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LOCAL GOVERNMENTS IN THE SYSTEM OF SEPARATION OF POWERS – REGULATORY POWERS IN THE FIELD OF LOCAL PUBLIC AFFAIRS

I. Introduction

This paper aims to present the status of local self-governments in generally and investigates the position of Hungarian local self-governments. The functional interpretation of vertical separation of power will be centre. The study consists of analysis on the legislative power of local self-governments relating to the scope of local public affairs, the implementation of local administration tasks, furthermore local public service delivery, and management methods of local public administration. The legislative power manifestly has tight correspondence with the performed responsibilities; therefore the legislative activity of local self-governments should not be assessed without the analysis of local public tasks and services.

For investigating the status of local and territorial self-governments in the system of separation of powers the legal essay can provide a kind of basis, because the separation of powers, as a value and idea of institutional control or limitation is based on normativity.¹ First, the positive legal approach of local-territorial self-governments' tasks and responsibilities, thereby, definition of their role in the system of separation of powers leads to the designation of the role of local self-government and the presentation of major changes which have recently occurred.

Studying the practice of the separation of powers doctrine supplementary to the deliberation of the territorial, local self-governments' responsibilities it is necessary to discover the guarantees ensuring the autonomy and independence in the exercising of their competences. State philosophical perception is discussed only limited scope necessary to highlight local self-governments' status in the separation of powers.

Furthermore, the possible demonstration of the effectiveness of vertical separation of powers might be considered another approach, which is based on the fundamental right conception. The right to local self-government supposes the local level interpretation of the principle of sovereignty; the collective right perception is discussed in a study together with the constitutional level changes of the rules.

¹ SÁRI, János: *A hatalommegosztás*. Osiris Kiadó, Budapest, 1995. 10.

II. Certain aspects of territorial separation of powers²

The demand and effective implementation of the principle of separation of powers is an essential requirement in the operation of constitutional legal state. Improvement related to content of the principle of separation of powers leaves room for diverse interpretations for scholars in different stages of state development process. Beliefs related to the principle of power reflect differing approaches nowadays, as well.

The emergence of separation of powers doctrine corresponded to the ideas of the Enlightenment.³ Originally it was intended against the absolute monarchy, aimed the control and restriction of the empire, and it is broadly based on the concept of *rule of law*.⁴ In the classical concepts of the principle of separation of powers, established by *Locke* and *Montesquieu*, the territorial aspect has not been respected. The privileges of the local power connected to the feudal system, in the age of Enlightenment the centralised state organization and operation was idealized.⁵

The principle of separation of power could be interpreted on one hand horizontal way, and on the other hand, as a kind of vertical division of power. Horizontal type of separation of power means the classical form: the legislative power, executive and judicial powers by *Montesquieu*. In connection the Constitution of England he described, that "[I]n every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. ...By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state."⁶

The original theory of *Montesquieu* on the doctrine of separation of power based on the following principles – as systematized *Sári* – (1) the power is subordinated to law, (2) state organizations and state functions are defined and distinguished as legislation, executive power, judiciary, (3) differentiation of organizations and staffs of powers.⁷ By the view of *Riklin*, *Montesquieu* combined three powers (1) legislative power, (2) executive power, and (3) judicial power, three social forces (1) the people, (2) hereditary nobility and (3) hereditary monarch, furthermore seven branches (1) electorate, (2) lower house of parliament, (3) jury, (4) upper house of parliament, (5) upper court, (6) king, and (7) ministers.⁸ The foregoing underlines that in the concept of *Montesquieu* the vertical type of separation of power did not appear at all.

For the first time local self-governments were considered autonomous powers as a municipal, local power in works of *Constant*, he regarded municipals as the limitation of central public administration.

² The publication of sections II–IV. of the paper, the conceptual approach of separation of power and the fundamental right aspect, is in progress in *International Law Review* under the title 'Local Governments in the system of Separation of Powers. The Executive Function in the Field of Local Public Affairs'.

³ VARGA Zs., András: *Eszményből bálvány? A joguralom dogmatikája*. Századvég Kiadó, Budapest, 2015. 45.

