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THE SUPERVISION OF THE LEGALITY OF LOCAL GOVERNMENTS

GYURITA, Rita

Introduction

The doctoral dissertation covers the supervision of the legality of local governments. The relevance of the subject of the research is based on the fact that more than 7 years have lapsed since the entry into force of the Fundamental Law of Hungary (hereinafter referred to as Fundamental Law of Hungary) and the provisions of Act CLXXXIX of 2011 on the local governments of Hungary (hereinafter referred to as the LGA)¹ on the supervision of the legality of local governments. In my opinion, this period is enough to compare the previous control form enforced above the local governments within the public administrative organization, i.e. legality review with the current supervision of legality and its practice.

Legality control was the form of review of legality of the local governments within the public administrative organization from 1990 to 2011. The legality review as well as its instruments and lack of instruments observed in the public administrative organization received a certain amount of criticism on both theoretical and practical levels. The control implemented within the previous public administrative organization system had a less severe influence than today's control, as the public administrative organ (capital and county government office or its legal predecessor organ) exercising the power of legality review had less instruments, and did not have instruments allowing any direct intervention.

Supervision of legality ensures stronger control with several instruments offering direct interventions in the public administrative organization system. Firstly, it includes the subjects and instruments of the previous legality review, secondly, its sets of subjects and instruments have been increased or modified, thirdly, the legality supervising organ (capital and county government office) has already a right to directly intervene (replacement of acts) and fining beyond initiating a procedure. It should be emphasised that the competence of the organ outside the public administrative organization system, applying the instrument of supervision of legality, i.e. of the court has been also expanded, partly the previous review of acts has been expanded (to cover also local government decrees), and partly compulsory order in the case of breaches and order of replacement of acts also appear.

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¹ The Fundamental Law of Hungary (hereinafter referred to as Fundamental Law) Article 32 (4)-(5), 34 (4), Act CLXXXIX of 2011 on the Local Governments in Hungary (hereinafter referred to as LGA) Section pp. 132-142.



The Hungarian system of supervision of legality is characterised by the elements of cooperating-helping supervision, and the use of the instruments ensures the protection of the local government functions and the performance of the duties by the local governments.² The instruments allow subsequent interventions in the case of infringement of laws.

The research focuses on the analysis, systematisation and evaluation of the supervision instruments ensuring the purpose of the supervision of the legality of local governments, i.e. the public interest, the objective legal protection and their comparison to the instruments of legality review.

Purposes of the doctoral thesis

The following research purposes have been specified by me. The examination, analysis, systematisation and evaluation of the strength of the influence and the possibility and limitations of interventions and of the use of instruments during the supervision of legality intended to protect the public interest and to ensure objective legal protection, and drawing conclusions. In addition, supervision of the legality of local governments and comparison of the instruments of the previous legality review.

The examination, analysis and evaluation of the maintenance of balance between the local governments' autonomy and legality as well as the objective legal protection, and of measures and interventions to be made in proportion to the infringement to the necessary extent, and drawing conclusions.

Formulation of possibilities and *de lege ferenda* recommendations ensuring future improvement of the supervision of legality as a legal instrument on the basis of analyses, evaluations and conclusions made with various methods.

The research is not intended to examine the changes in connection with the status and functions of the local governments and the re-regulation of the system of local governments. The research is limited to the supervision of the legality of local governments, including the instruments used by other state organs (courts etc.) at the initiative or on the basis of recommendations made by the legality supervision organ (capital and county government office).

Two assumptions are examined by me in the doctoral thesis:

The system of instruments of the supervision of the legality of local governments and interventions and influence ensured by the instruments guarantee the protection of public interest and the objective legal protection.

To certify the hypothesis, first the types of supervision, then the subjects and the system of instruments of the supervision of legality are examined, analysed, systematised and evaluated by me in the dissertation. The supervision of legality and the use of the supervision

² HOFFMANN István (2014): Az önkormányzati rendeletek bírósági felülvizsgálata - a Kúria Önkormányzati Tanácsa gyakorlata tükrében. Magyar jog, 2014. No. 6. pp. 341-343.

instruments are intended to ensure and guarantee the protection of public interest and the objective legal protection.

The system of instruments of the supervision of the legality of local governments ensures a balance between the local governments' autonomy and legality, the objective legal protection on the one hand, and the interventions to be made in proportion to the infringement to the necessary extent.

