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HUNGARY'S NEW CODE ON ADMINISTRATIVE COURT PROCEDURES

As a framework for the justiciability of educational rights

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1. Introduction

1.1. Educational rights and administrative court procedures

Though principally adherent to the sphere of constitutional law, the justiciability of educational rights is closely connected to administrative court procedures. Administrative law is applied constitutional law – as the German dictum puts it[1]. Thus, it is important to search for the right procedural framework for the enforcement of educational rights and other basic rights. This was also an important perspective of the preparatory work and the codification process of the recently enacted Code on Administrative Court Procedure. This article aims at highlighting those features of the Code, which are connected with the questions of the justiciability of educational rights through administrative court procedures and to give insights to the dilemmas arising in the codification process. These main features, which are able to bring modifications to the present system of remedies, are the scope of judicial protection, the standing, the actions granted by law and the respondent decisions of courts, as well as the special procedures against the omissions of administrative bodies. To highlight the changes, the present situation will also be presented shortly.

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1 Formulated by Fritz Werner: Verwaltungsrecht als konkretisiertes Verfassungsrecht. *Deutsches Verwaltungsblatt,* 1959. 527.; and frequently used by German scholars, cf. Eberhard Schmidt-Assmann: *Das allgemeine Verwaltungsrecht als Ordnungsidee.* Berlin–Heidelberg, Springer, [2]2006. 10.; or Rainer Pitschas: Neues Verwaltungsrecht im reflexiven sozialen Rechtsstaat. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio Iuridica,* Vol. LIV., 2013. 34.

1.2. The long way to the Hungarian Code on Administrative Court Procedure

After the Communist takeover, administrative jurisdiction was abolished in 1949 according to the principles of the unity of power and the unity of the judiciary. In some – very few – administrative matters, however, the possibility of access to ordinary courts remained: the Administrative Procedure Act allowed for judicial review in five categories of cases, but which were of marginal importance. The administrative court procedure was then regarded as a special type of administrative procedure and therefore governed by the Administrative Procedure Act. It was only in 1972 that Chapter XX. entitled 'Review of administrative decisions' was inserted into the Code of Civil Procedure (CCP). Thus, the administrative court procedure was conceived as a special civil process and therefore fell within the jurisdiction of civil justice.

In December 1990, the Constitutional Court found the enumerative regulation of the administrative acts which can be brought before court unconstitutional, and smashed the rules regulating access to court, and obliged Parliament to find a lawful solution by 31 March 1991.[2] As these three months didn't allow for sufficient time for in-depth preparation, the law 1991: XXVI. on the extension of access to court in administrative matters was enacted to provisionally grant access to court against authoritative administrative decisions in general. The extension included certain further decisions by local self-government bodies and also created the possibility for special regulations opening access to justice in other administrative decisions. These latter two categories are important in respect of educational rights, as the local self-government were at that time responsible for the provision of educational public services, thus the maintenance of schools. The head of the territorial government office could bring annulment actions against the decisions of local government as a maintaining organ. With the other extension, the Public Education Act opened access to court against the most significant school decisions causing unlawful harm: after filing an appeal to the maintaining organization of the school, the judicial review of the appellate decision was made possible.[3]

The new constitution, enacted in 2011, the Basic Law of Hungary allowed in Article 25 for certain 'groups of affairs' – in particular for administrative and for labour disputes – the creation of specialized courts.[4] But instead of setting up independent administrative courts, the legislator simply created so called 'administrative and labour courts', which meant, that the administrative judges were transferred from ordinary courts to the already existent labour courts, which are situated at the lowest level of the judiciary.[5] No changes were made to the administrative court procedure at that time. In the beginning of 2015, the Hungarian government adopted the concept

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2 Decision Nr. 32/1990. (XII. 21.) AB of the Constitutional Court.

3 §§ 37–40 of the Public Education Act.

4 On the changes of the constitutional framework of legal protection against administration cf. Krisztina Rozsnyai: Änderungen im System des Verwaltungsrechtsschutzes in Ungarn. *Die Öffentliche Verwaltung,* vol. 65, 2013/9. 335–342.

5 The administrative and labour courts started to function on 1st of January 2013.

of the codification of the new CCP. It was at this point, that it also decided not to regulate administrative court procedures as a special civil procedure. The minister of justice was ordered to start codification work in respect of the rules of administrative court procedures. The concept for the codification was adopted in May 2015 by the government and subsequently, the draft of the Code was presented to the public on 31 March. The draft law was passed at the end of September to the Parliament.[6]

The codification work was centered around the principle of effective judicial protection. Four directions of effectivity have been identified: on the one hand, the granting of subjective legal protection complemented by elements of objective control of legality, on the other hand the granting of seamless judicial protection, against all forms of administrative action, thirdly the effectivity in time, and fourth the effectivity as regards the procedural equality of arms.