⁴ SÁRI, 1995. 45.

⁵ VARGA Zs., 2015. 45.

⁶ MONTESQUIEU: *A törvények szelleméről*. Osiris – Attraktor Kiadó, Budapest, 2000. 248.

⁷ SÁRI, 1995. 37–38.

⁸ RIKLIN, Alois: *Montesquieu's So Called 'Separation of Powers' in the Context of the History of Ideas*. Discussion Paper Series No. 61., Collegium Budapest, 1999. 2.

II.1. Dogmatic approach of territorial separation of power

The ancient philosopher especially *Plato* and *Aristotle* besides them the natural law thinkers in 17th and 18th century, like *John Locke*⁹ and others investigated the nature of tyranny and tried to avoid the abuse of power. Nevertheless, the territorial dimension was identified as local, municipal power by *Constant*, in the 19th century. According to his view, “[T]he supreme authority is all citizens”,¹⁰ nevertheless it is not unrestricted, and what is more, “it must be limited by appropriate restrictions, in order to avoid the despotism”.¹¹ *Constant* distinguished the royalty, the executive power, the persistent representative power, the power of representation of the public opinion, and judicial power in political systems.¹² Besides, *Constant* differentiated the three branches of power, analysing the interrelation between constitutional and absolute monarchies, recognised as independent branches of power the presidential power and the municipal, local power, this latter may be considered as the constraint of the central public administration. The municipal, local branch was separated on the presumption of its own local interests and residents. *Constant* originated the source of municipal, local power from the emotional and the volitional unity of the locally residents.¹³ According to his view, the recognition of the local, municipal branch, the local power determined the constraints of the central power’s potential activity, “until now the local authority was considered as a dependent branch of the executive power: on the contrary, never has to obstruct it, but does not have to depend on it also”.¹⁴

Alexis de Tocqueville also dealt with different types of vertical separation of power, both the federative and the local government administration, might create obstacles against the tyranny.¹⁵

In Hungary, the separation of power from historical view emerged, the classical example is the *Holy Crown Doctrine*, although it did not focus the classical separation of power, nevertheless the prerogatives and the protection of the state. During the debate emerged between the centralist and municipalists in the 19th century on the state organization, the municipalists were inspired by the doctrine of *Constant*.¹⁶

Turning to the interpretation of the doctrine nowadays, the doctrine of separation of powers is generally effective in the state organization, if the organs might exercise control on activities of each other. The control mechanism should be general, and has a kind of counterbalance role, as well.¹⁷ On the basis of the effectiveness of separation of powers doctrine, in modern states different levels might be distinguished by the attitude of *Petrétei*: (1) horizontal, (2) temporal, (3) vertical, (4) constitutional, (5) decisive and (6) social level.¹⁸

⁹ LOCKE, John: *Értekezés a polgári kormányzatról*. Gondolat Kiadó, Budapest, 1986.

¹⁰ CONSTANT, Benjamin: *A régiek és a modernek szabadsága*. Atlantisz Kiadó, Budapest, 1997. 77.

¹¹ CONSTANT, 1997. 85.

¹² CONSTANT, 1997. 87.

¹³ CONSTANT, 1997. 87.

¹⁴ CONSTANT, Benjamin: *Az alkotmányos politika tana*. Pest, 1862. 134.

¹⁵ TOCQUEVILLE, Alexis de: *A demokrácia Amerikában*. Gondolat Kiadó, Budapest, 1983. 234–246.

¹⁶ SÁRI, 1995. 77–80.

¹⁷ VERESS, Emőd: A hatalommegosztás aktualitása. *Magyar Kisebbség*, 9 (2005) 3–4., 236. (10.10.2018.), CSINK Lóránt: *Mozaikok a hatalommegosztáshoz*. Pázmány Press, Budapest, 2014. 155.

¹⁸ PETRÉTEI József: *Az alkotmányos demokrácia alapintézményei*. Dialóg Campus Kiadó, Budapest – Pécs. 159–174.

