

**JUDIT SIKET**

**TERRITORIAL AND LOCAL ADMINISTRATIVE SYSTEM IN HUNGARY**  
**X. Some aspects of local autonomy (2)**



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## CHAPTER X

### SOME ASPECTS OF LOCAL AUTONOMY (2): ADMINISTRATIVE SUPERVISION, LEGAL PROTECTION OF RIGHT TO LOCAL SELF-GOVERNANCE

#### Content of the Chapter

1. The system and extent of administrative supervision
2. Local self-governments' rights protection

The aim of the Chapter: This Chapter presents the administrative supervision system in the practice of the Congress, in a European comparative perspective. Beyond this, the Hungarian administrative system is also covered, in the light of the provision of the Charter. The second part of the Chapter contains the legal protection opportunities, in the same structure, like the administrative supervision. Firstly the European systems, then the Hungarian system are presented, in the light of the Charter.

**Estimated reading time: 25-30 minutes**

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#### **1. ADMINISTRATIVE SUPERVISION**

The Article 8 of the Charter contains provisions on administrative supervision of local authorities' activities, as follows.

*1 Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.*

*2 Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.*

*3 Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.*

Administrative supervision should normally is limited to assess the legality of local self-governments' actions. In the case of delegated tasks, the state authority delegating its powers may exercise supervision over the compliance of delegated tasks. This provision of the Charter

is requiring that the national legislation on administrative supervision be in accordance with the principle of ‘proportionality’, whereby the controlling authority, in exercising its prerogatives, is obliged to use the method which affects local autonomy the least whilst at the same time achieving the desired result.

### 1.1. EUROPEAN CASES<sup>1</sup>

The concept of legal supervision encompasses a number of forms of supervision, which must be clearly distinguished.

- (1) supervision exercised by central or, regional government, which can be termed ‘administrative supervision’ by a ‘supervisory authority’,
- (2) supervision exercised by domestic courts (administrative and/or civil) where proceedings are instituted against a local authority,
- (3) supervision exercised non-judicial bodies which are, nonetheless, manifestly independent from central (or regional) government
- (4) the office of ombudsman or mediator, with responsibility for carrying out investigations (Scandinavian countries) or examining complaints of injustice suffered through maladministration by local authorities within their territorial jurisdiction. In the United Kingdom the latter role is fulfilled by the local government ombudsman, an office set up under the 1974 Local Government Act.

The other forms of supervision, such as financial supervision, or audit, political supervision are not the subject of this analysis.

As a matter of fact, a distinction should be made between supervision of decisions and supervision of bodies and persons, entitled to make decisions. It should be pointed out that the subject of the supervision is the local authority’s action: the sanction attaching to unlawful or otherwise improper action only affects the decision, although in some more serious cases a penalty may be imposed on the bodies or persons responsible for the decision.

Supervision of the lawfulness of decisions is expressly covered in Article 8.2 of the Charter, which provides that administrative supervision ‘shall normally aim only at ensuring compliance with the law and with constitutional principles’.

Under the *French system*, the concept of lawfulness refers not only to the Constitution and statute, but also to decrees and ministerial orders. The concept is therefore extremely broad-based. In France, a review by a prefect deals with all aspects of lawfulness.

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<sup>1</sup> See in details: Supervision and auditing of local authorities’ action No. 66. Council of Europe 1999. [https://localgovernment.gov.mt/en/DLG/Legislation/Documents/Legislation/R\(98\)12.pdf](https://localgovernment.gov.mt/en/DLG/Legislation/Documents/Legislation/R(98)12.pdf)

In the *United Kingdom*, primary legislation, secondary legislation, case law and common law are all binding on local authorities. A final source of law, or quasi-law, may be deemed influential by the courts.

*In Germany*, local authorities are in a more favourable situation in this respect. The Federal Constitution guarantees the right to self-government, and sovereign status is one of the traditional prerogatives of municipal self-government. Any review of the lawfulness of local authority action is therefore solely based on the laws of *the Länder*, which are responsible for establishing the statutory framework of local self-government.

The provision of the Charter provides, that administrative supervision of the lawfulness of local authority action is permissible, under the conditions set out in constitutions and statutes.

Two main models of regional influence over local self-governments may be distinguished.

(1) The first corresponds to countries traditionally administered on the French pattern, where decentralising reforms have recently been implemented but central government still has a dominant role, including in supervisory matters.

(2) The second model corresponds to federal states, where the most important role is apparently taken not by the state, but by the *Länder* (in Germany) or the cantons (in Switzerland). Central government has absolutely no legislative or practical role in such matters.

