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Local Governments and Political Question Doctrine in Hungary

JÁNOS FAZEKAS

Abstract The main aim of this paper is to investigate a quite unexamined area: the relationship between political question doctrine and local governments in Hungary. The research focuses on the decisions of Hungarian courts and the Constitutional Court made on this matter. The paper takes under investigation some local governmental acts which have not been reviewed by any court. The main purpose of the research is to find out whether it is possible to take local governmental acts of political nature under efficient judicial review in Hungary?

Keywords: • local government • political question doctrine • Hungary • discretionary power • legal foundations for local self-government

CORRESPONDENCE ADDRESS: János Fazekas, Ph.D., Associate Professor, Eötvös Loránd University Budapest, Faculty of Law and Political Sciences, Department of Administrative Law, Egyetem tér 1-3, 1053 Budapest, Hungary, email: fazekas.janos@ajk.alte.hu.

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1 Introduction

In the era of globalization the resilience and effectiveness of public administration has become extremely important (Hoffman & Fazekas 2018). These requirements may imply broad discretionary powers in certain levels of public administration and government. Broad discretion is an instrument which can provide the flexibility which is necessary to make and carry out governmental decisions quickly so that modern state can reflect to challenges (Warren 2003: 35-38.). On the other hand, in order to keep public administration in shape, it needs feedback and control both in legal and professional ways. From another perspective, decision-making of public administration needs obstacles in the system of checks and balances. Political question doctrine is the theoretical background of the conflict and maybe the compliance of the two opposite requirements: wide-range political discretion and legality of government.

What is political question doctrine? In order to answer this question we must take a look at a special sphere of governmental acts. These acts are usually under the scope of not administrative law but constitutional law or sometimes law does not apply to them. These actions have explicitly political substance, so law occasionally does not transfer any competence to governmental bodies to adopt these decisions. In some cases they generally have no legal effect or, if so, do not create a legal situation to be protected (Barabás 2018: 90). As a result, governmental acts cannot be challenged in administrative court because judicial review can cover only legal issues not political ones. In other words, 'political question doctrine, along with other justiciability doctrines, provided the Court with techniques for refraining from deciding cases on the merits when doing so would be imprudent' (Tushnet 2002: 1204). As many American scholars like Tushnet or Henkin pointed it out, the Supreme Court of the USA, especially in the Baker v. Carr 369 U.S. 186, 217 (1962) laid down the catalogue of criteria of political question cases:
'[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question' (Tushnet 2002: 1206, Henkin 1976: 597-600).

In European legal systems political question doctrine has its preludes, too. First of all, the principle of reason of state (raison d'etat) stated that the interest of the state is stronger than the principle of legality. According to C. J. Friedrich, this doctrine says that 'whatever is required to ensure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men' (Friedrich 1957: 4-5, cited

by Miller 1980: 587). In this theoretical framework executive power has two faces: it carries out political and administrative functions as well. Administrative function carries out public services and is regulated by law, so administrative courts can legally review it due to separation of powers. On the contrary, political function express sovereignty which is cannot be challenged in court or only on higher forums (Barabás 2018: 87).

Royal prerogatives in Great Britain serve as other historical antecedent of political question doctrine. These prerogatives traditionally covered the topics of foreign policy, declaration of wars and other questions of the army. Decisions regarding these sectors have been handled as acts of state which cannot be questioned in court; however, they have been usually under the scope of statutory law (Bradley & Ewing 2011: 250-251).

International relations and military affairs are classical areas of governmental acts based on political question doctrine. E. g. in the Pershing case the main problem was if Germany can permit the USA to place Pershing nuclear missiles in the territory of Germany. The decision of the Government was sued in the Constitutional Court which stated that this decision is not questionable because the risks must be considered by the political bodies of the Government. Due to French case law, such questions have occurred as political question cases as whether the government should send military forces to Kosovo or whether the government should launch international negotiations with another country or get involved in them. These acts enjoy immunity against judicial control. Nonetheless, Conseil d'Etat tends to interpret the notion of governmental act narrowly in order to strengthen the principle of legality of public administration. E. g. giving permission to another country to open an embassy is a governmental act but giving a permission to construct the building of the embassy is an individual public authority decision which is questionable in court. Only real governmental acts are nonjusticiable, because allowing courts to review these acts would be an interference in the affairs of the political branch (Barabás 2018: 86-88).

