RENASCENCE OF THE ADMINISTRATIVE JURISDICTION IN HUNGARY

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Abstract: The administrative jurisdiction is one of the guarantees of the civil legal security. However, a state has to „grow up" to this as to every legal guaranties. Administrative jurisdiction, and within it the creation of an independent administrative procedural order has been cause for much excitement in the law-making community basically from the early 1990 s, when control over administrative rulings became genuinely possible again. It was thus unsurprising that the codification of the Act on the procedural code of public administration was followed with interest, and the professional and scientific community gave regular updates on the status of the codification. Therefore, the fact that the president did not sign the Act passed by the National Assembly, but sent it to the Constitutional Court for evaluation instead caused a major stir. Based on the decision 1/2017. (I. 17.) of the Constitutional Court, the National Assembly eventually modified a number of provisions in the Act on the administrative procedural code and passed the Act again, which was then promulgated on March 1, 2017 as Act I/2017 on the administrative procedural code, and became effective, as per initial plans, on January 1, 2018. The article is not an ode to the Hungarian administrative jurisdiction or to the new independent administrative procedural code, but a historical and mainly legal analysis.

Key words: administrative jurisdiction, administrative procedural code, administrative courts, history of the administrative jurisdiction, Hungary

1 ABOUT THE ADMINISTRATIVE JURISDICTION IN GENERAL

Throughout our life we meet offices and authorities, which establish rights and obligations for us. These offices and authorities are parts of the administrative system and exercise the executive power.

Against the administration there is a general need for municipal administration and for the protection of the legality of the administration. As one of the preconditions of the realization of this last one we can regard the judicial control on the administration. This works in various countries as independent administrative court and on other countries it is realized as part of the civil jurisdiction. In Hungary there is no administrative jurisdiction de lege lata,[1] the judicial review of the administrative decisions is a part of the civil justice.

The administrative authorities (by their nature) in most of the cases establish rights and obligations for themselves. There is no such a perfect state which could eliminate the bias of every action by means of internal control. It cannot be left to the interested parties to bring the infringements to an end, the elimination of the violation of law in the law enforcement must be ensured with external control. This organ can only be an outsider, independent judicial organ.[2]

[1] PATYI, A. Közigazgatási bíráskodásunk modelljei. Tanulmány a magyar közigazgatási bíráskodásról. Budapest: Logod Bt., 2002, p. 228.

[2] KOZMA, GY. – PETRIK, F. Közigazgatási perek a gyakorlatban. Budapest: A Deák Ferenc Jogakadémia könyvei – KOTK Kft., 1994, p. 10.

This control can be realized in the most effective way, if the revision of the administrative actions is achieved by independent courts. Moreover, it is also very important, that the judicial control of the administrative decisions would cover not only certain cases but most of the cases, especially those cases which are important for the citizens.[3]

It is a measure of the constitutionality whether a state allows or not – and if yes to what extent – to submit itself under the control of an independent court mentioned above. Whereas there are three criteria of a constitutional state:

– distribution of the state powers
– unconditional regime of laws, and deriving from these two criteria:
– self-restraint of the state.[4]

The realization of the third criterion premises the existence of the administrative jurisdiction. The importance of this is at least so much as the importance of the constitutional court and its effect on the everyday life of the citizens is much more. This cannot be regarded as a simple resolution of the state organization, it is much more, a new opinion of the civil society about the acts, the law and the authorities, because today there is no greater offense to say about an act that it is unconstitutional and about an administrative decision that it is breaking the law and that is why they must be annulled.[5]

Accordingly, the administrative jurisdiction is one of the guarantees of the civil legal security. However, a state has to „grow up" to this as to every legal guaranties. István Stipta identified three preconditions which should be granted to develop the judicial control of the public administration:

– the administration and the jurisdiction should be isolated from each other in the sense of the constitution
– the customary character of the administrative rules should be stopped: the ranges of the state's actions should be regulated by acts and their activity should be determined at least by decrees
– there should be a social expectation to save the civil rights: the opinion which stresses the primacy of the state interest should be pushed into background.[6]

These preconditions were realized in the individual states in different times and in different forms. Thus, we can say that every state has its own administrative jurisdiction with specific structure and operation.