It should be added that beyond the administrative organs, the *courts also play role* in this field. The main area of activity of the courts is reviewing the lawfulness of decisions. In some countries, courts are the sole authorities empowered to do so.

As to the timing of supervision, the general view is that greatest respect for local self-government is, in principle, shown in the case of *a posteriori supervision*, which is carried out after a decision has taken effect without the approval of another authority being required. However, although it is true that *a priori or preventive controls* (those where the involvement of a government authority is necessary for a local decision to take effect or be valid) are usually regarded as exceptional, that does not necessarily mean that they are systematically incompatible with the freedom of local authorities to manage their own affairs. Where justified by the interests at stake, the legislature may provide for a priori supervision, subjecting local decisions to leave or approval from central government authorities.

## 1.2. THE CASE OF HUNGARY

Fundamental Law implies the provisions on conceptual significance concerning the *administrative jurisdiction* (Art. 25.). Courts shall decide on the lawfulness of administrative decisions the conflict of local government decrees with any other legal regulation, and on their annulment, the establishment of non-compliance of a local government with its obligation based

on an Act to legislate. The Government shall ensure supervision of the legality of local governments through the capital or county government offices.<sup>2</sup> The capital or county government office may apply to a court for the establishment of non-compliance of a local government with its obligation based on an Act, to adopt decrees or take decisions.<sup>3</sup> The court, if the requirements are fulfilled, authorized the capital or county office to adopt decree or take decisions. It should be emphasized that in this case a state organization can replace local government decisions this means a unique device in Europe. Nonetheless the judicial control during the application of the *replacement of decisions* is enforced properly. The Local Self-Government Chamber of the Curia (Curia is the highest judicial authority in Hungary) passes decisions in cases where local government decrees violate legal rules, and where the local government fails to legislate as laid down in the Act on Local Governments. The Council practises a considerable competence affecting municipal autonomy in the case when it authorizes the capital or county government office to adopt a local municipal decree. This competence ensures crucial influence for the government offices in the shaping of the local social relations. The replacement of the local government decision is an unprecedented legal tool in Hungary, introduced in 2012. The ruling on this supervision device is laconic and requires legal practice to interpret it. This intervention by the point of view of the Curia means, that the Curia has to determine in its decision establishing the replacement of the municipal decree, that the government office between what frameworks and guarantees may create the decree instead of the local self-government representative body.

The *supervisory fine* was also determined as a device as to strengthen the administrative supervisory. It is intended to ensure the compliances of local government's obligations. The capital and county government offices could impose this type of fine both against local self-governments and their associations.<sup>4</sup> The Local Government Act provides effective remedy for the local self-government in this case the administrative courts are empowered to pass decision. Legal supervision fine is functioning as a type of administrative sanctions, because implies every crucial elements of the sanction. It is applicable in complex relationship, and is subject of the administrative penalty law, can be considered in the context of Council of Europe' Recommendations.<sup>5</sup> Recommendation brings into focus the good and efficient administration,

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<sup>2</sup> Fundamental Law Article 34.

<sup>3</sup> Fundamental Law Article 32.

<sup>4</sup> Local Government Act Article 141.

<sup>5</sup> Recommendation No. R (91)1.

and the defence of public interest, but the main question is the individual right protection, thus only analogy can be used, especially in the field of guarantees.

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## 2. LOCAL SELF-GOVERNMENTS' RIGHTS PROTECTION

The constitutional and legal protection system of local governments' rights shows a diverse picture across Europe, between the local self-government models and the legal protection systems close correlation cannot be identified. Article 11 of the Charter laid down basic requirements in the field of legal protection, as follows.

*Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.*

The connotation of legal protection principle – recorded by the Charter as a mandatory requirement – has been evolved and developed in the practice of Congress. Consequently, legal protection implies that a local authority must have *the right to a judicial remedy* against any legal entity that *violates* its powers or autonomy, whether

- (1) central government,
- (2) another local authority, a regional authority or
- (3) even a private individual.

The right to a judicial remedy further presupposes that the *procedure* is fair and offers guarantees such as

- (1) adversarial proceedings,
- (2) a public hearing,
- (3) equality of arms,
- (4) the rights of the defence and
- (5) reasoned grounds given for the solution.

Local authorities shall have the right to judicial remedy in order to secure the free exercises of their powers.

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### 2.1. EUROPEAN CASES

Through several monitoring reports the compliance of the Charter provisions on legal protection could be highlighted from the last period. In this demonstration system of United Kingdom (UK), some of the continental states, a few of the former socialist countries have been included, and ultimately Hungary has been examined.