However, not only foreign and defense relations are often subjects to governmental acts but also substantially political cases. In French case law such decisions have been considered as governmental acts that whether the Government should submit a bill to the National Assembly or not; or whether the Prime Minister should initiate the reform of the Constitution. In Hungary e. g. entering into the International Monetary Fund (IMF) and into the European Bank for Reconstruction and Development (EBRD) was considered by the Constitutional Court as political question cases in the Decision No. 1154/B/1995 (Barabás 2018: 86, 89).

The abovementioned cases have occurred on both national and international level. Nevertheless, governmental acts on the base of political question doctrine arise in the sector of local governments, too. The main aim of this paper is to investigate a quite unexamined area of this question: the relationship between political question

doctrine and local governments in Hungary. The research focuses on mainly the decisions of Hungarian courts and the Constitutional Court made on this matter. Doing so, I examine primarily local government acts reviewed by courts or the Constitutional Court with the toolkit of administrative jurisprudence. Secondarily, I take under investigation some decisions of other (e. g. central) governmental bodies regarding local government problems with the same methodology. Nonetheless, there are not so many published court decisions on this matter; therefore I take under investigation several local governmental acts which have not been reviewed by any court or the Constitutional Court in Hungary. Since there are approximately 3.200 local governments in Hungary, I have chosen one of them: the 10th District (Kőbánya) of Budapest (Capital of Hungary). The main purpose of the research is to answer the following question: is it possible to take these local governmental acts under efficient judicial review in Hungary? If the answer is yes, a wide-range judicial review is an important guarantee of such principles as rule of law, separation of powers and legality of public administration in politically sensitive cases. Furthermore, local governments performing under the scope of legality can be more transparent and accountable, thus they can administer public services more efficiently to their citizens.

Hereinafter, I examine the court cases and local governments act categorized into the following topics: 1. formation of a municipality, 2. namings regarding local governments, 3. symbolic matters, 4. partnerships with foreign municipalities, and 5. flats for employees.

2 Formation of a municipality

Formation of territorial units of Hungary is a fundamental question of public administration, because local self-governments operate in these units: municipalities, towns, counties, the capital (Budapest), and its districts. Moreover, these units are the elements of the structure of the Hungarian state. The competences of formatting these units are conferred to the President of Hungary or the Parliament, due to the Local Government Act. The competence of formatting a municipality is assigned to the President. In 1997 a motion was submitted to the Constitutional Court of Hungary which discommended that statutory law provides no remedy against the President's decision on formatting a new municipality. The Constitutional Court in Decision no. 1044/B/1997. rejected the motion, emphasizing that the President's decision is not an individual administrative decision based on public authority but a governmental act based on the President competence as Head of the State. Consequently, this decision cannot be the subject of judicial review of administrative decisions and it is not under the scope of the fundamental right of remedy, due to the Constitution of Hungary.
Barabás analyses this decision in a chapter examining governmental acts in the system of administrative litigation (Barabás 2018: 89). However, he does not commit himself in any debate regarding whether the President's decision on this matter is a governmental act based on political question doctrine. In my opinion, it

is not, because Hungarian statutory law regulated strictly the criteria of formatting a new municipality: in that time the Act LXV of 1990 on Local Governments prescribed that (among other criteria) only an inhabited part of a municipality or town with minimum 300 inhabitants can be formatted into a new one. The situation due to the new Local Government Act is similar but the criteria are stricter. Therefore the decision made on that matter needs legal considerations: to decide whether the application meets the criteria specified by law.

Furthermore, in 2007 the President of Hungary did not approve the application of Magdolnavölgy District to get out of Piliscsaba Town and become an independent municipality. The justification of the presidential decision underlined that Magdolnavölgy District could not confirm that it would able to carry out such compulsory municipality tasks as health care, social care, maintaining public nursery, primary school, and public cemetery (President László Sólyom's Letter to Minister Gordon Bajnai 2007). The President made a legal decision on an individual case considering whether the application meets the standards stipulated by statutory law.

3 Namings regarding local governments

a) The name of a municipality. The Decision No. 120/2008. (X. 3.) of the Constitutional Court handled a case regarding naming of a capital district in 2008. In this case the Constitutional Court annihilated a decree of the 9th District (Ferencváros) of Budapest which regulated the name of the District as 'Ferencváros'. The substance of the justification of the Constitutional Court's decision was that naming is the competence of the district itself as a local self-government but this competence is not limitless. The Act XLII of 1994 on the Districts of Budapest Capital which is a parliamentary act prescribed that the name of a district must contain the phrase 'Budapest Főváros' (Budapest Capital) and the number of the district. The name 'Ferencváros' did not meet the standards prescribed by the Act.