In the legal history of Hungary these preconditions came into being very slowly and shakily: this is what will be discussed in this study.

2 ADMINISTRATIVE JURISDICTION IN HUNGARY BEFORE THE COMPROMISE

The three preconditions of development of the judicial control on the administration mentioned above had to come into being also in Hungary to raise the idea of the administrative jurisdiction at all.

[3] Ibid.
[4] Ibid., p. 9.
[5] Ibid.
[6] STIPTA, I. A magyar bírósági rendszer története. Debrecen: Multiplex Media – Debrecen University Press, 1997, p. 136.

Because of the lack of these three preconditions, before 1848, real administrative jurisdiction did not exist in Hungary.

The changes in 1848 built up a very important condition of the legal defence against the administrative actions, because with the declaration of the equality before the law, the non-feudal persons of past times could also put up for judicial protection against the actions taken on behalf of the state. The other requirement, namely the distribution of state powers could be realized just in part, so the relationship between the administration and the jurisdiction was not exonerated, the structural sharing of this two state power was not tried. Of course, it could also not amount to constitutional regulation of the implementation.[7]

However, because of the tragic end of the revolution and war of independence the laws from April 1848 did not have real impact to this area. Thus, in the case of the administrative jurisdiction they could lay down only the outlines and the principal demand.

3 PURSUITS OF ESTABLISHMENT OF ADMINISTRATIVE JURISDICTION AFTER THE COMPROMISE

After the compromise between Hungary and Austria in 1867 it was possible to implement the acts from 1848 and the concretisation of the ideas about state organization. The contemporary governing party did not plan the establishment of the administrative jurisdiction at that time. Namely, they were afraid, that the administrative court would weaken the state will, it would control the ministerial self-sufficiency, as well as it would enhance the separative process in that time, when the country is shared in nationality and political aspects. The opposition, which defined itself as public law, did also not demanded the establishment of an institute which limits the power of the government, it concentrated on serious believed questions.[8] There was a large theoretical uncertainty about this question, the clarifying academic debates was missing as well. The example of Austria[9] did also not incite to the establishment of this legal institution.[10] Of course, it did also not encourage the establishment of the administrative jurisdiction that several constitutional structures[11] missed.

The political and legal milieu changed slowly. In 1880 it was decided at a consultation on the administrative reforms in the Ministry for Home Affairs, that the general administrative jurisdiction must exist in Hungary. This was the first time, when the governmental agents were concerned seriously about the details of a future solution. Beyond that, a parliamentary decision ordered the government that '… if an administrative court could not be regulated soon, for financial jurisdiction should be presented a proposal'.[12]

In the opening speech of the diet in 1881 there appeared the case of the administrative jurisdiction. After the expectation of the monarch '… the establishment of the administrative courts has

7 Ibid., p. 137.

8 E.g. the criticism of the compromise, the autonomy of the counties and the principle of election.

9 In Austria was established the Imperial Court in 1869, which acted in cases of breach of constitutional fundamental rights of citizens, but it had not competence on the revision of the non-legal decisions of the administration.

10 STIPTA, I. A magyar bírósági rendszer története, op. cit. p. 139.

11 E.g. court system, which comply with the requirements of the era; clarification of the relationship between the central and the lower level administration; declaration of civil rights in acts.

12 STIPTA, I. A magyar bírósági rendszer története, op. cit. p. 141.

to be effected as soon as possible'. From the opinion of the head of the state it turns out, that the legislature got to pre-sanctify for the establishment of more with each other in hierarchical relationship organ.[13]

The government made still in 1881 two drafts. According to the version published on 31th January 1881, the future special court would have consisted of administrative officers, judges of the high courts and laymen. This proposal faced great resistance from the public opinion. Pursuant the other idea from 24 September 1881, the government wanted to organize a full-time, independent court for the decision of disputes on financial questions. This proposal came to the chamber of deputies.[14]

