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Should there be unity in diversity?

Regulatory issues of legal supervision and control over local governments and public bodies

summary of doctoral thesis

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I. Brief summary of the research objectives and methodology

Administrative control activities have become the focus of my interest through my work. My professional life has developed in such a way that I have an insight into the control procedures over both local governments and certain public bodies. In the case of local governments, this was at a time when the system of legal supervision was being set up. Even this shift has raised a number of aspects that may have been the subject of research. It marked a turning point in my research on legal control / supervision over local governments, when I began to deal with legal supervision over certain chambers of professional services. The under-regulation of the latter procedures could be clearly established even without further investigation. This, in turn, led to further issues to be examined, because, as Marianna Fazekas explained, the control system over public bodies is followed the model of supervision over local governments.

During the research, I used the historical, descriptive analysis and the comparative research method. The dissertation contains both dogmatic deductive and practical analysis. In connection with the examined issues, I also present Hungarian and international literature, Hungarian legislation and the related court practice. Accordingly, my dissertation relies mainly on library sources. When analyzing the legislation, I not only carried out an evaluative analysis of the Hungarian regulations in force, but also took into account the recent amendments to the legislation, and in each case I also studied the available explanatory memorandums. The analysis refers to historical antecedents for all legal institutions presented, but since the dissertation does not have a legal history focus, the historical review is less emphasized. The same is true for the international outlook. The aim of the dissertation is to present the advantages and disadvantages of Hungarian regulation, however, if we want to find adequate answers to Hungarian problems, we do not disregard international tendencies, the regulation of other states, or the presentation of scientific results. Thus, for each legal institution, I have indicated foreign roots and examples, but only in such depth that it does not stretch the scope of the dissertation.

One of the biggest challenges of the research was precisely that the legal control of local governments and public bodies cannot be examined without addressing the issue of the rule of law, autonomy, self-government or control activities. However, their Hungarian and international literature is large in size, and the presentation of all views and trends would go beyond the scope of a doctoral dissertation. In the course of my work, I therefore tried to present the theses most related to the problem - pro and contra. In connection with the resources, it

should also be emphasized that much more emphasis is placed on local governments in the publications. Significantly less scientific work deals with public bodies, and recent research on chamber autonomies is not from a legal point of view.

The first part of my dissertation consists of chapters explaining the central concepts. In order to establish the research, it was essential to present the rule of law, legal protection, supervision and the topics of self-government, autonomy and decentralization. The next two sections expand on the legal control of local governments and public bodies. The last part of the dissertation presents the final conclusions of the research and makes suggestions for the development of legislation.

My research sought answers to the following questions:

- the regulation of legal supervision over local governments complies with the requirements of the rule of law,
- whether the regulation of legal control over public bodies complies with the requirements of the rule of law,
- the lack of regulation of legal control over public bodies,
- whether local government regulations can serve as a guide when renewing public body legislation,
- whether a fully uniform regulation of legality control activities over public bodies is feasible.

II. Brief summary of the conclusions of research

With regard to the subject of supervision in general, it can be stated that it is given prominence not only among scientific studies, but is also present in the efforts of the legislator to unify and clarify the legal system. In the latter field, the first major step forward was the adoption of Act LVII of 2006 on Central Public Administration Bodies and on the Status of Members of the Government and State Secretaries. It was the first to regulate vertical relations between public administrations. At the same time, a review of the current legal environment also shows that the regulation of activities covered by the title of legal supervision is still diverse. However, consensus on the use of terminology (also) would be essential for legal certainty.

Few things can be identified as a characteristic feature of legal supervision. It is certain that the supervisory body is only entitled to examine the operation and decisions of the supervised body from the point of view of compliance with the law. This is indicated by the legal indicator in the name. And the word supervision refers to the fact that the possibility of intervention associated with the activity is limited. The reason for this limitation is the autonomy of the supervised body or the fact that it is outside the administrative organizational system.

