

Znanstveni članek  
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# Varstvo legitimnih pričakovanj v postopkih z izrednimi pravnimi sredstvi po Zakonu o splošnem upravnem postopku

Špela Lovšin

## POVZETEK

Avtorica obravnava koncept varstva legitimnih pričakovanj v luči postopkov z izrednimi pravnimi sredstvi po Zakonu o splošnem upravnem postopku (ZUP). Na podlagi primerjalnopravne analize v prvem delu se avtorica opredeli do sedanje umestitve koncepta varstva legitimnih pričakovanj v slovenskem pravnem redu, čemur sledi pregled veljavne ureditve izrednih pravnih sredstev po ZUP. Na tej podlagi avtorica sprejme oceno o ustreznosti varstva legitimnih pričakovanj naslovnika upravne odločbe v postopkih z izrednimi pravnimi sredstvi po ZUP z vidika tehtanja med javnim interesom po zakonitosti delovanja uprave ter zasebnim interesom po nadaljnjem obstoju upravne odločbe in na tej podlagi poda predloge potencialnih prilagoditev.

*Ključne besede:* legitimna pričakovanja, načelo zakonitosti delovanja uprave, upravni postopek, izredna pravna sredstva, dokončnost in pravnomočnost upravne odločbe.

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# Protection of Legitimate Expectations Through Extraordinary Legal Remedies as Regulated by the Slovenian General Administrative Procedure Act

Špela Lovšin

## SYNOPSIS

The author discusses the concept of protection of legitimate expectations in the light of extraordinary legal remedies as regulated by the Slovenian General Administrative Procedure Act (GAPA). Based on a comparative law analysis in the first part, the author adopts a position regarding the status of the concept of protection of legitimate interests within the legal system of the Republic of Slovenia, which is followed by an overview of the existing regulation of extraordinary legal remedies in the GAPA. The author then adopts an assessment of the adequacy of protection of legitimate expectations of the administrative decision's addressee in the GAPA regarding the balancing between public interest in the legality of administration and private interest in the further existence of the administrative decision and proposes potential adjustments.

*Keywords:* legitimate expectations, the principle of the legality of administration, administrative procedure, extraordinary legal remedies, administrative and judicial finality of the administrative decision.

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# Prihodnost javnega komuniciranja: predlog o tem, kako bi lahko v Evropi definirali sovražni govor

Andraž Teršek

## POVZETEK

Postalo je očitno, da Evropa potrebuje in si resnično želi svoj koncept sovražnega govora. Zato ga mora natančno dovolj opredeliti, ne samo v pravni teoriji, ampak tudi v sodni praksi ustavnih sodišč držav članic EU in Sveta Evrope. Konceptualno opredelitev mora razviti in ponuditi predvsem Evropsko sodišče za človekove pravice (ESČP). Sodba tega sodišča v zadevi *Weideland proti Švedski* iz leta 2012 je ponujala le opisne smernice za morebitno opredelitev sovražnega govora. Sodišče je poudarilo, da bi lahko »žaljive« in »sovražne pripombe« zakonsko prepovedali in kazensko preganjali, zlasti če bi take pripombe lahko pravno priznali in ocenili kot »zelo resne obtožbe na podlagi močnih in stvarno neutemeljenih predsodkov«. ESČP je sredi junija 2020 sprejelo končno sodbo v zadevi *Carl Jóhann Lilliehögl proti Islandiji*, ki obravnava homofobni sovražni govor. Čeprav je izrecno uporabilo izraz sovražni govor, pa ga še vedno ni opredelilo kot koncept. Avtor z upoštevanjem sodne prakse ESČP o svobodi izražanja v zadnjih petih do osmih letih poveže z razumevanjem tega pojma Evropske komisije in domnevno opredelitev, določeno v KZ-1. Ponudi alternativni predlog za skupno in celovito evropsko opredelitev sovražnega govora.

*Ključne besede:* svoboda izražanja, definicija, sovražni govor, Evropsko sodišče za človekove pravice, Evropska komisija, kaznivo dejanje.

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# The Future of Public Communication: A Proposal on How Hate Speech could be Defined in Europe

Andraž Teršek

## SYNOPSIS

It became obvious that Europe needs, and really wants, its own hate speech concept. So, it needs to be defined—precisely enough. Not only in legal theory and in the case-law of the constitutional courts of the EU and Council of Europe Member States. The definition must be developed and offered primarily by the ECtHR. Its judgement in *Vejdeland vs. Sweden* (2012) offered only a descriptive guidance for a possible definition of hate speech. It emphasised that “offensive” and “hostile tuned remarks” can be legally prohibited and criminally prosecuted, especially if such remarks can be legally recognised and evaluated as “very severe accusations based on strong and really unfounded prejudice.” In June 2020, the ECtHR passed its final judgement in *Carl Jóhann Lillindahl vs. Iceland* addressing the homophobic hate speech. While the Court used the term hate speech, it still did not define such speech as a concept. Combining the ECtHR case-law on freedom of expression in the last eight to five years with understanding of this concept by the European Commission and with the supposed definition from the Slovenian Criminal Code, the author offers an alternative proposal for a common and comprehensive European definition of hate speech.