To certify the hypothesis, the terms and limitations as well as the legal effect of the use of the instruments of supervision of legality are examined, analysed, systematised and evaluated by me in the dissertation. The legality control enforced inside and outside the public administrative organization, and consequently the interventions and the influence have strengthened (e.g. replacement of acts), and this is why I examine the balance between the local governments' autonomy and the legality, the objective legal protection.

The Applied Research Methods and the Structure of the Dissertation

Typical research methods used during the research and drawing of the doctoral dissertation are the historical and descriptive analysis as well as the comparative method. The doctoral dissertation contains also dogmatic deductive and practical analyses. As regards the structure and content of the doctoral dissertation, it is divided into seven chapters:

- theoretical introduction (Chapters I to III),
- detailed explanation of the legality review (1990-2011) and supervision of legality (2012-) of the local governments,
- analysis,
- systematisation,
- evaluation and comparison of the literature, the legal regulation and the legal practice (Chapter IV),
- international outlook on the European legality supervision and legality control models,
- formulation of scientific results related to the subject of the research and *de lege ferenda* recommendations.

The theoretical introduction and groundwork of the doctoral dissertation (Chapters I to III) discuss supervision as a type of public administration activities and as a legal relationship, and analyse and compare the individual types of supervision, considering that the supervision of legality is a type of public administration supervision. This is followed by a brief historical outlook on state legality control over the local governments. During the research, for the purpose of the theoretical groundwork, I analyse the national literature on supervision from the beginning of the 19th century to the 21st century, in view also of space limitations. Without aiming to give an exhaustive list, the history and development of the theoretical approach of supervision and supervision of legality are outlined on the basis of the prominent works of legal academics dealing with supervision (e.g. Lajos Szamel, Tibor

Madarász, Jenő Kaltenbach, Imre Verebélyi).³ Supervision and supervision of legality are analysed typically with historical and descriptive methods on several levels: (a) the supervising entity, (b) the supervised organs, (c) the subjects of supervision, and (d) its system of instruments.

The second part of the doctoral dissertation (Chapters IV and V) is the central part of the dissertation, which contains the detailed discussion of the review and supervision of the legality of local governments as well as the detailed analysis of the legality supervising organs (capital and county government offices), the supervised local governments (municipal and territorial local governments), the subjects of supervision and the supervision instruments. (Chapter IV) A separate chapter is assigned to the analysis and systematisation of those organs (Constitutional Court, court, National Assembly), including the instruments used by them, which perform (external) legality control over the local governments outside the public administration organisation system at the initiative or on the basis of the recommendation of the legality supervising organ (capital and county government offices). (Chapter V). In the second part of the dissertation, the diverse system of instruments of the legality control performed for the protection of public interest and objective legal protection, and thereby the strength of the influence and interventions are introduced and evaluated.

In addition to the national literature, the statutory law regulation of the legality review and supervision of legality of the local governments is also discussed (Act XX of 1949 on the Constitution of the Republic of Hungary, Fundamental Law, Act LXV of 1990 on the Local Governments, LGA). From 1990 up to the present day. This part is characterised by both the historical, descriptive method and the comparative method, as the legality review and the supervision of legality are also compared on several levels from the aspects of (a) legal regulation, (b) reviewing or supervising entity, (c) the reviewed or supervised local governments, (d) the subjects of review or supervision, and (e) their instruments. The practice of the use of the legality supervision instruments, i.e. the legal practice is also analysed and evaluated. The legality supervision instruments have been divided between the government office (public administrative organ) and other state organs, and therefore the practice of the Curia's Council of Local Governments, several significant decisions of the Constitutional Court, the accounts of the chairman of the Curia as well as the annual accounts of the Government Office of Győr-Moson-Sopron County on the supervision of legality are studied and analysed.

³ SZAMEL Lajos: *Az államigazgatás vezetésének jogi alapproblémái*. Budapest, Közgazdasági és Jogi Könyvkiadó. 1963. pp. 154-198., SZAMEL Lajos: *Az államigazgatási szervek irányítása és vezetése*. In. SZAMEL Lajos szerk.: *Magyar államigazgatási jog Általános rész*. Budapest, Tankönyvkiadó. 1973. pp. 423-459., MADARÁSZ Tibor: *A magyar államigazgatási jog alapjai*. Budapest, Nemzeti Tankönyvkiadó. 1989., KALTENBACH Jenő: *A felügyelet intézménye az államigazgatásban*. Jogtudományi Közlöny, 1988. március hó. pp. 125-137., KALTENBACH Jenő: *Az önkormányzati felügyelet*. Szeged. 1991., KALTENBACH Jenő: *Irányítás, felügyelet és ellenőrzés a közigazgatásban*. In FAZEKAS Marianna - FICZERE Lajos szerk.: *Magyar közigazgatási jog Általános Rész*. Budapest, Osiris Kiadó. 2005. pp. 243-260., VEREBÉLYI Imre: *A tanácsi önkormányzat*. Budapest, Közgazdasági és Jogi Könyvkiadó. 1987.