It is not disputed that local governments belong to the organizational system of public administration, but the identification of public bodies is not so clear. Many authors do not classify them as public administration bodies, but at least consider them as atypical public administration bodies. However, there is no doubt that their characteristics include self-government and autonomy, and they also perform a public task, so the characteristic features of their legal status are the same as those of local governments. These characteristics largely determine what type of control can be exercised over them.

Under current legislation, the main form of control over local governments and public bodies is legal supervision. The few exceptions are some types of public bodies where the prosecution carries out legality checks (chambers of commerce, chambers of agriculture). The National Faculty of Education (hereinafter: NPK) is also exceptional, with the Minister exercising control over legality. In addition, there are public bodies where the issue is not regulated at all: Hungarian Academy of Sciences (hereinafter: MTA), Hungarian Academy of Arts, Hungarian Faculty of Government Officials (hereinafter: MKK). A formal logical conclusion could otherwise lead to that there is the same rule in these cases as in the case of legal persons. Act V of 2013 on the Civil Code refers to the court of registration of the legal person, but in the case of public bodies there is not necessarily such a court.

In connection with the evaluation of the system of supervision over local governments, it can be stated that although the experts supported the introduction of the system in principle, several criticisms were raised in connection with the specific regulation. There were those who expressed concerns about the use of some of the new tools (such as the replacement of acts). Others have complained that certain elements of the regulation violate the autonomy of local governments.

It should be emphasized that the European Charter of Local Self-Government does not specify the specific type of state control over local self-government. One of the expectations of the Charter is to create an appropriate legal basis for supervision and to exclude ad hoc supervision procedures accordingly. Procedures should normally only concern the legality of the municipality's measures and not their appropriateness. According to its provisions, public administration supervision must be exercised in such a way that the intervention of the supervisory body is proportionate to the importance of the interests to be protected.

In my opinion, the legal supervision over local governments is extensively regulated. Not only the Basic Law, or Act CLXXXIX of 2011 on Local Governments in Hungary (hereinafter: the Act), but other legal acts also contain related provisions. The Government Decree 119/2012. clarifies a number of procedural issues (procedural deadlines, formal requirements) that were of guarantee significance and were previously unclear.

In addition to the above, not only is the regulation diverse, but the number of bodies involved in the proceedings are also high: in addition to the government office, other public administration bodies as well as bodies outside the public administration system are also involved. Multi-stakeholder procedures obviously run counter to efficiency, while safeguarding municipal autonomy. There is no question that the system of local government established in 1990 has made the far-reaching respect and protection of local government autonomy a primary value. And a control system reinforced with supervisory elements is undoubtedly a shift at the expense of autonomy. However, this does not violate the rule of law if it serves both subjective and objective legal protection interests.

At the same time, it is clear that a well-functioning system can be further developed. For example, it is justified to review the power to dissolve the municipality. It could also be introduced that the government office should be able to initiate norm control procedure of the CC, and that in the case of a special legal order, different rules would apply.

Contrary to the above, in the case of public bodies, re-thinking of the rules on the legal control is in any case justified. This would help to increase the requirement for legal certainty. Overall, the control of legality over public bodies can be said to be extremely diverse and rough. And in some cases, the legislator did not resolve the issue of control at all. And all these negatives raise serious legal certainty issues.

Based on the analysis of the legal provisions, it can be stated that control can often not be called supervision. This is because, in most cases, the scope for action provided to the controlling body is either limited to the warning, or to initiating a procedure of another body (typically a court) in the event of an unsuccessful signal, which is the case for most public bodies.

In the case of legal supervision the authority exercising control has stronger powers. This was the case when the supervision of the chambers of commerce was exercised by the Minister. The Minister could annul the decision of the Chamber, convene the competent body of the Chamber of Commerce or the Assembly of Delegates, and in case of repeated or serious violations of the law, suspend the operation of certain bodies and officials of the Chamber of Commerce. In justified cases, in view of the public interest, the Minister could declare his decision immediately enforceable, and the Chamber could request its suspension in an application to the court.

It should be noted here that the forms of appearance of public bodies and the types of control over them are also extremely diverse in the international context and depend to a large extent on the public law traditions of the country. We find an example of the use of repressive supervisory tools being decided by the supervisory body itself and not by a court. The decisions of the supervisory body are, of course, subject to appeal.