Vertical separation of powers in the widest sense is the relationship between those organs, when an organization or body constrains or counterbalances the function of another organ or body (e.g. state organs supervise the local governments' decisions). In the strict sense the vertical separation of powers might operate if the organs, established on territorial basis have the same legitimacy. However, in this latter case the people's sovereignty is the key consideration question, whether local sovereignty of the people is effective or not.

Analysing types of vertical separation of powers might be a dual interpretation, on the one hand the federal state organization, and furthermore, on the other hand the system of local, territorial level self-government public administration bodies.¹⁹ In case of vertical separation of powers organizations at different levels are exercising public power, providing counterbalance against the central power, entirely.²⁰ The vertical form of separation of powers might be interpreted as otherwise like (1) the right to local self-government, including the division of labour at central, territorial and local levels (territorial decentralization), (2) the functional decentralization, (3) the federal and (4) international, supranational separation of powers.²¹

Since the principle of separation of powers and the principle of people's sovereignty are closely linked, the source of sovereignty could be contested in case of local self-governments.

To explore the position of local self-governments in the system of powers the normative, legal analysis of local self-governments' competencies could serve as a basis of the search. This type of survey might lead to the determination of the role of local self-governments in the state governing system. It might demonstrate the special status of local self-governments, in principle might be accepted, that local self-governments are not autonomous independent branches, but rather counter balancers, since these territorial and local organizations play a major role as executive and regulatory bodies in the field of local public affairs.

The principle of separation of powers could be interpreted from another view also, from functional and from institutional approaches. The institutional approach is based on the principle of one power is only a single institution. On the contrary, the functional approach is based on the competency of the institutions; this latter interpretation can be useful for the analysis of local self-governments functions.²²

The functional interpretation of the principle of separation of powers deserves special attention in the analysing process. On the basis of the classical threefold power (legislative, executive powers and judicial) the role of local self-governments no longer can be considered referring to the institutional interpretation (the only single power – one organization) in the field of legislation and implementation.²³

The local self-governance is not just a fundamental right, but a kind of sovereignty also. As it was mentioned, that the source and existence, furthermore the interpretation of local sovereignty is a controversial matter. However, it might be

¹⁹ CSINK, 2014. 156., SÁRI, 1995. 235., SZANISZLÓ, KRISZTIÁN: Államszervezeti fogalmak útvesztőjében. *Közjogi Szemle*, 2018/1. 54., TAKÁCS, ALBERT: A hatalommegosztás elvének alkotmányelméleti értelmezése. In: Mezey, Barna (ed.): *Hatalommegosztás és jogállamiság*. Osiris Kiadó, Budapest, 1998. 135.

²⁰ SÁRI, 1995. 235., SZANISZLÓ, 2018. 54.

²¹ PETRÉTEI 2009. 169–170.

²² VARGA Zs. 2015. 51.

²³ VARGA Zs. 2015. 51.

concluded, that local self-governance is the achievement of the self-restraint of the sovereign.²⁴

In addition, it is also essential to explore the elements of guarantee which ensure the independence, autonomy of local self-governments in the exercise of powers. The limits of exercising powers shall meet with the requirement of legality; the democratic constitutional state must ensure the enforcement of right protection also in the course of executive-administrative functions.

II.2. Territorial separation of powers from the historical aspect in Hungary

Different forms of territorial separation of power were established during the historical development of the doctrine. Territorial units with autonomy – like nobiliary counties, towns with special rights granted by the king, cities and other territorial-local units like districts, settlements – had huge role in regulation of local social relations, in management of local public affairs, therefore they were to be regarded parties of the system of separation of powers. Especially, the regulative power and executive role of nobiliary counties are worth enshrining; hence they were empowered for local legislation and the implementation of central regulation, exercising the right to *vis inertiae*.