The state of affairs was examined in the *UK* in 2013. Accordingly, one of the most important findings was that fairly limited disposal is against the central government for the local self-government. The occasion of legal protection depend on whether the legislative decision of Parliament or executive action of central or local government violates the right or legal interest of local self-government. In the former case there are only restricted tools, typically whether the subject of the fundamental right or the rule of law principle breach has been emerged. In the latter case whether the decisions or actions of executive organ has resulted infringement, the judicial review is more often available. Characteristic court actions are related to planning decisions, housing and reduction of the number of local authorities. However it should be noted that the Charter is neither directly applicable by the court nor can local governments refer to it. As a result of the monitoring process it was considered that whether the legal protection is rather limited, notwithstanding possible, the plight is in compliance with the Charter.<sup>6</sup>

Basically, the French and German local self-government system belong to the continental model, nevertheless they have a few entirely different features. In *France* the local autonomy has been linked essentially to the free administration concept accordingly ascertained in the Constitution. These rules provide facilities for the local self-government bodies to initiate decision on constitutionality question at Constitutional Council. Pursuance to monitoring report<sup>7</sup> the administrative courts decide hundreds of cases year by year opposing the state and local and regional authorities, or between these bodies, such as grants allocated to local community, new regulations on expenses or administrative regulations. Nevertheless the Council of State (*Conseil d'Etat*) has comprehensive case law completed the devices of legal protection. It should be noted that the characteristics of legal protection are underpinned the unitary state and legal system functions. In *Germany* one of the major legal protection tools is the constitutional complaint. It provides to local authorities devices to turn to the constitutional court of the Land to repeal Land laws and statutory regulations that violate their constitutional or legal rights. The most frequent cases seemed to be the litigation on municipal boundaries and local finances.<sup>8</sup>

In *Denmark*, considered traditionally decentralized state, local self-government system belonged to the Scandinavian model, legal protection is guaranteed in practice, by the monitoring report, 2013. Provisions of the Charter directly applicable and shall affect, it means that the municipalities directly could rely on the provision of the Charter in case of

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<sup>6</sup> United Kingdom 2014. 46-47.

<sup>7</sup> France 2016. 56.

<sup>8</sup> Germany 2012. 30-31.

infringement. It should be also noted that municipalities rarely initiate juridical proceedings.<sup>9</sup> Considering *Norway*, who also follows the Scandinavian model, the Congress recommended in 2006 to set up an independent body to decide upon disputes arising between central government and local authorities. According to the statements of monitoring report 2015, a number of bodies have been set up (to settle child welfare disputes, 2010, health sphere, 2012). Despite the Norwegian Government set up an inter-ministerial working party to prepare the establishment of a dispute resolution body in 2014, the situation is not in conformity in law with legal protection provision of the Charter.<sup>10</sup>

Nevertheless belonging to the continental local self-government model the post-soviet states are deserved particular attention. Poland's, Slovak Republic's and Hungary's local self-government legal protection system could be highlighted below. In *Poland*, legal protection of local self-government is expressly declared by the Constitution. As reported by the monitoring committee in 2015, Polish legal system provides assorted possibilities for local self-government units to defend their rights, such as protection by ordinary or administrative courts and by Constitutional Court. The role of administrative courts is worth underpinning, because local self-government bodies are provided legal defence against the decisions of central government. The Constitutional Court have played prominent role in the course of local self-government law's development on the basis of the Charter's provisions. For that reason, Polish legal system completely meets the requirements of the Charter.<sup>11</sup> Legal protection of local self-government in *Slovak Republic* deserved by the Congress a 'nuanced assessment'. Local self-government bodies have a large scope of autonomy with limited state intervention possibility. They may apply to the courts to defend their rights in the same way like other entities. The same situation is on the Constitutional Court proceedings. In the Constitution the right to complaint of local self-government bodies is included. However, it is questionable whether the Act of Parliament could be challenged on the complaint applied by the local self-government body. The basic standards of the Charter are essentially complied by the opinion of the Congress.<sup>12</sup> Finally a short description required whether in *Hungary* the legal protection system considered in compliance with the Charter by the opinion of the Congress. The monitoring report, 2013 concluded that local authorities do not have any effective legal protection to secure the free exercise of their powers or protect their rights as provided in the Charter.<sup>13</sup>

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<sup>9</sup> Denmark 2013. 27-28.

<sup>10</sup> Norway 2013. 20-21.

<sup>11</sup> Poland 2015 22-23.

<sup>12</sup> Slovak Republic 2016. 23-24.

<sup>13</sup> Hungary 2013. 27-28.