2. Main features of the administrative court procedure connected to the justiciability of educational rights

2.1. Widening the scope of judicial protection

As we can see, at present, judicial protection is ensured generally only against concrete authoritative decisions of authorities brought in administrative procedures. Of course, time has already proven that not all administrative court procedures fit into this framework, which resulted in the creation of special procedures, like the so-called 'non-contentious administrative judicial procedures', which can be filed against omissions in administrative procedures of administrative authorities and some procedural decisions, like the decision of stay of an administrative procedure or its ending without deciding on the merits. This led to a fragmentation of the rules on administrative court procedures. There are at present numerous special rules that widen the scope of judicial protection. To mention only the Public Education Act, administrative courts review the decisions of the maintaining organ of the school concerning unlawful acts of the school. The decisions of local self governments (still responsible for some public services in the field of education, like education in kindergartens) can be sued by the county government office which is responsible for the supervision of local governments.

According to the new Code, all administrative activity of administrative organs, which is regulated by administrative law, can be reviewed by court. Activity is the action and the omission of action which is aimed at producing or factually produces legal consequences, i.e. changes the legal situation of a person. Thus, it does not matter anymore, if the concrete action of an administrative organ was governed by the Act on Administrative Procedures, neither if it was an authority or an

[6] The Parliament enacted the code on 6th December, but the President of State referred it to the Constitutional Court because of some elements of the regulation of the competence of courts. After the decision of the Constitutional Court, the draft was altered accordingly and enacted on 20 February 2017.

administrative organ without exercising authoritative powers. By this change, the activity of administrative organs in the field of service provision can also be subject to review by administrative courts. In the field of service provision, administrative organs exercise numerous activities which can be deemed as administrative activity governed by administrative law, either in connection with the maintenance of institutions providing public services, like public education, or in connection with administrative contracts by which administrative organs organize (mostly by outsourcing) the provision of public services. In both cases, there will be numerous decisions or omissions, which alter the legal situation of individuals.

During the codification process questions arose whether the activity of public service providers, (and this way also schools and other institutions providing educational public services) should be directly susceptible to judicial review. But it seemed to be more appropriate to first give the maintaining organ the possibility for review, as most disputes can be solved this way more easily. Also, this would have given rise to quite many conceptual questions connected to the basic questions of the notion of public service, which would have placed the Hungarian judiciary and legislation under too heavy pressure.

Another important direction of the widening of the scope of judicial protection is the reviewability of the normative acts of non-legislative nature issued by administrative organizations. It is not hard to convey that these acts issued by the maintaining organization regulating the functioning of public institutions providing public services can also have strong impact on the position of users of public services. School rules for example can contain rules which are in connection with the acceptability of education. These normative regulations, which are not legislative instruments, can – according to the rules of the Code – be brought before court in connection with individual acts, which apply these regulations. This ensures the seamlessness of judicial protection. Of course, this will not make void the functioning of ombudsmen, as there are numerous situations where there are no individual acts flowing from these regulations or they do not directly infringe rights or legal interests. This possibility can also in the long run foster the creation of rules of norm setting of administrative organs, like the rules contained in the model rules of ReNEUAL[7] or in the Administrative Procedure Act of 1946 of the United States.[8]

2.2. Standing

The other crucial element of justiciability in general is the question of standing: who is allowed to ask for review, who can bring his plea before court? In this respect, the Code makes the rules concerning authoritative decisions to a fully general rule:

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[7] The ReNEUAL Model Rules on EU Administrative Procedure, Book II., at http://www.reneual.eu/

[8] For a comparison of the two sets of rules cf. Anna Forgács: Administrative Rule-Making based on the ReNEUAL Model Rules. In: Balázs Gerencsér – Lilla Berkes – András Zs. Varga (eds.): *Current Issues of the National and EU Administrative Procedures (the ReNEUAL Model Rules).* Budapest, Pázmány Press, 2015. 441–446.

Any person who invokes an immediate infringement of his or her right or legitimate interest, can file an action for review. Besides this group, public bodies invoking an infringement within their area of responsibility also have standing, as well as authorities supervising autonomous organizations (like local governments, minority councils or professional self-regulating bodies, chambers)[9]. The law may also grant standing to civil organizations defending common interests or human rights. Latter possibility has a growing importance in relation to collective litigation, in respect of administrative court procedures mostly in cases of environmental protection and consumer protection[10], but could also be a forceful instrument for the enforcement of educational rights.[11] The Code thus gives a general possibility to grant standing to civil organizations, but the legislator of the special field – in this case responsible for education – has to gauge this possibility.