The third part of the dissertation (Chapter VI) contains an international outlook. Partly, I introduce the typical European legality supervision and legality review models (Anglo-Saxon, French, German-Austrian) from both organisational and instrumental aspects. In this chapter, the legality supervision systems of the V4 countries (the Czech Republic, Poland, Hungary and Slovakia) are also compared, laying an emphasis on the common, typical and different marks.

Finally, in the fourth part of the dissertation (Chapter VII), the scientific results related to the subject of the research and the *de lege ferenda* recommendations are discussed, which could improve the protection of the function of the legality supervision, the public interest and the objective legal protection.

Summary of the Scientific Results of the Dissertation and their Applicability

The statutory law specified the form of legality review of the local governments within the public administrative organization from 1990 to 2011 as legality control. The legality control as well as its instruments and lack of instruments received a certain amount of criticism on both theoretical and practical levels.⁴

When the local governments were re-regulated, the legislator specified the form of legality control of the local governments as supervision of legality, and this form of control replaced the previous form of legality review control from 1 January 2012 according to the statutory law terminology. The legality control of the local governments is specified by both the statutory law and the literature as supervision of legality from 2012. Earlier the legality control of the local governments is specified by only the literature as supervision of legality.⁵

The General Grounds of LGA refer to supervision as a form of control among the general purposes of the re-regulation in the following way: “The general purpose is to set up a modern, cost-efficient and task-oriented system of local governments, which ensures democratic and efficient operation, while it specifies a more stringent framework (of supervisory nature) for the local governments’ autonomy in a way which enforces and protects the collective rights of voters for self-government, and it simultaneously reforms the rules of conflict of interest.”⁶

The rules laid down in the Fundamental Law and LGA for the supervision of legality entered into force on 1 January 2012. Legality is supervised by the same territorial organ of state administration (capital and county government offices) having a general competence, that previously performed the legality review, however, the subjects and the instruments

⁴ DANKA Ferenc: *Törvényességi ellenőrzés - Hogyan tovább?* In: *Magyar Közigazgatás*, 2003. LIII. évfolyam. 9. szám. pp. 564-570., GELENCSEŔ József: *A közigazgatási hivatalok törvényességi ellenőrzési tevékenysége*. In: *Magyar Közigazgatás*, 2006. LVI. évfolyam, 2. szám. pp. 99-102., HOFFAMNNÉ dr. Németh Ildikó - HOFFMAN István: *Gondolatok a helyi önkormányzatok tevékenységének ellenőrzéséről és felügyeletéről - nemzetközi és történeti kitekintéssel, a gyakorlati végrehajtás módszereivel Somogy megyében*. In: *Magyar Közigazgatás*, 2005. február. pp. 89-103.

⁵ FAZEKAS Marianna: *A köztisztviselők szabályozásának egyes kérdései*. Budapest, Rejtjel Kiadó. 2008. p. 88.

⁶ <https://uj.jogtar.hu/#doc/db/1/id/A1100189.TV/ts/20190710/lr/chain729> (date of download: 05. 08. 2019.)

have been changed or supplemented. Supervision of legality is a stronger control, it includes the subjects and instruments of the previous legality review on the one hand, and further subjects and instruments were added on the other hand, as a result of which the possibility of intervention has improved as compared to the legality review.

The Legality Supervision

The public administration tasks are diverse, and therefore the public administration activity is a differentiated one. Supervision is one type of public administration activities. Administrative supervision is also a differentiated activity, and several types are distinguished:

- 1) hierarchical supervision,
- 2) supervision of legality,
- 3) official supervision.⁷

The supervision of legality is an activity displayed within the public administrative organization, in exceptional cases outside the public administrative organization. The latter activity has reduced, but might occur (e.g. the clerk exercises supervision of legality over the multi-apartment buildings). The supervision of legality is a public authority activity displayed outside the hierarchy. The supervision of legality is regulated by the Fundamental Law (in the case of local governments) and typically by acts.