Naming a municipality is a symbolic act which is the very core of the autonomy of a local self-government. Nonetheless, as the abovementioned case displays there are certain statutory law regulations which restrict the independence of a local government when making decision on that matter in Hungary. Doing so, statutory law pushes these kind of decisions from the area of governmental acts on the base of political question doctrine to the sphere of public law decisions because they can be legally reviewed by (constitutional) court. In addition, legal constraints adopted by the Parliament are the limits of the independence of the local self-government, too.

b) Permitting companies to use the name of the municipality in their names and commercial materials. In several cases of the Constitutional Court occurred the problem that whether a municipality can adopt a decree on permitting companies

the usage of its name [Decision No. 47/1995. (VI. 30.) and Decision No. 40/1998. (IX. 25.)]. The proponent was a territorial governmental body which was responsible for the legal supervision of the municipality. The proponent recommended the Constitutional Court to repeal the municipality's decree because of the collision with the Company Registry Act which regulated the naming of companies. The Constitutional Court stated that a municipality has the right to adopt a decree on that matter since it would have legal interest regarding the usage of its name. Therefore the municipality can have impact through permitting on how and for what purpose its name is used. The decisions of the Constitutional Court uses the phrase 'legal interest' which suggests that the individual permission can be questioned in court. On the other hand, the Constitutional Court's decisions or any statutory law does not limit the freedom of municipality on formatting the content of its own decree on that matter. E. g. Kőbánya District of Budapest regulated this matter in its Decree No. 31/2004. (VI. 24.) which was in force until 2017. This decree prescribed no substantive conditions for permitting the usage of the name 'Kőbánya', therefore the competent committee of the local government – on the proposal of the Mayor – had a broad discretionary power on giving the permission.

c) Naming of public domains e. g. streets. This topic is regulated on several levels of statutory law in Hungary. First of all, the Act CLXXXIX of 2011 on Local Governments transfers the competence of naming public domains onto the municipality (Art. 13). At the same time, the Local Government Act prescribes some substantive constraints on that matter: e. g. public domain must not be named after a living person or a person who was strongly connected to take part in maintaining of an authoritarian regime in the 20th century (Art. 14.). In addition, Government Decree No. 303/2007. (XI. 14.) regulates some technical conditions, e. g. a name of a public domain cannot be longer than 50 characters. Finally, in Budapest both the Capital Assembly and the District Assemblies adopt decrees on some other substantive conditions of naming. E. g. Decree No. 94/2012. (XII. 27.) of the Capital Assembly ordains that names of public domains in Budapest must be in accordance with historical traditions and grammar.

The political or ideological sensitivity of this problem has been highlighted in the case No. Kfv. 37.374/2015/3. of the Curia of Hungary. In this case a municipality named a street after a communist party army officer, Lajos Fekete, who took part in the suppression of the Revolution in 1956. In the procedure of naming the municipality obtained the opinion of the Hungarian Academy of Sciences who did not approve the naming. On the contrary, the municipality decided to name the street after Fekete. The regional governmental body responsible for the legal supervision of the municipality sued the decision in court and after appellations the Curia decided the case and declared the decision unlawful. The justification of the sentence was that the naming did not meet the conditions of the Local Government Act regarding authoritarian regimes. Due to Curia, the opinion of the Hungarian Academy of Sciences was legally binding to the municipality, because according to

the Art. X of the Hungarian Fundamental Law 'the State shall not be entitled to decide on questions of scientific fact'.

I think that the classification of this case is very controversial regarding the political question doctrine. On the one hand, the municipality has a broad discretionary competence on this matter: it has to make very serious political considerations on quite sensitive problems with rather strong connections to ideologically divisive questions. Consequently, it is classically under the scope of political question doctrine. On the other hand, as we have seen above, several layers of statutory law stipulates this matter with both substantive and technical regulations so it is partly pushed to the sphere of public authority decisions. This can be a guarantee of legality since being strictly regulated these decisions can be questioned in court. Although, independence of local self-governments is seriously restricted by upper level statutory legislation in this matter.

4 Symbolic matters

Decision made on crests and awards are purely symbolic and therefore originally independent decisions of local self-governments. Through these emblematic decisions municipalities can express their and their citizens' identity and certain political and community values. However, statutory law implies regulations on these matters, too, which makes the categorization of these decisions complicated.

a) Crests. Similar to the abovementioned topics crests are regulated in upper levels of statutory law in Hungary as well. Due to the Fundamental Law local self-governments have the right to create their own symbols (Art. 32). The Act CCII of 2011 on State Crest, Flag and Awards prescribes that the crest of the local government must be distinguishable from the crest of Hungary. Whatsoever, the Government has set up an advisory body, the National Crest Committee in order to help local self-governments to create crests which meet professional standards and traditions. Local self-governments must ask for the Committee's opinion before creating a new crest.