*Keywords:* freedom of expression, definition, hate speech, ECtHR, European Commission, criminal offence.

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# Upravno odločanje med hierarhično ubogljivostjo in načelom zakonitosti

Matija Žgur

## POVZETEK

**A**vtor obravnava prakse odločanja prvostopenjskih upravnih uradnikov. Zlasti ga zanima, kako upravne okrožnice postanejo glavni vir norm za odločanje teh uradnikov – tudi, kadar je njihova vsebina v nasprotju s hierarhično nadrejenimi pravnimi viri. Dispozicija prvostopenjskih uradnikov, da se primarno zatekajo k notranjim ukazom hierarhično nadrejenih uradnikov, je pojasnjena kot posledica skupnega vpliva več organizacijskih načel na njihove kognitivne procese. Po predstavitvi problema in njegovega pomena za pravno teorijo avtor najprej zagovarja metodološki pristop, ki ga v tem besedilu uporablja. Nato predstavi osrednje pojme in organizacijska načela, ki oblikujejo institucionalno delovanje javnih uprav. Na koncu poda še psihološko utemeljeno razlago vpliva teh načel na kognitivne procese upravnih uradnikov, ki poudarja nagnjenost slednjih do uporabe upravnih okrožnic kot primarnih virov norm za odločanje.

*Ključne besede:* javna uprava, upravne okrožnice, načelo zakonitosti, prvostopenjski uradniki, viri prava.

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# Legality on the Frontlines of Administrative Decision-Making

Matija Žgur

## SYNOPSIS

The author discusses the decision-making practices of frontline administrative officials. In particular, he examines how administrative circulars become the primary source of these officials' decision-making norms, even when their content may be in contrast with hierarchically superior sources of law. The disposition of frontline officials to resort primarily to internal orders of hierarchically superior officials is explained as a consequence of the joint influence of several organisational principles upon their mental faculties. After introducing the problem and its relevance for legal theory, the author first defends the methodological approach to which he subscribes. Thereafter, he presents the central categories and organisational principles framing the institutional operations of public administrations. Finally, he provides a psychologically-informed explanation of the influence exerted by these principles upon the mental faculties of frontline officials which underpin the latter's preference for the use of administrative circulars as primary sources of decision-making norms.

*Keywords:* public administration, administrative circulars, principle of legality, frontline officials, sources of law.

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# Nekatera vprašanja smiselne uporabe Zakona o splošnem upravnem postopku v postopkih javnega razpisa za (so)financiranje iz javnih sredstev

Katja Štemberger

## POVZETEK

Postopki dodeljevanja javnih sredstev na podlagi javnega razpisa so specifični tip postopka, pri katerem posamezniki po vnaprej določenih pogojih in merilih v skladu z načelom enakega obravnavanja konkurirajo za javna sredstva. Vsem prijavljenim na razpis je tako zagotovljena pravica, da pod enakimi pogoji sodelujejo v postopku javnega razpisa in se potegujejo za dodelitev sredstev, uspeh na razpisu pa je odvisen zlasti od izpolnjevanja predpisanih pogojev oziroma meril vseh konkurentov. Po ustaljeni sodni praksi gre pri postopkih javnega razpisa za »drugo javnopravno stvar«, zato se Zakon o splošnem upravnem postopku (ZUP) uporablja zgolj smiselno, kolikor ta področja niso urejena s posebnim postopkom. Prispevek obravnava razlago pojma smiselne uporabe ZUP v postopkih javnega razpisa za (so)financiranje iz javnih sredstev in nekatera druga vprašanja, povezana s temi postopki.

*Ključne besede:* javni razpis, druga javnopravna zadeva, smiselna uporaba pravil upravnega postopka.

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# Some Issues of *Mutatis Mutandis* Application of the General Administrative Procedure Act in Public Tenders for (Co)Financing from Public Funds

Katja Štemberger

## SYNOPSIS

Procedures for allocating public funds based on a public tender are a specific type of procedure in which individuals compete for public funds according to pre-determined conditions and criteria under the principle of equal treatment. All applicants are thus guaranteed the right to participate in the public tender procedure under the same conditions and apply for the allocation of funds, and the success of the tender depends in particular on the fulfilment of the prescribed conditions or criteria of all competitors. According to the established case-law, public tender procedures are "other public law matters", so Slovenian General Administrative Procedure Act (ZUP) applies only *mutatis mutandis*, insofar as these areas are not regulated by a special procedure. The article focuses on the interpretation of the *mutatis mutandis* application of the ZUP in public tender procedures for (co) financing from public funds and on some other issues related to these procedures.