The supervision of legality is performed by public administrative organs (central and territorial organs of state administration, clerk). The supervised organs are autonomous entities, legal persons, typically local governments. Within the public administrative organization, the supervised organs may be classified into the following groups:

- local governments,
- national minority self-governments,
- statutory professional bodies,
- regional development councils.

The supervision of the legality of local governments is regulated basically by the Fundamental Law and by the LGA.

The supervision of legality is performed by the government office exercising the right of supervision of legality (territorial organ of state administration, organ of government administration).⁸

The supervised organs are local governments: (a) municipal and (b) territorial local governments as well as (c) capital local governments.⁹

⁷ FAZEKAS Marianna: *Irányítás, felügyelet, ellenőrzés a közigazgatási rendszerben*. In: FAZEKAS Marianna ed.: *Közigazgatási jog Általános rész I.* Budapest, ELTE Eötvös 2014. Kiadó. p.134.

⁸ Fundamental Law Article 34 (4).

⁹ LGA Section 3 (1)-(3).

The purpose of the supervision of legality by the government office is to ensure objective legal protection, protection of the legal order, the legality of the operation of the representative body of the local government, its committee, partial local government, mayor, lord mayor, chairman, association and clerk of the general assembly (hereinafter referred to as the party concerned).¹⁰

The LGA exhaustively specifies the scope and subject of the supervision of legality, and within the government office's power of supervision of legality, it examines for the party concerned:

- the legality of its operation and decision-making procedure;
- legality of its decisions;
- performance of its legislation obligation as well as its decision-making and duty performance obligations based on the laws.¹¹

In connection with the subjects of the supervision of legality, the LGA specifies also exceptions, and the procedure of supervision of legality does not cover such decisions made by the party concerned, based on which a labour dispute or a public service-related dispute (designation, dismissal, disciplinary penalties etc.), a judicial or public administration official procedure specified in the laws is in place (special decisions made within the authority's competence etc.), or which were made by the representative body of a local government in the exercise of its discretionary powers, except for the examination of the legality of the decision-making procedure.¹²

The Fundamental Law and the LGA. regulate and share the supervision instruments between the government office appointed to exercise the right of supervision of legality and other state organs (Constitutional Court, court, National Assembly), and the latter are non-public administration or state administration organs, typically they have instruments allowing direct interventions (review of decisions, dissolution).

The following main types of supervision instruments (hereinafter referred to as instruments) provided in the Fundamental Law and the LGA for the government office as a legality supervisory organ are distinguished:

- a) legality notice,
- b) initiation of a procedure
 - (ba) initiation of the convocation of the representative body of a local government or of the association council,
 - (bb) initiation of the review of a local government decree at the Curia,
 - (bc) initiation of the review of a local government resolution at the administrative and labour court,

¹⁰ LGA Section 132 (2).

¹¹ LGA Section 132 (3).

¹² LGA Section 132 (4)-(5).

(bd) initiation of the establishment of failure of complying with the legislation obligation at the Curia,

(be) initiation of the establishment of failure to make decisions and perform duties at the administrative and labour court,

(bf) initiation of the review of supports granted from the central budget at the Hungarian State Treasury or the supporter,

(bg) initiation of the examination of the economic management of the local government at the SAO,

(bh) initiation of a procedure against the mayor or against the clerk at the mayor, (bi) initiation of legal proceedings for the dismissal of the mayor repeatedly infringing the law,

c) recommendation

(ca) recommendation to the minister liable for the supervision of the legality of local governments (hereinafter referred to as the minister) to ask the Government to propose to the Constitutional Court to review compliance of a local government decree with the Fundamental Law,

(cb) recommendation to the minister to ask the Government to propose the dissolution of the representative body of a local government operating in breach of the Fundamental Law,

d) convocation of the representative body of a local government or of the association council,

e) replacement of acts,

f) imposition of legality supervision fines.¹³

As regards the nature of the instruments, there are supporting, correctional (notice, annulment of acts etc.) and replacement (replacement of acts) and sanctioning instruments, however, the supporting and correctional instruments are predominant.¹⁴

The majority of the government office, as a legality supervisory organ, still do not ensure direct interventions (notice, initiation of a procedure, recommendation). András Patyi explains in connection with the instruments provided for the government office: “Only a minor part of the supervision instruments of the government agent is really supervisory, they allow mostly only control.”¹⁵

As regards the use of instruments, some sort of sequencing and graduation are enforced, and in principle the legality notice is the first and mandatorily used instrument, and if the legality notice fails, a repeated notice or another instrument is applicable, and more than one instruments can be simultaneously used.