The majority of the listed territorial, local administrative units performed besides the executive and legislative tasks the judicial function in their own territory as well. These territorial units were entitled to exercise the right to send legate to the Parliament, which considered a form of participation in the system of separation of power. Legates had binding mandates; thereby the territorial autonomous units had the right to propose. Nevertheless legates were not delegated directly by the residents of the territorial units, but they were delegated in the age of the feudal estates by the feudal territorial assemblies and the councils of the certain cities. The petition right of the nobiliary counties belonged also to the territorial separation of power directed to the king, the central government and to the Parliament, containing such kind of appoint of view or petition and protestation.²⁵

The nobiliary counties were the most important protectors of the Hungarian historical Constitution; their political role was a vital question at the end of the 19th century. The legal status of the territorial and local self-governments, furthermore the establishment of the relationship between the Government and territorial and local self-governments was arranged in 1870 and 1871, furthermore in 1886, the municipal law²⁶ determined for a long time the legal status and the role in the separation of powers' system of territorial and local self-governments. Local self-governments were important organs of the transmission of state public administration responsibilities beyond the exercising right to local self-government. The municipal law established a centralized public administrative system and the latter regulation strengthened further these tendencies.

²⁴ CSERVÁK, Csaba: A hatalommegosztás elmélete és gyakorlati megvalósulása. *Jogelméleti Szemle*, (2002) 1. 14.

²⁵ KÁLLAY, István: Hatalommegosztás és városi rendiség. In: Mezey Barna (ed.): *Hatalommegosztás és jogállamiság*. Osiris Könyvkiadó, Budapest, 1998. 11–27., STIPTA István: Parlamenti viták a területi önkormányzatról (1870–1886). In: Mezey Barna (ed.): *Hatalommegosztás és jogállamiság*. Osiris Könyvkiadó, Budapest, 1998. 77–79.

²⁶ Act XLII of 1870 on the Arrangement of Public Municipal Authorities, Act XVIII. of 1871 on the Arrangement of Municipalities, Act XXI of 1886 on Public Municipal Authorities, Act XXII of 1886 on Municipalities.

The basic features of local self-government system created by the end of 19th century barely changed until the middle of the 20th century. After then the soviet-type regime eliminated the local self-government system and the separation of powers doctrine had no meaning according to the self-government system.

As result of the regime changes, the collapse of the soviet-type system, the local and territorial self-government have also been given a more important role in the administration of local public affairs, in provision of public services furthermore in performing as local actors of certain state responsibilities. According to the view of *Soós* and *Kákai* ‘Hungary ... has failed to facilitate the so-called devolutionary processes, which would have granted considerable right, specified in the constitution, to subnational levels within the unitary structure’.²⁷

III. The state organization guarantees of the separation of powers

In this chapter the provision of the Hungarian Fundamental Law is demonstrated on the doctrine of separation of powers on the one hand, and on the other hand it deals with the interpretation of the doctrine briefly, discusses the content of the principle of separation of powers in the light of the decisions of Hungarian Constitutional Court.

According to the Fundamental Law of Hungary the State shall function based on the principle of separation of powers.²⁸ The source of public authority shall be the people.²⁹ Sovereignty of the people goes alongside the separation of powers. The practical effectiveness of the doctrine is ensured by the precise and exclusive definition of competences of state bodies.³⁰ The former Constitution of Hungary³¹ did not contain explicitly the doctrine of separation of powers, but now, the Fundamental Law of Hungary *expressis verbis* includes the provision on the doctrine of separation of powers.

Effectiveness of the doctrine was at the centre in the case law of the Hungarian Constitutional Court several times, generally in the sense of a main part of the principle of rule of law. The Constitutional Court, in an early decision after the transition, interpreted the doctrine of the separation of power as a fundamental requirement of the effectiveness of the principle of rule of law. The Constitutional Court determined, that ‘one of the fundamental demand of the effectiveness of rule of law is that organs entitled for exercising public power, operates within the organizational framework and according to the procedural defined by law, within certain limits which must be available for the citizens and ruled predictable way’.³² The effectiveness of the doctrine in the operation of state organizations was evaluated by the Constitutional Court as it follows: ‘Constitutional provisions, ruling on the responsibilities and competences of state organs (branches of powers), legislation

²⁷ Soós, Gábor – KÁKAI, László: Hungary: Remarkable Successes and Costly Failures: An Evaluation of Subnational Democracy. In: Loughlin, John – Hendriks, Frank – Lidström, Anders (eds.): *Local and Regional Democracy in Europe*. Oxford University Press, New York, 2011. 532.