**Keywords:** public tender, other public law matter, *mutatis mutandis* application of the rules of administrative procedure.



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# Analiza pojava remunicipalizacije v Evropi in stanja v Sloveniji

Enika Svete, Iztok Rakar

## POVZETEK

Obseg in pomen javnih služb je v preteklosti doživel številne spremembe. V zadnjih treh desetletjih je bil poudarek na liberalizaciji, privatizaciji in deregulaciji, od leta 2000 dalje pa lahko v Evropi in drugje po svetu opazimo primere, v katerih je prišlo do vnovičnega prevzema javnih služb pod okrilje samoupravnih lokalnih skupnosti. Gre za pojav, znan pod izrazom remunicipalizacija. Namen prispevka je predstaviti pojem, obseg in razvoj remunicipalizacije po Evropi in ugotoviti stanje na tem področju v Sloveniji, glavno raziskovalno vprašanje pa, ali lahko tudi v Sloveniji pričakujemo pojav remunicipalizacije na področju koncesioniranih javnih služb? Rezultati empirične raziskave kažejo, da večina občin redno spremlja delo koncesionarjev, da so občine v povprečju zadovoljne z njihovim delom in tudi v prihodnje želijo izvajati javne službe s pomočjo podeljevanja koncesij. Možnosti nadaljnjega raziskovanja tega področja so predvsem v smeri analize mnenja uporabnikov storitev in/ali civilne družbe, ki so glede na mednarodne raziskave pomembni akterji sprožitve procesa remunicipalizacije.

*Ključne besede:* javne službe, remunicipalizacija, lokalna samouprava, Slovenija.

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# Analysis of the Remunicipalisation in Europe and the Situation in Slovenia

Enika Svete, Iztok Rakar

## SYNOPSIS

The scope and significance of public services has undergone many changes over time. In the last three decades, the emphasis has been on liberalisation, privatisation and deregulation. From the year 2000 onwards, we can see cases in Europe and elsewhere in the world where public services were taken over by local self-governing communities again. It is a phenomenon known as remunicipalisation. The purpose of this paper is to present the concept, scope and development of remunicipalisation in Europe and to determine the situation in this field in Slovenia, limited to concessions. The results of the empirical research indicate that in Slovenia most municipalities regularly monitor the work of concessionaires, that municipalities are on average satisfied with their work and that they want to provide public services in the future by granting concessions. Possibilities for further research in this area are mainly in the direction of analysing the opinion of service users and/or civil society, which, according to international research, are important actors in initiating the process of remunicipalisation.

*Keywords:* public services, remunicipalisation, local government, Slovenia.

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## **Ali je koncesionar uradna oseba?**

Polona Kukovec

### **POVZETEK**

**A**vtorica obravnava vprašanje, ali koncesionar odgovarja za kazniva dejanja, ki jih lahko izvršijo le uradne osebe v smislu 4. točke prvega odstavka 99. člena Kazenskega zakonika (KZ-1). Predstavi sodno prakso v zvezi z uradno osebo in uradnim dejanjem ter naravo koncesije in mehanizem podelitve javnega pooblastila. Izpostavi problematiko razmejevanja strokovnih od oblastvenih nalog pri nepravih uradnih osebah in kot bistveno za odgovor na postavljeno vprašanje napoti na vsebino koncesije. Ker opravljanje javne službe ne zahteva nujno podelitve javnega pooblastila, je pri presoji, ali koncesionar izvaja oblastveno funkcijo državne uprave v pomoč osredotočanje na vprašanja pristojnosti, vnaprej predpisanega postopka izvajanja nalog ter izdajanja uradnih listin.

*Ključne besede:* uradna oseba, koncesionar, koncesija, javno pooblastilo, negospodarska javna služba, oblastvena funkcija državne uprave, servisna funkcija državne uprave, podelitev javnega pooblastila, odgovornost za kazniva dejanja.

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## **Is the Concessionaire an Official Person?**

Polona Kukovec

### **SYNOPSIS**

**T**he author discusses the question of whether the concessionaire is responsible for criminal offences that can only be committed by an official person within the meaning of point 4 of Article 99(1) of the Slovenian Criminal Code. She presents the case-law concerning the terms official and official act and presents the nature of concession and the mechanism for granting public authority. She emphasises the issue of delimitation of professional and authoritative tasks in the case of non-standard officials and, as essential for the answer to the question posed, refers to the content of the concession. As the performance of a public service does not necessarily require the granting of a public authorisation, whether the concessionaire exercises the authority of the state administration it is helpful to focus on issues of competence procedure and official documents.

*Keywords:* official person, concessionaire, public authority, non-economic public service, service function of state administration, power function of state administration, granting public authority, liability for criminal offences.