The legality notice is a supporting (correctional), reparative instrument. As regards its subject, the legality notice is a written warning related to the infringement and the self-

¹³ LGA Section 132 (1), Fundamental Law Article 32 (4)-(5).

¹⁴ KALTENBACH: *ibid.* pp. 169-174.

¹⁵ PATYI András: *A közigazgatási működés jogi alapjai*. Budapest, Dialóg Campus Kiadó. 2017. p. 90.

correction, and as regards its content, it is not an instrument of direct intervention. The notice does not cause the annulment or modification of the challenged decision, the replacement of failure, and it has no suspensory effect on the implementation of the decision or measures involved in the legality notice.

The initiation and recommendation are not synonymous. If a procedure is initiated, the government office directly proposes the competent organ (court, SAO etc.) to initiate and conduct the procedure, and to make a decision or to take other measures (direct intervention) in order to restore the lawful operation and to objectively protect the law. The minister's consent or approval is not necessary for the government office to exercise its right of initiation.

Contrary to the initiation, in the case of a recommendation the government office may not directly initiate a procedure at the competent organ, but makes a recommendation to the minister to initiate the procedure. The minister does not automatically submit a motion on the basis of the recommendation, first he/she examines the recommendation, and then proposes the initiation by the Government (for the dissolution of the representative body of a local government and the review of the compliance of the local government decree with the Fundamental Law), if the terms are met.

The replacement of acts is a substitution instrument, and the will enforcement and the right of decision-making are transferred from the supervised party to the government office. The replacement of acts (replacement of decisions) ensures a direct intervention in the local government's decision-making autonomy. The replacement of acts may take place only after a failed legality notice sent by the government office, two-stage legal proceedings and the issue of a court warrant.

The establishment of legality supervision fines is a sanctioning, repressive legality supervision instrument. The government office imposes a sanction (fine) as a legal consequence of the infringement. The legality supervision fine is a fine based on objective liability.¹⁶

Summary of the Exercise of the Legality Supervision

Statistics number OSAP 1622 available in an electronic way served as a source for the analysis of the frequency of legality supervision instruments used by the legality supervision organ (government office).¹⁷ The statistics summarise the legality supervision instruments applied by the legality supervising organ (government office) by instrument type on county (capital) and national levels every six months. The legality notice is the legality supervision instrument most frequently used by the legality supervising organ (government office), which is obviously explained by the fact that the legality supervising organ (government

¹⁶ NAGY Marianna - HOFFMAN István szerk.: *A Magyarország helyi önkormányzatairól szóló törvény magyarázata*. Budapest, HVG-ORAC Lap- és Könyvkiadó Kft. 2012. p. 495.

¹⁷<https://www.kormany.hu/hu/dok?page=3&source=7&type=308#!DocumentBrowse> (date of download: 05.08.2019)

office) must use first the legality notice within the legality supervision instruments. It can be also stated that a high percentage of the legality notices is efficient. In my opinion, the legality notice is an efficient and successful supporting (correctional) instrument, which does not mean a direct intervention in the operation and decision-making of the local government, and only calls the attention of the party concerned to the self-correction.

In connection with the use of the additional legality supervision instruments, it can be stated that the initiation of the review of a local government act (local government decision), i.e. the initiation of the control of the compliance of the local government decree with the laws at the Curia (abstract norm control) as well as the initiation of the review of the local government resolution at the administrative and labour court belong to the most frequently used legality supervision instruments. In addition, the most frequently used instruments include initiations intended to eliminate an infringement or to oblige the failing party to meet its obligation, i.e. motions submitted to the administrative and labour court for the establishment of the failure of the local government to make resolutions or to perform its duties. Finally, the legality supervision fine is also a frequently used sanctioning instrument.

The less frequently used instruments include (a) initiation of the conduction of a control of the economic management of the local government at the State Audit Office, (b) initiation of the review of supports granted from the central budget at the Hungarian State Treasury or the supporter, (c) initiation of a disciplinary procedure against the mayor or the clerk, (d) initiation of litigation against the mayor repeatedly infringing the law, (d) initiation of the convocation of the meeting of the representative body of a local government or of the association council, and (f) convocation of a meeting, and (g) replacement of acts. These instruments are generally used rarely, but there are years when they are not used at all.

