators, implementers and preparators of general legal rules, understand them, and how they (based on their understanding) implement them in practice. Decision-makers should listen to them; they should listen to Mill's saying from the introduction of this paper. What will they hear? Nothing new, until employees are given an opportunity to see decisions as systems as communications and mutual relations. Otherwise, they will remain just the Mill's small men with some administrative skill but with no great things in mind.

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