²⁸ Hungarian Fundamental Law (25 April 2011) (hereafter: HFL) Art. C, par. (1).

²⁹ HFL Art. B, par. (3).

³⁰ VARGA Zs. András: Hatalommegosztás, az állam- és a kormányforma. *Pázmány Law Working Papers*, (2013) 5., 2. <http://plwp.eu/docs/wp/2013/2013-5-VZSA.pdf> (18.08.2018.)

³¹ Act XX of 1949 on the Constitution of Hungarian Republic.

³² Constitutional Court Decision 56/1991 (11.08.) ABH 1991. 454–456.

concern relationships among the state organs (organizational and procedural guarantees), furthermore constitutional rules of conflict of interests evidenced the effectiveness.³³

Analyzing the decisions of the Hungarian Constitutional Court, as a conclusion might be drawn, that interpreting the doctrine of separation of powers, the Court should adopt the classical, horizontal form of it, and the functional interpretation is mandatory, because the constitutional organizations are independent.³⁴ It should be added, that the Constitutional Court recognised as an independent power of the President of the Republic of Hungary, because the President is an independent, outside person from the aspect of branches of powers.³⁵ By the attitude of *Varga Zs.* the interpretation of *Constant* is applied.³⁶

The separation of powers doctrine might be applied within the local self-governments structure, according to view of *Varga Zs.*, in ‘some extent’,³⁷ the inner structure of the Hungarian local self-governments should be briefly outlined to attempt to demonstrate whether the separation of powers doctrine has effectiveness.

Despite of the fact that the Hungarian local self-government system established at two levels, municipal and territorial level, there is no hierarchical relationship, these local governments are legally equal. In the classical sense, the separation of powers in this relationship, between local self-governments, shall not be interpreted.

The main organizations of the local self-governments are the representative body, the mayor and the chief executive. Representative body is entitled to exercise responsibilities of the local self-government, the mandatory tasks of local self-government are performed by the representative body, and only exceptionally the mayor can exercise these competences. The mayor and the chief executive are entitled by legislation to exercise state administrative tasks, in this case there is no hierarchical relationship between the representative bodies and the competent authorities like the mayor or chief executive. In these competences the mayor and the chief executive exercise tasks on their own discretion, may not receive any instructions from the representative body. Where the mayor or the chief executive shall perform the functions assigned to them by the regulation, the doctrine of separation of powers is effective within the organs of local self-government.

As regards to the separation of powers, the administrative, legal supervision system is essential. The Hungarian local self-government supervision system has special characteristic features; however administrative supervision over the decisions became stricter after the adoption of new local self-government act, although remained posterior control mechanism. Legal toolkit of administrative supervision has become more diverse; however it does not cover powerful intervention tools in order to interfere the prevailing of unlawful legislation and provisions. The most powerful monitoring tool is unique in Europe: the replacement of local self-government decision under an appropriate judicial control over its enforcement.

³³ Constitutional Court Decision 2/2002 (01.25.) ABH 2002. 50–51.

³⁴ VARGA ZS., 2013. 6.

³⁵ Constitutional Court Decision 48/1991 (09.26) ABH 1991. 217–246.

³⁶ VARGA ZS., 2015. 52.

³⁷ VARGA ZS., 2013. 4.

IV. Constitutional status of local self-governments

As it was analysed earlier, beyond the classical horizontal form of the doctrine of separation of powers, as a result of the expansion of administrative function, the vertical form of separation of powers have been given high priority, as well. It might be interpreted in unitary states, like in Hungary as a form of territorial decentralization, operation of territorial, local self-governments. In circumstances where vertical form of separation of powers is functioning, organizations at different levels are exercising the public power, as opposite the central power, counterbalancing it.³⁸ The vertical division of government power is simply a historically proven, but at least accepted public interest.³⁹