Finally, it should be noted that recommendation has not been used as an instrument. The legality supervising organ (government office) did not give any recommendation to the minister in charge of the supervision of liability between 2015 and 2018 in connection with the review of the compliance of a local government decree with the Fundamental Law by the Constitutional Court or with the initiation of the dissolution of the representative body of a local government infringing the Fundamental Law. In my opinion, the statistics confirm that the new instruments related to the legality supervision were necessary, the legality supervising organ (government office) and the court apply them to ensure the lawful operation of legal governments. The more frequently used instruments – within the new instruments of supervision – include obliging the local government to eliminate its failure through a court and the supervision fine. Replacement of acts, as an exceptional instrument, is rarely used, however, I find it reasonable, as the regulation itself has already a dissuasive effect.

Certification of the Hypotheses

It is found that the current system of instruments of the supervision of legality includes much more instruments, and thereby more differentiated possibilities to intervene, as

compared to the previous legality review (state supervision of legality). On the basis of the study of the practice of the government offices and judges, the current system of instruments of the supervision of legality is able to ensure the objective legal protection, the instruments are suitable to achieve the purposes of the supervision of legality and to ensure the lawful operation of local governments and performance of their duties.¹⁸

On the basis of the study of the practice of the government offices and judges, the current system of instruments of the supervision of legality is able to ensure interventions to be made in proportion to the infringements to the necessary extent, while the local governments are allowed to make self-corrections.¹⁹

The current system of instruments of supervision is diverse, a differentiated set of instruments ranging from notices to dissolution ensures graduation, and as a thumb rule, the legality notice is the instrument to be applied first, which allows the concerned party (supervision) to make self-corrections.

Obviously, instead of any intervention by the supervising organ, the elimination of the infringement via self-correction is the primary purpose. While professional assistance and other helpful and supporting instruments (consultation, recommendation etc.) may be used to prevent future infringements. The current system of instruments is able to guarantee interventions to be made in proportion to the infringements to the necessary extent for the correction or elimination of the infringements and for the objective legal protection. Replacement of acts and dissolution are instruments applicable only in exceptional cases, with the assistance of several state organs.

Based on the experiences of the recent 7 years, – in view of the judicial practice and the instruments used by the legality supervising organ – recommendations may be made, which could potentially improve the efficiency of the function of the supervision of legality and the objective legal protection. These recommendations are detailed in the following subsection.

Applicability of the Scientific Results of the Dissertation, Recommendations de lege ferenda

Recommendation on the Subjects of Supervision of Legality

In connection with subjects removed from those of the supervision of legality, 2 sub-exceptions were previously contained in the Ötv., then in the LGA. Firstly, the legality supervision procedure of the legality supervising organ (government office) covered also decisions made on the removed subjects during the examination of the legality of the organisation, its operation and decision-making (sub-exception1). Secondly, the legality

¹⁸ <https://www.kuria-birosag.hu/hu/a-kuria-elnokenek-beszamoloi> (date of download: 01. 12. 2009.), Report of Government Office of Győr-Moson-Sopron County.

¹⁹ <https://www.kuria-birosag.hu/hu/a-kuria-elnokenek-beszamoloi> (date of download: 01.12. 2019.), Report of Government Office of Győr-Moson-Sopron County.

supervision procedure covered also decisions, based on which any labour dispute or any dispute arising out of a public service legal relationship was in place, if the decision contained any infringement to the benefit of an employee (sub-exception).²⁰ Now, the LGA does not regulate the above two sub-exceptions any more. This means that the legality supervising organ (government office) may not examine the decisions made by the concerned party as an employer, based on which a labour dispute or a dispute arising out of a public service legal relationship is in place, even if the decision contains an infringement to the benefit of an employee.

It is a problem, as local governments might make decisions, which contain infringements to the benefit of employees. It is assumed that the employee will not apply to the court in such cases. While the legality supervising organ (government office) may not proceed within its legality supervising powers in theory, in order to prevent any infringement of the objective legal protection.