On this statutory basis, municipalities usually adopt decrees on their crests. These decrees are rarely subject to judicial or constitutional review. The only Constitutional Court decision I have found regarding this matter is Decision No. 604/B/2009. which was adopted in 2009 reviewing two Acts of Parliament. These Acts was so called memorial Acts: they commemorated the heroism of the citizens of two Hungarian municipalities (Balassagyarmat and Kercaszomor) and modified the crest of the two municipalities. Doing so, the Acts has put a motto in each crest ('Civitas Fortissima' and 'Communitas Fortissima'). The two Acts have been taken to the Constitutional Court because the applicants stated that by adopting the Acts the Parliament had restricted the constitutional right of the municipalities to create their own symbols. The Constitutional Court has turned down the application stating that these two Acts had been based on the discretionary power of the Parliament

and had been adopted on the proposals of the affected municipalities. Consequently, they are governmental acts which do not infringe the fundamental rights and autonomy of these local self-governments. On the contrary, adopting these acts Parliament had expressed its respect and appreciation to the two municipalities.

In this case we can face a very special situation in which another state body, the Parliament itself delivers a governmental act in the framework of political question doctrine. Whatsoever, this parliament act constraints the content of a municipality's governmental act which is based on political question doctrine, too. The topic of crests is classically symbolic and political so it can hardly be a subject to judicial review in a substantial way since court cannot make a decision on the content of a crest, except for extreme cases like symbols connected to authoritarian ideologies, as we could see it regarding naming. Besides, in the case of a constitutional review constitutional matters must play a role, e. g. when a crest infringes the principles of the Constitution.

b) Awards. The abovementioned relationship between symbolic decisions and the principles of the Constitution was highlighted in the case law of the Constitutional Court regarding awards. Giving honors or awards is the competence of the local self-governments due to the Art 42. of the Local Government Act. Moreover, the Act CCII of 2011 on State Crest, Flag and Awards stipulates that a municipality's award cannot be similar to other state awards regarding their name and form. Hence, the Act empowers the assembly of the local self-government to adopt a decree on the creation, name, and types of a local award and to lay down the regulation on the procedure and conditions of giving an award. E. g. the Assembly of Kőbánya District of Budapest adopted the Decree No. 10/2012. (III. 27.) on that matter. This decree sets no detailed requirements against the persons to whom the Assembly of Kőbánya can give an award. The conditions are quite general, e. g. the candidate's activity must be respectful and must raise Kőbánya's reputation. However, there are exceptions, e. g. the Excellent Junior Colleague Award can be given to an employee under the age of 30.

I have not found any court or Constitutional Court decisions regarding local self-governments' awards. Although, the Constitutional Court's Decision No. 47/2007. (VII. 3.) refers to the constitutional problems of state awards in general including ones given by municipalities. In that case President of State László Sólyom refused to give a state award to former Prime Minister Gyula Horn because of his former role as a member of the Communist Police Force fighting against the Revolution in 1956. The Constitutional Court emphasized in its decision that if a state body makes a decision on giving an award to somebody, it must take the principles and values of the Constitution into account. When doing so, the competent body carries out discretionary power based on political and ideological considerations. In this case, the President of State's opinion was that the candidate's relationship to a historical event was contradictory to the values of the Constitution.

5 Partnerships with foreign municipalities (twin towns or sister cities)

Due to the Art. 32 of Fundamental Law, 'municipal governments have the right to cooperate with municipal governments from other countries in matters falling within its competence, and seek membership in international organizations of municipal governments'. In addition, the Art. 42 of the Local Government Act says that it is the competence of the assembly of the local government to make an agreement with a foreign local government. Furthermore, e. g. the Assembly of Kőbánya District has adopted the Decree No. 20/2011. (V. 25.) on the international affairs of Kőbánya District. It ordains that an agreement with a foreign local self-government must be voted with a qualified majority of the representatives and must be signed by the Mayor.

Before and after the adoption of this Decree Kőbánya District has made several partnership agreements with foreign municipalities. E. g. the Draft of the Partnership Agreement between Kőbánya District and Jaroslaw City (Poland) states that the partnership between the two municipalities should operate within the framework of the legal systems of their countries, due to the principles of equality, human rights, democracy and the general rules of international cooperation. In details, the agreement sets the rules on cooperation in the fields of inter alia education, sport, and exchange of students. The contract expressly states that it does not create a legal or economic obligation. Moreover, any violation of the contract does not result in a sanction. Similarly, the 1-page-long Partnership Agreement between Kőbánya District and Vinkovci City (Croatia) contains declarations on facilitating cooperation in the field of tourism, culture, exchange of experiences, joint submissions on European Union tenders, and facilitating meetings of local non-governmental organizations etc.