In the practice of Council of Europe, a wide range of compliance, a diverse institutional systems are considered acceptable. Requirements could be *generalized* as follows:

- (1) independent institutions pass decisions on legal disputes arose between the local self-government authorities and the central government organizations,
- (2) as to secure free exercise of local self-government powers and
- (3) local self-governments have to have possibilities for actual, effective remedy.

## 2.2. THE CASE OF HUNGARY

The Hungarian constitutional and legal protection system case analysis has demonstrated lack of compliance with the Charter *de facto* it does not ensure effective legal remedy. The direct proposal of constitutional protection was ceased; the lack of constitutional ruling of right to local governance has eliminated the constitutional protection system. The protection of the local governments' basic rights can be interpreted only in that case, if these provisions are defined on a fundamental law or law level. However Local Government Act provides some cases of the judicial legal defence, these legal redress opportunities do not prevail in the practice actually. Starting point of legal protection analysis is the regulation system of the Constitution of 1990 and the reshaped regulation of Basic Law 2011, served as a framework for protection devices system and determined specific features.

The Constitution defined the right to local self-governance as a fundamental collective right. It had contained explicit provisions on constitutional and legal protection of right to local self-government nevertheless the Basic Law has not incorporated the type of guarantee rules. The constitutional and legal protection of local self-government right got to a lower regulation level into the Local Government Act of 2011.

The Congress formulated a recommendation for Hungarian Government in 2013. The Congress recorded, that the basic principles of local self-government both necessary to provide their success in the legislation and in the practice unambiguously. It called on the Government to ensure legal protection and effective legal remedies for municipalities.<sup>14</sup>

### 2.2.1. Constitutional protection

At constitutional level, the framework of legislation and law enforcement are basically defined. Constitutional Court stated in a decision in 1994, that special procedural obligations and competencies may be established only by direct applicable provision of law. It had appropriate competencies formerly in the field of local self-government legislation, local referenda, delivering of opinion according to the unconstitutional operation of the local representative

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<sup>14</sup> Recommendation 341 (2013) 4.

body, furthermore local self-government had been entitled to practice the right to propose posterior constitutional examination of regulation also (*action popularis*).

Based on the former constitutional court rules provisions<sup>15</sup> local self-governments could propose the additional examination of regulation and other state management regulation tools by the constitutional law complaint also. The constitutional law complaint could be submitted in the case of omission unconstitutionality and the infringement of constitutional right. The local self-governments were entitled to practice the right to complaint in latter cases also.

New provisions of Fundamental Law 2011 and constitutional court rules<sup>16</sup> significantly narrowed the constitutional and legal protection possibilities of local self-government. Fundamental Law remains silent provisions on protection. Furthermore proposal for abstract posterior examination of regulation may not be submitted directly.

Constitutional law complaint is regarded as remedy in the case of constitutional violation, but it is not considered as a general remedy, thus as a unique device has a subjective right defence function primarily beyond objective defence functions.

Summarizing, the change of the constitutional protection of local self-governments could be laid down, that the available devices in the case occurring violation from the unconstitutional rules has been narrowed.

### *2.2.2. Judicial protection*

The scope of legal protection analysis should be restricted to remedies against public law decisions provided by the Local Government Act.

The Fundamental Law provides, that in order to preserve a balanced budget, an Act may provide that for any borrowing or further undertaking of commitments by local governments the *consent of the Government shall be required*.<sup>17</sup> This regulation affects fundamentally the housekeeping autonomy of the local self-government, but the remedy against the decision of the Government is not ensured. In another case assured the direct legal redress at the court if the deadline of commitment to the European Union or other international organizations has expired unsuccessfully, or there is the risk of default, the *Government* could undertake the obligation related to *investment implementation* within its own competence.<sup>18</sup> The local governments concerned in the investments could refer to court against the decisions of the Government.

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<sup>15</sup> Act XXXIII of 1989 on Constitutional Court

<sup>16</sup> Act CLI of 2011 on Constitutional Court

<sup>17</sup> Art. 34. par (5).

<sup>18</sup> Local Government Act Art. 16.

Likewise ensures the Local Government Act legal redress opportunity regarding the legal dispute affairs of the *associations*. The judicial debates between members of the associations are not qualified as a public law nature rather civil character.

Answer the following questions.

1. The Charter determines requirements related to the administrative supervision. How could you define them?

a) procedural issues: .....

b) aim of supervision in general: .....

c) organizational provision: .....

d) proportionality: .....

2. Choose a European state example and characterize it.

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3. How could you subscribe the Hungarian administrative supervision tools?

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4. What is the main content of legal protection?

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5. Choose a European state example and characterize the right protection.

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6. How could you subscribe the Hungarian right protection system?

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