In connection with the currently effective regulation (there is no sub-exception), the Curia took a position as to whether the decision made on the mayor's remuneration may be reviewed within the legality supervision powers. Contrary to the decision made by the court of 1st instance, the Curia stated that the legality supervision powers cover also decisions made by the local government on the mayor's remuneration on the basis of the effective regulation.²¹

In my opinion, the decision of the Curia points out also that the previous sub-exception should be regulated. In fact, the decision made on the mayor's remuneration meets the terms of the decision removed from the subjects of the supervision of legality, as it is a decision, based on which a labour dispute or a dispute arising out of the public service legal relationship would be in place. Consequently, this decision may not be a subject of the supervision of legality in theory, as it is a removed subject, and no sub-exception is specified by the LGA I agree with the position of the court holding that any decision containing an infringement to the benefit of an employee injures the objective legal protection, if the legality supervising organ may not apply a legality supervision instrument. Based on the above, consideration should be given to the question as to whether the LGA regulates again the sub-exception – beyond the exceptions – based on which any decision containing an infringement to the benefit of an employee is covered by the legality supervision powers, in order to ensure the objective legal protection on the one hand, and to ensure uniform application, practice and legal certainty on the other hand.

Potential Expansion of the Instruments of the Legality Supervising Organ

Instruments specified in the Fundamental Law and the LGA for the legality supervising organ ensure the implementation of the legality supervision function, as it has a relatively wide range of instruments to ensure the elimination of infringements and to ensure the lawful operation of the local governments and the performance of its tasks. Consideration

²⁰ LGA 132 (5).

²¹ EBH 2017. K.24., Kfv.IV.37.166/2016. sz. határozat.

should be given to addressing the re-regulation of instruments of suspension of the execution of the acts of local governments (resolutions and decrees) or at least of the resolutions of local governments.

During the period of the legality review, suspension of the decisions of the local governments as relatively limited. Suspension of the resolutions of the local governments belonged to the competence of the court, and suspension of a local government decree was not possible. As a result of the regulation of the supervision of legality, suspension of the resolutions of the local governments remained in the competence of the court, while prohibition of the temporary application of local government decrees belongs to the competence of the Curia.²² The legality notice has no suspensory effect on the implementation of the decisions of the local governments, and after the failure of a legality notice, submission of an application for a judicial review has no suspensory effect on the implementation of the acts of local governments either. Adding up the periods provided for the procedure of the legality supervising organ, the review of the notice by the party concerned as well as the initiation of legal proceedings during the legality supervision procedure, it is found that a prolonged period (up to several months) lapses between resolution-making, announcement of the resolution and its suspension or prohibition of its application, which means that infringing acts of the local governments are being implemented during this period. In addition, the administrative burdens of the supervising organ are increased by the fact that the suspension must be also proposed and reasoned together with the application for review.

Consideration should be given to the acceleration of decisions made on suspensions and to the simplification of procedures, and the suspension of the implementation of the acts of local governments should be assigned to the competence of the legality supervising organ (government office) in order to prevent the enforcement and implementation of potentially infringing acts of the local governments. Assignment of the suspension of the implementation of the acts of the legal governments to the legality supervising organ is not incompatible or unprecedented, as this legal instrument is already known in the Hungarian law, since the suspension of the implementation of the decisions of the regional development council belongs to the competence of the legality supervising organ, and the regulations of the European states on the local governments often assign this instrument to the competence of the legality supervising organ (Poland, the Czech Republic etc.).

Recommendation on the Division of the Legality Supervision Instruments between the State Organs

Review of the Local Government Decrees

In connection with the review of local government decrees, the competence is shared between the Curia and the Constitutional Court. Establishment of the compliance of the

²² LGA Section 139 (2).

local government decree only with the Fundamental Law (constitutional review) belongs to the competence of the Constitutional Court, and establishment of the compliance with other laws (legality review) belongs to the competence of the Curia.²³ Mixed proposals also belong to the competence of the Curia. The competence of the Constitutional Court has been significantly reduced as compared to the previous regulation in connection with the local government decrees. Consideration should be given to the liquidation of the divided competence related to the review of the local government decrees and to the assignment of the norm control competence related to local government decrees to the Curia.

When the Act I of 2017 on the Code of Administrative Court Procedure (hereinafter referred to as ACP) was prepared, it was raised again that in the case of administrative normative acts the norm control is performed by the court, while the Constitutional Court examines the constitutionality of the operation of the legislative power, and the administrative court reviews the legality of the operation of the executive power.²⁴

Procedure Related to the Review of Normative Resolutions as well as to the Establishment of Failure of Normative Resolution-Making Obligation Based on the Law