These partnership agreements are obviously operate in the symbolic field of local policy and express the political sympathies of the local self-government. Meanwhile, they can signify the will and interest of the local communities. On the other hand, from a legal point of view we can observe that the adoption of the partnerships stands on a vague legal basis. The municipality is entitled with the competence in the statutory law but this competence is general and allows a wide-range discretionary power to the local self-government to decide if it wants to make such an agreement and with whom. Therefore the judicial review of an agreement like this is hardly imaginable since it implies no legal bindings on anyone (the contracting parties or the citizens).

6 Flats for employees

There is a special competence transferred to the local self-government of Kőbánya District by itself in the Decree No. 32/2012. (IX. 24.) on Flats. The Decree regulates the usage of municipality-owned flats and entitles the Mayor with the competence to select the tenant of a flat. The Decree regulates the conditions of the flat lease in a very vague manner. Substantially, an employee of the local government or its company can apply for department lease if they perform their activity in favor of the people of Kőbánya. Apparently, the Mayor has a broad discretionary power regarding that matter and can consider not legal but both professional, personal, and political circumstances, too. Consequently, any appellation or administrative court action could be hardly feasible against these decisions.

7 Conclusions

The main purpose of the research was to answer the following question: is it possible to take these local governmental acts of political natureunder efficient judicial review in Hungary? The importance of answering this question is – as I mentioned it in the Introduction – that a wide-range judicial review is an important guarantee of such principles as rule of law, separation of powers and legality of public administration in politically sensitive cases. Furthermore, local governments performing under the scope of legality can be more transparent and accountable, thus they can administer public services more efficiently to their citizens. I can add to these considerations that there must be exceptions under the scope of judicial review. Maybe not 'wide-range' but 'adequate' is the correct indicative when we would like to characterize judicial review. The point of the political question doctrine is that there are governmental acts which cannot be questioned in court because they are substantially political decisions, and the court's task is to supervise public administration's performance in a legal way. This the reason why they are not under the scope of the new Hungarian Code of Administrative Litigation (Act I of 2017).

Considering the real nature of the examined cases we can observe that more of them are not entirely governmental acts which have been adopted on the base of political question doctrine. In most cases a lot of levels of statutory law (parliamental acts and government decrees) determines the content of these acts, creating legal boundaries for these decisions therefore making them justiciable. That's why these cases could get to the court or the Constitutional Court and be decided by them. Only two areas could be observed with real governmental acts on the base of broad political discretion: partnership agreements with foreign local municipalities and flats for employees. In my opinion, in these sectors it is a real danger that lack of transparency and accountability leads to undemocratic changes and corruption. That is why it is extremely important to incorporate sufficient safeguards against these tendencies. There are progressive solutions in the examined decrees as well, e. g. the Decree of Kőbánya District on Flats obligates the Mayor the inform the

Assembly about their decisions made on flat matters. Such measures can at least partly substitute courts as safeguards of rule of law.

References:

Barabás, G. (2018) Kormányzati tevékenység: a "political question doctrine" a magyar közigazgatási perjogban, In: Barabás, G., Rozsnyai, F. K. & Kovács, A. G. (eds.) *Kommentár a közigazgatási perrendtartáshoz* (Budapest: Wolters Kluwer Hungary), pp. 86-90.

Bradley, A. & Ewing, K. D. (2011) *Constitutional and Administrative Law* (15th Edition, Pearson).

Friedrich, C. (1957) *Constitutional Reason of State. The Survival of the Constitutional Order* (Providence: Brown University Press).

Henkin, L. (1976) Is There a "Political Question" Doctrine?, *The Yale Law Journal*, 85(5), pp. 597-625.

Hoffman, I. & Fazekas, J. (2018) *Voluntary Municipal Tasks as Tool of The Resilience of the Local Communities* (under publication).

Miller, A. S. (1980) Reason of State and the Emergent Constitution of Control, *Minnesota Law Review,* 64, pp. 585-633.

Tushnet, M. (2002) Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, *North Carolina Law Review,* 80, pp. 1203-1235.

Warren, K. F. (2003) Administrative Discretion, In: Ravecebin, J. (ed.) *Encyclopedia of Public Administration and Public Policy: A-J* (Boca Raton: CRC Press), pp. 35-38.