Act XLIII of 1883 on Financial Administrative Court was sanctified on the 13th of July 1883 and published on the 21th of July 1883. This disposed to establish an independent financial court with seat in Budapest, which has the same grade and character as the Hungarian Royal Curia. The main achievement of the Act is that it was the first to allow in certain cases the revision of administrative decisions, namely it adopted the principle of judicial control of executive power. According to the modern approach, it guaranteed the citizens' individual right to claim against the administration and the effective legal defence of a part of the finances (typically in the field of fiscal and fee affairs).[15]

The procedure of the Financial Administrative Court was written,[16] it had not only power for cassation, but it could decide the merits.[17]

After the establishment of the Financial Administrative Court in 1883 was the preparatory work on realization of general administrative jurisdiction in progress. As a result of this, with Act XXVI of 1896 the Hungarian Royal Administrative Court was born, in which the Financial Administrative Court was blended.

4 FUNCTION OF THE HUNGARIAN ROYAL ADMINISTRATIVE COURT (1896 – 1949)

The Hungarian Royal Administrative Court was a supreme court which had two departments: the general administrative department and the financial department.

The president of this court was equal with the president of the Curia and the judges of this court had to comply with highly professional requirements.

The court had a written procedure with only one instance but with authority of reformation.[18]

The competence of the court was laid down in an itemized list. However, this list was modified more than a hundred times. In general, it can be said, that about 80 percent of administrative decisions could be reviewed by the Hungarian Royal Administrative Court.[19] In practice, most of the

13 Ibid., p. 142.
14 Ibid.
15 Ibid., p. 148.
16 Ibid., p. 149.
17 GÁSPÁRDY, L., WOPERA, Z., KORMOS, E., CSERBA, L., NAGY, A., HARSÁGI, V. Polgári perjog különös rész. Budapest: KJK-Kerszöv, 2004. p. 167.
18 See more on the procedure: CSIBA, T. A közigazgatási bíráskodás alapvető kérdései. In IMRE, M. (ed.): Közigazgatási bíráskodás. Budapest: HVG-ORAC, 2007, p. 24 – 25.
19 KISS, D. A közigazgatási perek. In NÉMETH, J. (ed.): A polgári perrendtartás magyarázata. Budapest: Közgazdasági és Jogi Könyvkiadó, 1999, p. 1356.

cases were tax and duty related, over and above cases in connection with the entitlement of representatives to duties and pension.[20]

During the more than 50-year-long existence of the Hungarian Royal Administrative Court there was a lot of intention and attempts to give the procedure more instances or to connect the court to the general court system, but nothing had a real result in practice.

5 ADMINISTRATIVE JURISDICTION BETWEEN 1949 AND 1989

Between 1949 and 1989 the administrative jurisdiction did not exist in Hungary aside from some cases. Thus, in cases related to legal basis and amount of state tax, as well as to certain duties, the financial and duty arbitration committees of the Ministry of Finance acted. Although in some cases, the appeal against the administrative decisions was allowed before the civil courts, but in the 1950's the state and political power became so concentrated that the judicial control on the activity of the executive organs became practically impossible.[21]

6 ADMINISTRATIVE JURISDICTION AFTER THE POLITICAL TRANSFORMATION (1989) BUT BEFORE 2018

In 1989 the legislators created the constitutional basis of the administrative jurisdiction with the amendment of the Constitution. Thus, the administrative jurisdiction exists again since 1991, when the Hungarian Constitutional Court provided the making of the new rules on judicial review of the administrative decisions.

Act XXVI of 1991 was not an autonomous act, but a modification of three acts (Act on Administrative Proceedings, Act on Code of Civil Procedure and Act on Court Organization). Thus, the main rules of the administrative jurisdiction were in the Code of Civil Procedure.

Chapter XX of the Code of Civil Procedure was applied to actions for the review of administrative decisions.

Administrative actions were brought by the client or by any other party to the proceeding concerning provisions expressly pertaining to him. The action were brought against the administrative body that has adopted the decision to be reviewed. (327.§ Par. (2))

The court procedure had a lot of own rules (this means: they were different from the general rules) and if we read these rules, we could feel that these rules are to some extent a foreign body in the Code of Civil Procedure. This statement is supported by the fact that these rules were amended several times and from time to time the idea of creating an independent administrative jurisdiction appeared.