Noteworthy one of the positions on the subject, pursuant to which the independent and entire state function might not be assigned to the territorial form of separation of powers, and therefore the local self-governments could not be set against none of the classical horizontal forms, and cannot form a counterbalance neither.⁴⁰ This point of view is open to doubt in two respects. On one hand the scope of local public affairs is not considered as dominant factor or local power, furthermore the performing of local public affairs should not qualify as indifferent activity from the aspect of the state, especially in decentralized state system. The main content of the local public affair is the local legislation and administration, provision of local public services, economic development, and might be the direction of local political relations.⁴¹ These components have considerable significance for the state. On the other hand the local sovereignty is a problematic issue; even so the source of sovereignty is derived from the people. The unity of the sovereignty does not exclude either entirely the local interpretation, because the effectiveness of decentralization also supposes the sovereignty at local level, at least indirectly, derived from the state.

Vertical separation of power is an essential issue regarding the connection between local self-governments and the State in Hungary, especially from view of counterbalance role of local self-governments. The real question therefore is, whether local authorities could play such a balancing role, in the changed constitutional and legal environment, after 2012. Various points of views are known on the effectiveness of the vertical separation of powers. According to one aspect, the principle of separation of power does apply to some extent within the local self-governments as well.⁴² Another approach would stress that local self-governments are not based on people's sovereignty and therefore vertical separation of powers is not effective.⁴³ In line with this view the effectiveness of the doctrine of separation of powers depends on the source of sovereignty.

Related to the provision of former Local Governments Act,⁴⁴ local government implements the principle of the sovereignty of the people at local level. Local governments shall enforce the principle of the sovereignty of the people and, in public affairs, shall express

³⁸ CSINK, 2014. 155.

³⁹ BALÁZS, Zoltán: A hatalommegosztás elméletének normatív alapjai. *Working Papers in Political Science*, (2012) 2., 27. https://politologia.tk.mta.hu/uploads/files/archived/2550_2012_8_balazs.pdf (12.12.2018.)

⁴⁰ TAKÁCS Albert: A hatalommegosztás elvének alkotmányelméleti értelmezése II. *Jogtudományi Közlöny*, (1993) 7. 266–270., TAKÁCS 1998. 134.

⁴¹ PÁLNÉ KOVÁCS Ilona: *Helyi kormányzás Magyarországon*. Dialóg Campus Kiadó, Budapest – Pécs, 2008. 50.

⁴² VARGA Zs., 2013. 4.

⁴³ CSINK, 2014. 156.

⁴⁴ Act LXV of 1990 on Local Self-Governments.

and enforce the public will in a manner both democratic and open.⁴⁵ Local self-governments possessed sovereignty in political and legal sense also.⁴⁶ The new Local Government Act,⁴⁷ adopted in 2011 by the Hungarian Parliament, does not contain reference to the principle of sovereignty, at all.

The leading conception of the Hungarian Fundamental Law is different compared with the former Constitution. The Fundamental Law focuses on the management of local public affairs and on the exercise of local public powers, instead of fundamental collective rights approach and of the legal protection against the Government and the central public administration. Practically, local public affairs mean the mandatory duties and powers of local governments; the Fundamental Law does not regulate these public powers. In accordance with the new local self-government regulation it might be generally considered that the role of local self-government in the field of local public services and the exercising of local public power, considerably decreased.

V. Regulative power of local self-governments

The constitutions of European states contain provisions on local self-governments, especially on law-making power in variant scope. The fundamental basis of states are the principle of rule of law, however the local legislative power regulations are divers way.⁴⁸ The Hungarian Fundamental Law's provisions represent a relatively limited scope with regard to the local self-government regulation.

V.1. Authorization, general requirements and legal supervision

Local governments are organisations that have law-making (regulative) competence based on the Fundamental Law. Regulative competence is guaranteed by the European Charter of Local Self-Government⁴⁹ also. Due to the provision of European Charter local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.⁵⁰

The effectiveness of principle of rule of law claims on one hand that the legislation ruling the rights and obligations of the citizen shall be published and easily accessible, and on the other hand the principle of non-retroactivity prevails. These requirements shall be enforced in local legislation as well.⁵¹

According to the Fundamental Law, there are two means of administering local public affairs: local governments issue decrees and make resolutions; therefore the exercising of

⁴⁵ Act LXV of 1990 on Local Governments Article 2. (1).