A question highly connected to standing is the possibility of taking part in administrative court procedures by third parties. Those persons and organizations who have standing, also have the possibility to take part as third parties in administrative court procedures. They enjoy almost the same rights as the parties, with exception of the withdrawal of the action.

3. Actions ad decisions

3.1. Types of action

The widening of access to courts through this general formulation of administrative activity needs several types of actions, as the traditional annulment action against decisions is not able to cover all sorts of pleas. The mandatory action makes it possible to ask the court to order the administration to perform, or to refrain from performing, for example in relations in connection with administrative contracts. A very important part of unlawfulness of administration resorts from the non-fulfillment of positive obligations posed on administrative organs. The Code will thus also provide for an action against omission. And of course, there are also situations, where we face factual deeds which cannot be annulled, but only deemed unlawful. For these cases, the Code makes possible for the court to pronounce a declaratory decision, given that an other type of decision could be brought. Of course, the plaintiff has to prove that he has a special interest in having the court declare an activity unlawful. The declaration of the unlawfulness of the custodial disposition of the police by

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[9] Cf. István Hoffman*:* The Legal Status of the Procedure of Legal Supervision of the Hungarian Local Governments: An International and Historical Outlook. In: Gerencsér–Berkes–Varga (2015) op. cit. 373–384.

[10] Cf. Krisztina Rozsnyai: Public Participation In Administrative Procedures: Possibilities And Recent Developments In Hungary. *Curentul Juridic,* vol. 58., no. 3. (2014) 50–66.

[11] At least this is a possible interference from the civil court procedures led by civil organisations against ethnic segregation in Hungary, e.g. the case underlying EBH 2015. P.6. of the Curia (April 22, 2015), or *Case Horvath and Kiss v. Hungary,* ECLI:CE:ECHR:2013:0129JUD001114611.

the administrative court for example will be a precondition for filing an action for compensation.

The diversification of the types of actions necessitates the diversification of procedural rules: the Code is therefore divided into a general part containing the general rules on courts and on the procedure of the first instance court, on its decisions, on the rules of remedies, with view to annulment actions. These general rules are followed by rules on the special procedures before administrative courts, among which we can find the mandatory procedure, the omission procedure or the procedures for the execution of court decisions.

3.2. Decisions

The types of decisions correspond to the types of actions, of course: there are annulment decisions, mandatory decisions, omission judgements and declaratory judgements, and of course some types of judgements corresponding to special procedures. As a new field, the judgments in connection with administrative contracts will get a systematic regulation. As there are no general substantive rules on administrative contracts, this may lead to the evolvement of such substantive rules, which would be very important pertaining service provision contracts. These are very often used in the field of education, because – as a counter-tendency to the nationalization of educational public service provision, i.e. transferring responsibilities from local governments to the central government[12] – churches and minority self-government organs take over more and more schools.

In the field of annulment decisions, the court can either annul or reform the decision of the administration if it is found unlawful. Borders of these possibilities constitute on one hand the procedural errors that did not have an effect on the merits of the case, and on the other hand decisions implying a margin of appreciation. In latter cases, the court can only review the compliance by the administrative authority with the limits and objective of the power, and with other rules which govern the exercise of discretion exercise of powers, as well as the procedural aspects of the decision making process, but does not conduct a separate assessment of the expediency of a discretionary decision. The possibility to reform administrative decisions (i.e. to remove the contested decision and decide the merits of the case) is not a new feature, but as long as at present the court can only reform decisions if it is given reformatory powers by the special legislator, according to the rules of the Code this will be a general possibility of the court, if the nature of the case makes this possible and the facts of the case are clear and all relevant data is available for the decision. The nature of the case only allows reformation, if the court does not engage by it in an exercise of the discretionary power in the place of the administrative authority. Reformatory powers can help ending administrative disputes in reasonable time, as in lots of cases

[12] Cf. István Hoffman – János Fazekas – Krisztina Rozsnyai: Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-municipal Associations in the last Decades. *Lex localis – Journal of Local Self-Government*, vol. 14., no. 3. (2016) 461–467.

the removal of the contested administrative act and the new procedure would cause harm to the plaintiff through the time still needed to get a new final decision in his case.