[20] KENGYEL, M. Magyar polgári eljárásjog. Budapest: Osiris Kiadó, 2014, p. 424.
[21] Ibid., p. 424 – 425.

7 ANTECEDENTS OF THE ACT ON THE PROCEDURAL CODE OF PUBLIC ADMINISTRATION

7.1 Direct antecedents of the Act on the Procedural Code of Public Administration

The government legislated on the procedural code of public administration with Government resolution 1011/2015. (I.22.), followed by resolution 1352/2015. (VI.2.) on certain tasks connected with the preparation of the act on the procedural code of public administration and the act on general administrative regulations. It was along the principles laid down in these two resolutions that further acts were prepared: Act T/12233 concerning general administrative regulations and the Act concerning proposals on the restructuring of the court system, and Act T/12234 on administrative regulation. The acts on administrative regulation and on the procedural code of public administration were sent for debate to the National Assembly together, and were both passed with a simple majority on December 6, 2016 (the Act on the procedural code of public administration was passed with 115 yes votes, 36 no votes and 21 abstentions). The Act concerning the restructuring of the court system was finally not sent to the Assembly, as when the above mentioned two acts were passed, the Ministry of Justice was still conducting political negotatiations with the representatives of the parliamentary parties.

7.2 Presidential motion to the Constitutional Court

János Áder, the president of the republic – based on Art. 6 par. (4) of the Constitution – has requested the Constitutional Court to rule on the constitutionality and compatibility with public law of Art. 7 par. (4) and Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration passed by the National Assembly on December 7, 2016, but not yet promulgated. The president of the republic furthermore advised the Court to evaluate the constitutionality of the promulgation of the above questioned legislative proposals. The legislation evaluated by the Constitutional Court is the following:

"Art. 7. [Courts acting in administrative proceedings]

[…]

(4) The Budapest-Capital Regional Court acts as the supreme court in administrative proceedings".

Art. 12. (2) Except trials related to the legal relationships of public servants, the court acting as supreme court in administrative proceedings handles trials relating to the administrative activities of the following:

"a) an independent regulatory agency, an independent state administration agency or a government office, as per the act on central state administration agencies

[…]

c) the electoral commission."

The presidential motion dated December 16, 2016 cites Art. 25 par. (8) of the Constitution, as per which the detailed instructions regulating the organization and administration of courts, as well as the supervision of the central administration of courts in Hungary is laid down in a fundamental law, which fundamental law is presently Act CLXI of 2011 (henceforth Act CLXI) on the organization and administration of courts. As per Art. 16 of Act CLXI, justice can be exercised on the territory

of Hungary by the following types of courts: the Curia (the Supreme Court of Justice), the Court of Appeals, the tribunal, the district court and the administrative and labour court.

The presidential motion points out that Art 7. par. (4) of the Act on the procedural code of public administration mentions a court which is not included in Act CLXI, the so called administrative supreme court, the attributes of which are held by the Budapest Capital Regional Court. Thus, while the Act on the procedural code of public administration does not formally modify Act CLXI, it does however widen its content by adding a new court, furthermore, this legislative change is the result of a law passed by the National Assembly with a simple majority.

Therefore, the presidential motion specifies that although the role of the newly 'created' administrative supreme court is fulfilled by the Budapest-Capital Regional Court this does not change the fact that the court system laid down by Act CLXI is enlarged with a new type of court. This is further underlined by the provisions which outline the functions and authority of the administrative supreme court [Art. 7 par. (1) pt. b), Art. 7 par. (2) pt. b), Art. 12 par. (2)-(3), Art. 15 par (3) pt. a), Art. 36. par. (2) pt. a)], define its structure [Art. 8 par. (6)] and specify regulations which differ from the 'general procedural order' of the Budapest-Capital Regional Court [for example regarding representation and compulsory legal representation in Art. 27 par. (1)].