⁴⁶ PETRÉTEI, 2009. 175–176.

⁴⁷ Act CLXXXIX of 2011 on Local Self-Governments of Hungary.

⁴⁸ FABIÁN Adrián: *Az önkormányzati jogalkotás fejlődés és fejlesztési lehetőségei*. Dialóg Campus, Budapest – Pécs, 2008. 15–18.

⁴⁹ European Charter of Local Self-Government Strasbourg, 15.X.1985, ETS No.122. [European Charter]

⁵⁰ European Charter Article 3 (1).

⁵¹ BEKÉNYI József (ed.): *Önkormányzati rendeletek*. Profit L & M Kiadó Bt, 2001. 19.

public power might be with these legal tools.⁵² Local self-governments make their decisions in general independently, without previous or posterior assent of any other organisation; only in exceptional cases shall be subject the decision of local self-government to prior consent or posterior approval.⁵³

By the provision of Fundamental Law, decree of local government is a legal act, in which a generally binding rule of conduct may be determined. Local governments acting within their competences shall adopt local government decrees to regulate local social relations on one hand which are not regulated by an Act, and on the other hand, by the authority of the Act.⁵⁴ Decrees of local governments are at the lowest level in the legislative hierarchy, therefore cannot conflict with 'other laws'.⁵⁵

Where the local self-government is expressly authorized by the parliamentary act to issue municipal decree, it is not only a right, but an obligation also. The most important aim of these local decrees is to regulate statutory provisions more precisely, to fit to local social relations. Adoption of local decrees in general based on the empowerment of the Legislator, but several times emerged a controversial question on the scope of regulation. The Constitutional Court has on several occasions expressed that the central regulation of social regulation is not a bar of the issue of local decree. If there is a local public affair, the local self-government might issue local decrees which are not contrary to central regulation, only complements it.⁵⁶

The Government exercises legal supervisory competence on the decisions and the operation of local self-governments in Hungary. Local self-governments have the obligation to send their decrees to competent Budapest and county government offices. If the territorial governmental office finds the decree or any provisions unlawful, it may initiate the judicial review of the local self-government decree. The government office has the right to bring a case to the court. The same situation is when the local self-government fails to issue local self-government decree.⁵⁷ The judicial legal supervision of local self-government decrees until 2012 was the only competence of the Constitutional Court. The new local self-government regulation divided this competence between the court and the Constitutional Court. The Constitutional Court has the competence only in that case when the lawfulness is originated from the violation of the Fundamental Law. In other cases the Supreme Court of Hungary, the special Local Self-Government Council of the Curia has the competence to eliminate the violation of law.

Furthermore a unique legal tool was established from the enter into force of new local self-government act, the acts replacement according to the Fundamental Law as follows: [i]f the municipal government fails to discharge its obligation to adopt decrees and to pass resolutions inside the time limit the court has prescribed in its ruling on the omission, the

⁵² HFL Article 32 (1) a)–b).

⁵³ Such a case is the borrowing transaction or the financial commitment of the local self-governments. According to the provision of HFL Article 34 (5), in order to maintain a balanced budget, an act of Parliament may restrict the borrowing of municipal governments above a specific limit, as well as their other commitments subject to certain conditions or Government approval. See details: Act CXCV of 2011 on Economic Stability of Hungary.

⁵⁴ HFL Article 32 (2).

⁵⁵ HFL Article T (2).

⁵⁶ Constitutional Court Decision 17/1998. (V.13.) ABH 155–159.

⁵⁷ HFL Article 32 (4).

court shall – at the initiative of the relevant Budapest or county government office – order the head of the Budapest or county government office to draw up the municipal decree or municipal resolution with a view to remedying the omission in the name of the municipal government at fault.⁵⁸ This local decree should not be modified or repealed by the body of representative, the municipal government at fault, but only the representative body after the next general local election. The decree shall be published in the official journal (*Magyar Közlöny*) of Hungary.