It is also striking with regard to the Hungarian regulations that in the rare cases when the public body is subject to legal control of the prosecution, the powers of the prosecutor are no weaker than, with a few exceptions, the powers of public administration bodies, which exercise legal supervision over other public bodies.

In view of the legislative changes that have taken place, I do not see any obstacle to the legislator switching to control by the administrative body in all cases where the legal control by the prosecutor is in force. It is important to note that if the chosen form of control is legal supervision, then the prosecution would retain the right to initiate proceedings.

In order to regulate the legality control in a uniform, transparent manner, a legal act should define the content of this power. This legislation could also regulate the most important characteristics, scope and procedural issues of different types of control. The legislator may

provide for the possibility to create different or additional detailed rules in sectoral regulation or, if justified, to determine the scope of public bodies excluded from the scope of the legislation. Mariann Fazekas' position, for example, is that, due to the social weight and authority of the MTA, it would require regulations different from the supervision of other public bodies.

In my opinion the uniform establishment of basic rules can be a decisive step towards more transparent regulation of the institution of legal supervision, which can contribute to the improvement of legal certainty, while ensuring sufficient flexibility by creating exceptions. The model of legal supervision over local governments can serve as an example of this regulation, as the main characteristics of the legal status of public bodies are the same as those of local governments.

Before creating such legislation, it is essential to review the statistics on legality assurance procedures. If adequate statistics are available, the number of measures and the nature of the infringements could be assessed. An overview of these can provide an additional basis for what is worth taking over from regulation over local governments. In the case of local governments, for example, the government office has the right to convene a representative body, while the public body can be convened by the court, which is in any case a less effective solution. It is also thought-provoking that in local governments, the notary is the guardian of legality and must indicate if the decision or operation of the local government is in violation of the law. There is no person in the public bodies who can report violations of the law, so in their case there can be stronger arguments for the introduction of preliminary investigations.

Local governments and public bodies are bodies performing public functions and exercising public power. These can act as a counterweight to central power. In addition, the principles of decentralization and subsidiarity, which are essential tools of democracy, apply in their operation. The importance of these bodies in a democracy is indisputable. However, this does not preclude the state from gaining adequate control rights over these bodies.¹

The control system ensures that a body operates within the rule of law. The question is not whether it is necessary, but whether the legislator finds the right balance between ensuring

¹ A Magyar Tudományos Akadémiáról szóló 1994. évi XL. törvényhez fűzött indokolása

autonomy and the degree of accountability when regulating the control mechanism. Moreover, is it possible to put the regulation in a form that ensures that the balance is maintained in practice. The lack of norm or norm clarity is detrimental to everyone. In my view, the development of regulation would also benefit the autonomy of local governments and public bodies.

An important element of their self-government is that rules of control over them should be transparent, clear and predictable, as this would account not only for themselves but also for the body that carries out the control.

I am confident that the results of my research as a whole will contribute to the initiation of a professional dialogue, the finding of new answers and the development of an important area of the legal system.

III. Publications of the author, related to the topic

Az Alkotmánybíróság határozata a közjegyzőkről szóló törvény egyes részletszabályaival kapcsolatos, mulasztással előidézett alaptörvény-ellenesség megállapításáról

Jogesetek Magyarázata 2020/1-2., (2020) pp. 15-19., 5 p. (2020)

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IUSTUM AEQUUM SALUTARE 4 pp. 153-166., 14 p. (2019)

A törvényességi felügyelet jogintézményének jelenlegi szabályozása a magyar jogrendszerben, különös tekintettel a kamarák feletti törvényességi felügyeletre

In: Szabolcsi, László; Juhász, Zoltán; Varga, Éva Csilla (szerk.) Szakmai Elemzések a Jogszabályok Hatályosulásának Vizsgálatára: Elemzések a kodifikáció szolgálatában

Budapest, Magyarország: Magyar Közlöny Lap- és Könyvkiadó, (2017) p. 207

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