Following the motion of the president, as per Art. 57 par. (1b) of Act CLI of 2011 on the Constitutional court, the minister of justice forwarded his resolution on the matter, dated December 20, 2016, to the Constitutional Court. The minister of justice debated the nullity under public law and the constitutional incompatibility of the provisions highlighted by the president. In his argumentation the minister points out that the presidential motion is untimely, furthermore, that the possible future incompatibility with the Constitution would not be caused by the act itself, but by eventual insufficiences of subsequent legislation.

The Constitutional Court, in line with Art. 57 par. (2) of Act CLI, requested the declaration of the Speaker of the National Assembly. In his resolution dated January 5, 2015, the Speaker of the National Assembly informed the Constitutional Court that, as per the National Assembly diary, the acting speaker requested the house to vote according to the rules of simple majority voting, and the closing voting likewise happened along the same guidelines.

7.3 Decision of the Constitutional Court

The Constitutional Court, through Constitutional Court decision 1/2017. (I.17.) found Art. 7 par. (4) and Art. 12 par. (2) pts. a) and c) of the Act on the procedural code of public administration, passed by the National Assembly on December 6, 2016, to contravene the Constitution, and as such, unfit for promulgation.

The Constitutional Court made the decision public on January 13, 2017. The judge rapporteur of the case was Tamás Sulyok, parallel argumentations were provided by constitutional court judges Imre Juhász, Béla Pokol, István Stumpf and András Zs. Varga, and a diverging opinion was provided by constitutional court judge Egon Dienes-Oehm.

7.4 Argumentation of the Decision – The majority point of view

Prior to evaluating the motion, the Constitutional Court conducted a brief review of the historical precedents of administrative jurisdiction in Hungarian lawmaking, as well as the legislative purpose

of creating the Act on the procedural code of public administration, then proceeded to analyse the sections of the motion which state the nullity under public law of the Act.

Based on the motion, the analysis of the Constitutional Court extended to the following: 1. reviewing the legislative scope impacted by the law amendment, 2. analysing whether the law amendment is directed at modifying the content of the provisions of Act CLXI and, if so, 3). whether amending this fundamental law occurred as per the required procedural order.

Upon reviewing the relevant regulations contained in Act CLXI, the Constitutional Court ascertains that, by mentioning an administrative supreme court, furthermore defining its scope of tasks and authority and defining procedural rules connected to the new denomination, and through this new denomination empowering the Budapest-Capital Regional Court to act as such, the Act on the procedural code of public administration legislates in matters which, as per Act CLXI, are considered subject to fundamental legislation.

The Constitutional Court points out that at this stage it does not bear relevance under public law that the new denomination is to be assumed, temporarily or indefinitely, by a court which already exists as per Act CLXI, however, it does bear relevance that the Act on the procedural code of public administration, passed under the procedural order of laws requiring a simple majority cannot create a new type of court, which is not specified in Art. 16 of Act CLXI.

The Constitutional Court points out that the Act on the procedural code of public administration – passed under the procedural order of laws requiring a simple majority does not change the denomination of the Budapest-Capital Regional Court, instead it invests it with the powers of an administrative supreme court, a type of court which is not explicitly specified or nominated in Art. 16 of Act CLXI.

During its investigation, the Constitutional Court also touched upon the question of general jurisdiction and special courts. With regards to this, the Court found that Art. 7 par.(4) of the Act on the procedural code of public administration invests the Budapest Capital Regional Court, a court regulated by fundamental law, with the judicial powers of an administrative supreme court, thus making it a court which has both general jurisdiction, and additionally acts as a special court.

In the context of analysing the Act's nullity under public law, the Constitutional Court subsequently touched upon the matter of fundamental legislation. Here the court invokes Constitutional Court decisions 16/2015. (VI.5.) and 1/1999. (II.24.) (already cited above), which were also quoted by the presidential motion. Based on these, the court finds that Art. 7 par. (4) of the Act on the procedural code of public administration, passed along the procedural order of a simple majority, is content-wise directed at amending a fundamental law, and thus should have been passed according to the procedural order of legislation requiring a qualified majority.

In the second part of the decision, the Constitutional Court analyses the incompatibility with the Constitution of Art. 12 par (2) of the Act.