Two groups of the normative acts of local governments are (a) the normative resolution and (b) the decree. The procedure related to the conflict of the decree with other laws and to the establishment of the failure of legislative obligation based on the law belongs to the competence of the Curia. The procedure related to the review of the infringing normative resolution of the local government and to the establishment of the failure of the normative resolution-making obligation based on the law belongs to the administrative and labour court. The legislator regulates in the ACP, that the procedural rules related to procedure of the review of the normative resolutions of the local government as well as of the establishment of the failure of the normative resolution-making obligation based on the law, to the review of the local government decrees as well as to the failure of legislative obligation are applicable, however, the administrative and labour court is the proceeding court instead of the Curia. In my opinion, the competence should have been divided not according to the two forms of the local government decisions (decree and resolution), and the division of the competence in relation to the normative acts of the local governments (local government decrees, local government normative resolutions) is not reasonable. The procedure related to the review of the infringing normative resolutions of the local government as well as to the establishment of the failure of the normative resolution-making obligation based on the law should be also assigned to the competence of the Curia for uniform practice.

²³ Act CLI of 2011 on the Constitutional Court (hereinafter referred to as CCA) Section 37 (1), Act CLXI of 2011 on the Organization and Administration of Courts Section 24 (1) f).

²⁴ BALOGH Zsolt: *Procedures to review the conflict of a local government decree with other laws and procedures due to the local governments failure to fulfil its duty to legislate*. In: Gergely BARABÁS- Krisztina F. ROZSNYAI - András György KOVÁCS (eds.): *Commentary of the Administrative Court Procedure*, Budapest: Wolters Kluwer Hungary, 2018. p. 740.

Dissolution of the Representative Body of a Local Government Infringing the Fundamental Law

Dissolution of the representative body of a local government infringing the Fundamental Law belongs to the competence of the National Assembly.²⁵ Its dissolution is an ultimate sanctioning instruments of ultima ratio nature. In my opinion, acting in special cases and making decisions by judging them, and consequently using organisational sanctions are incompatible with the powers of the National Assembly. Consideration should be given to the assignment of the instrument of dissolution to the competence of the court, namely the Curia.

Other Procedural Issues

Initiation of a Procedure at the Constitutional Court

A relatively complex system of rules has been developed for the initiation of a procedure at the Constitutional Court. The legality supervising organ may recommend to the minister in charge of the supervision of the legality of local governments to initiate a proposal at the Government as to which the Constitutional Court would review compliance of the local government decree with the Fundamental Law.²⁶

After the legality supervising organ, the “decision” of two other organs is necessary for the local government decree to be submitted to the Constitutional Court. For the purpose of simplification of the proposal, the acceleration of the procedure, and the destruction of the local government decrees infringing the Fundamental Law as soon as possible, consideration should be given to the possibility that the legality supervising organ directly initiates the examination of the compliance of the local government decree only with the Fundamental Law (constitutional review). Furthermore the other proposal III./2.3.1. section. (See also Section 2.3.1. of Chapter III.)

Labour Litigation Related to the Termination of the Mayor’s Position

If the mayor’s position is terminated, labour litigation is initiated.²⁷ According to the rules of the Act CXCV of 2011 on Civil Service Officials Section, the legal relationship of the mayor is a specific public service legal relationship.²⁸ It is a specific employment relationship with the mayor (public service legal relationship), and many of its characteristics differ from an employment relationship. The ACP states that any legal dispute related to a public service legal relationship is a public administration legal dispute, and thereby it is subject of public administration litigation. Based on the above, it is not reasonable for a court to judge a dispute related to the termination of the public service legal relationship of a mayor within labour litigation, and already with the entry of the ACP into force, modification of the regulation should have been reasonable, which I think is still reasonable, namely any

²⁵ Fundamental Law Article 1 (2) g).

²⁶ LGA Section 132 (1) c).

²⁷ LGA Section 142 (1), 132 (1) h), 70.

²⁸ Act CXCV of 2011 on Civil Service Officials Section 225/A (1).

litigation related to the termination of the legal relationship of a mayor should be judged according to the rules of administrative litigations.

Initiation of a Review of the Economy of the Local Government and the Obligation to Proceed

The instruments of the legality supervising organ include the initiation of a review of the economy of the local government at the State Audit Office. However, it is a problem, that the State Audit Office is not obliged to proceed on the basis of the initiation, and therefore part of the infringements of economic nature are not liquidated. Consideration should be given to the regulation of the substantive review of the initiations of the legality supervising organs and to the obligation to initiate an examination if at least certain terms exist (in the case of a risk of severe infringement etc.). The State Audit Office would not start a review in the case of all initiations, but would first examine the initiation, and would start a procedure only if the terms specified in the law exist.