V.2. The scope of local regulation

As a result of the enhancement of public tasks, with regard to development of welfare states, local self-governments' public responsibilities widened, as well. Very significant improvements have been made to the local self-governments system in Europe over the last decades, exercising their public power functions were affected by the abovementioned horizontal and vertical arrangements of powers.⁵⁹ It has to be highlighted that the functionality of local self-governments' responsibilities was basically changed provided by the new local governmental regulation. The expansion of the State in the provision of local public services had a negative effect on local public affairs and reduced the possibilities for regulation local social relations. All along, performing of public tasks characterized by strict regulation, the provision of service requirements, strengthening the control and from the side of local self-governments there is a decreasing margin for local discretion.

According to the Hungarian Fundamental Law, there are two means of administering local public affairs: local governments can issue decrees and make resolutions.⁶⁰ They make their decisions independently, without previous or posterior assent of any other organisation.

It should be highlighted that the functionality of local self-governments' responsibilities was basically changed provided by the new local governmental regulation. The expansion of the state in the provision of local public services had a negative effect on local public affairs and reduced the possibilities for regulation local social relations. Due to the statutory legislation, functionality of local self-governments is defined by the financial resources that are available for implementation of public tasks.

Powerful centralization process could be traced in the state operation in Hungary, this trend has been hit particularly hard the local self-government sector as well. Outstanding changes might be observed in the case of municipal and county self-governments' responsibilities, reducing the regulative power on local social relations of local self-governments. Public education, except for pre-school education is excluded from local public affairs.⁶¹ Changes were occurred in the field of cultural services also: the maintenance of museums was delegated from the county governments to settlements. The same procedure was in the case of public libraries.⁶² The archives were nationalized.⁶³ The social and health

⁵⁸ HFL Article 32 (5).

⁵⁹ Soós, 1998. 65.

⁶⁰ Hungarian Fundamental Law art. 32. par. (1), Act CLXXXIX of 2011 on the Local Self-Government of Hungary art. 48. par. (1)

⁶¹ Act CXC of 2011 on National Education.

⁶² Act CXL of 1997 on Museums, Services of Public Libraries and Public Education.

⁶³ Act LXVI of 1995 on Public Files, Archives and Protection of Private Archives.

care institutions were socialized,⁶⁴ except for primary care. Therefore in these fields of local public affairs local self-governments are no longer able to regulate charges of provided services.

The municipal services are obligatory tasks of the local governments, but the statutory legislation may regulate the requirement of majority state or local government property in corporations, which provide certain public services.⁶⁵ This is the situation *e.g.* in the field of healthy drinking water service, water drainage or waste disposal. The subject of local regulation has also been reduced in these areas of servicing. There is another important change: local government does not have empowerment to fix the charges of special services (*e.g.* waste disposal).⁶⁶

VI. Concluding remarks

Examining the different forms and interpretation of the doctrine of separation of powers, the vertical separation of power is also effective in Hungary, as a form of decentralization. According to the Hungarian Fundamental Law, the essence of local self-governments is to manage public affairs and to exercise public authority,⁶⁷ since this is the reason why local governments shall exist, this type of organs shall act in connection with local public affairs, within the framework of law. Local self-governments should exercise legislative and executive functions, thus they constitutes a substantial part of government power.

After 2010 as a result of a powerful centralization process, great changes could be traced, and these trends have influenced the most important elements of local public affairs: the regulative and functional autonomy has also narrowed substantially during the period considered.

Having regard to fact, that local self-governments' role significantly decreased in the field of providing public services and in exercising of local public powers, therefore, the regulative function has been significantly deteriorated. Local self-governments exercise regulative power for the most part in implementation of parliamentary act, not in the field of classic local public affairs.

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⁶⁴ Act CLIV of 1997 on Health Care and Act III of 1993 on Social Care and Social Administration.

⁶⁵ Act XLI of 2012 on Passenger Transport Services, Act LVII of 1995 on Water Management.

⁶⁶ Act CLXXXV of 2012 on Waste.

⁶⁷ HFL Article 34. (1).

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