Regarding Art. 12 par. (2) point a), the Court has found that it invests that Budapest Capital Region Court with a jurisdiction which had previously been assigned, through the fundamental legislation of the Media act, to the exclusive scope and authority of another type of court (administrative and labour court), more specifically to the Budapest-Capital Administrative and Labour Court. The exclusive scope of jurisdiction and authority which had been assigned through fundamental legislation cannot be changed or amended through legislation passed along the procedural order of a simple majority. It is thus concluded that the currently discussed provision is unconstitutional.

With regards to Art. 12 par. (2) point c), the Constitutional Court invoked the argumentation presented in the presidential motion, and concluded that, along the same line of reasoning as Art. 12 par. (2) point a), this point is unconstitutional as well.

In the recapitulative section of the decision, the Constitutional Court emphasized – evidently in response to the stance of the minister of justice – that the subject case of our present study was subjected to a prior review of constitutionality, along the lines of the presidential motion, that is, the analysis concerns a law which has been accepted, but not yet promulgated. As such, the Constitutional Court pointed out that the Act on the procedural code of public administration, like any other piece of legislation, could not have materialized before being promulgated, independently of the content of the Court's decision. Therefore, the Court sees its own role in the present case solely as meant to point out that fact that, should the Act be promulgated, it would become null under public law due to it having been passed according to an incorrect procedural order. Consequently, at this point in time the Court exercised a prior review of constitutionality, the purpose of which is to prevent that a piece of unconstitutional (and as such, null under public law) legislation become a part of the legal system.

7.5 Consequence of the Decision of the Constitutional Court

Based on here discussed decision 1/2017. (I. 17.) of the Constitutional Court, the National Assembly eventually modified a number of provisions in the Act on the procedural code of public administration and passed the law again, which was then promulgated on March 1, 2017 as Act I/2017 on the procedural code of public administration, and will become effective, as per initial plans, on January 1, 2018. The provisions analysed by the Constitutional Court have been amended in the new Act as follows:

"Art. 7. [Courts acting in administrative proceedings]

(1) First instance decisions taken by

a. the administrative and labour court

b in cases defined by law, the tribunal or the Curia

(2) Appeal decisions taken by

a. for cases handled by the administrative and labour court the tribunal and

b. for cases handled by the tribunal, the Curia

(3) Re-examinations are handled by the Curia.

12. § [Jurisdiction]

[…]

(2) Except trials related to the legal relationships of public servants, the tribunal handles trials relating to the administrative activities of the following:

a. in the absence of other legal provisions, an independent regulatory agency, an independent state administration agency or a government office, as per the act on central state administration agencies

b. the railroad administration agency and the aviation authority

c. public agencies

d. the Hungarian national bank."

We can thus see that the legislator, in conformity with the Constitutional Court decision, does not mention neither an administrative supreme court, nor a court acting as such: Art. 7 par (4) has

been removed from the Act. As Art. 12 par. (2) pts. a) and c) had also been found to be unconstitutional by the court, pt. a) was modified by the legislator, using the suggestion made by András Zs. Varga in his parallel argumentation, by adding the phrase 'in the absence of other legal provisions', while the electoral commission previously included in pt. c) was removed altogether from the enumeration.

8 CONCLUSION

Administrative jurisdiction, and within it the creation of an independent administrative procedural order has been cause for much excitement in the lawmaking community basically from the early 1990 s, when control over administrative rulings became genuinely possible again. It is thus unsurprising that the codification of the Act on the procedural code of public administration was followed with interest, and the professional and scientific community gave regular updates on the status of the codification. Therefore, the fact that the president did not sign the Act passed by the National Assembly, but sent it to the Constitutional Court for evaluation instead caused a major stir.

However, the Act on the procedural code of public administration has been promulgated in its new form, and seemingly does not contain any unconstitutional provisions. We apply its provisions since the 1st January 2018: we shall find out how it fares in practice.

The development or the renascence of the administration jurisdiction does not stop: the latest news from the government are talking about a new, from the civil courts separated administrative court system. We can conclude that the idea of the independent administrative jurisdiction is more than a dream today and in a few years we can talk about a new system of courts because of the existence of independent administrative jurisdiction in Hungary. We shall see!

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