3.3. Interim relief

Of course, the dimension of time of judicial protection is also very important. If the court can only grant protection with its final decisions that will in numerous cases – in the field of education this is extremely true – be not effective. As Rec(2004)20 formulates this in connection with the effectiveness of judicial protection: "The tribunal should be competent to grant provisional measures of protection pending the outcome of the proceedings."[13] It is thus very important to give the court sufficient means to stop administrative action in advance of the judgment. The Code sets forth a set of tools of interim relief. At the one hand, the court can give suspensory effect to the administrative action, which cannot be performed until the judgement is delivered. This is presently also available in a narrower form, as the setting out of the execution of administrative decisions. As the filing of an action does not have an automatic suspensory effect, this is a very important tool. As in educational cases the suspensory effect of the filing of an action is often granted by law, in this field, the inverse tool of the court to lift the suspensory effect of the filing of the action will be used also quite often. There are of course cases, where the mere prohibition of acting will not provide for effective protection. The judge has therefore also the possibility to order interim measures, in the scope of the judgement, like for example making a public service he was denied access to by the administration available to the plaintiff for the duration of the procedure. The taking of evidence in advance is the tool completing the system. When deciding on granting interim relief, the judge has to ponder *periculum in mora* and strike a fair balance between private and public interests.

4. Omissions of administrative bodies

4.1. The scope of omission procedures

The omission procedure will hopefully be an apt instrument in issues connected with positive obligations flowing from the right to education. An omission is the absence of the performance of an action prescribed by law, which can be sued before courts in an omission procedure. The court only pronounces that there is an obligation prescribed by law, which the administrative organ responsible for it did not come after. According to the rules of the Code, the administrative organ is obliged in this case to carry out the action by law. As the Code makes suable the duties not only of

[13] Recommendation Rec (2004)20 of the Committee of Ministers of the Council of Europe to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies).

authoritative action, but also of service provision, there was need for a differentiated regulation of the omission decision of the court. Against omissions in administrative authoritative procedures, i.e. the omission of issuing an authoritative decision (mostly permits), the above-mentioned non-contentious administrative court procedures are already a functioning means. Other types of obligations, in connection for example with service provision, today are almost not enforceable. Only the local government office responsible for the legal supervision of local governments can bring omissions outside authoritative procedures before court at present. The code will guarantee access to justice also against all types of omissions for all persons and organization with standing. As this field is a very large one, with different types of obligations, varying in their conditionality or finality, the Code had to strike a balance to ensure access to courts and the non-engulfment of courts, which would render access to court practically ineffective. It thus differentiates among omissions according to the criteria, whether there is a time limit given by law for the performance of an obligation: in former, there are mainly the authoritative decisions and decisions in internal appellate procedures. Obligations outside of this area seldom are bound to a time limit. In these cases, the court has a margin of appreciation: if there is no overriding reason relating to the public interest or to the interests of the plaintiff, no omission has to be stated.

4.2. Enforcement of omission decisions

Another important field of the non-fulfillment of positive obligations is that of the non-execution of judicial decisions. There are two types of judicial decisions, where court enforcement mechanisms do not work: these are the judgements ordering the repeating of procedures and the omission judgements, according to which the administrative organ has to fulfill the obligations stated to be omitted by court. At present, there are only tools for protection against such omissions in the field of judicial decisions ordering the reiteration of authoritative procedures, but these are lengthy and complicated procedures. According to the new rules, the court will have several possibilities, if the plaintiff signalizes the non-fulfillment of its judgment. After asking for clarification from the administrative organ, if the clarification is not satisfactory, the court can impose a fine on the administration. The fine is not the unique tool for achieving the fulfillment: the court may also order another administrative organ or – according to the type of omission, of course – the supervisory authority to perform the duty in replacement. If these tools are not possible, the courts can order provisional measures until the administrative organ fulfills its obligations flowing from the judgement. In case of a repetitive omission, the fining of the leader of the administrative organ is also possible, which is deemed to be an effective measure against obstruction of administration in cases where the other tools in the hand of the judge do not work.

5. Closing remarks

By enhancing the effectiveness of judicial protection against administration, the Code will provide a good framework for a strong judicial review. The general rule of access to court, the differentiated system of actions and decisions form a system that fosters autonomy of judges and the broadening of the horizon of their judicial work. The aspects of human rights will be able to appear more frequently, and this will hopefully lead to a systematic case law which has more and more links to constitutional case law and will also foster the dialogue between administrative courts and the constitutional court. The judiciary will have an important role of interpreting the rules of the Code in accordance with its aim to guarantee effective judicial protection and to exercise substantive control of legality over the administration enforcing both its negative and positive obligations. As there are numerous new institutions and rules regarding judicial review, it will be a great and important challenge to interpret the new rules autonomously, proactively not allowing the present case law to hinder the improvements envisaged by the Court.