TOWARDS AN AUTONOMOUS ADMINISTRATIVE JUDICIAL POWER?

SMEROVANIE K SAMOSTATNEJ ADMIISTRATÍVNEJ SÚDNEJ MOCI?

Emese Pál
University of Pécs, Faculty of Law

ABSTRACT
The judicial control over public administration and administrative justice, though, are not synonyms. The first expression is broader; it comprehends the supervision of administrative decisions, carried out either by ordinary or by special administrative courts. Currently, Hungarian administrative justice is in transition. As from the 1st January 2013 "administrative and labour courts" were set up as the legal successors of the former "labour courts", which has been the biggest revolution in the judiciary since the implementation of the Regional Courts of Appeal. Additionally, the work of establishing the autonomous rules of procedures on which administrative lawsuits are to be built, has started.

ABSTRAKT
Súdna kontrola verejnej správy a správne súdnictvo nie sú synonymické pojmy. Prvý pojem je širší; zahŕňa kontrolu rozhodnutí verejnej správy vykonávanú buď všeobecnými alebo špeciálnymi správnymi súdmi. V súčasnosti je maďarská správna justícia v transformácii. Počnúc 1. januárom 2013 tzv. "správne a pracovné súdy" boli vymedzené ako právni nástupcovia niekdajších "pracovných súdov", čo bolo najväčšou revolúciou v justícii od čias implementovania Regionálnych odvolacích súdov. Okrem toho, boli zahájené práce na vytvorení samostatných procedurálnych pravidiel, ktorými sa budú riadiť administratívne spory.

"The main vocation of administrative justice is its mere existence."
Lajos Szamel

I. INTRODUCTION

The legal institution of judicial control over public administration was created in the 19th century as a guarantee of the rule of law.[1] The expectation according to which the executive power may not intervene in human relationships either against the law (*contra legem*) or beyond the law (*ultra legem*) was expressed as one of the principal conditions of bourgeois transformation.[2] Formerly, it had been a widely accepted practice that public administration could ensure rights and determine obligations or bans at its own discretion, i.e. even for lack

[1] HAID Tibor, A közigazgatási bíráskodás főbb modelljei [Main Models of Administrative Justice] Bolyai Szemle: A Bolyai János Katonai Főiskola kiadvány 2010. XIX. nr. 1. (1 Jan 2010.) 148.
[2] HAID (n 1) 147.

of legal regulation presenting thereby opportunity for administrative autocracy. Consequently, the arbitrary power of administration had been furtherly increased.[3]

Only following the bourgeois transformation had the *Declaration of the Rights of Man and of the Citizen* generally declared – echoing Montesquieu's thoughts[4] – that nothing may be banned if it was not prohibited by law and no one may be obliged to do what was not prescribed by law.[5] Therefore, in order to give full effect to the separation of powers, a principle promoted by Montesquieu, and to create the balance between these powers, restricting state intervention within legislative limits became indispensable. Also limiting the executive power via an "independent supervisory body" became a basic requirement of the rule of law.[6] The judicial control over public administration is supposed to ensure this requirement and it is carried out either within the existing judicial system or in a separate structure, differing from state to state. Nevertheless, administrative courts ought not to deprive the executive power of its own competence.[7]

The judicial control over public administration and administrative justice, though, are not synonyms. The first expression is broader; it comprehends the supervision of administrative decisions, carried out either by ordinary or by special administrative courts. Thus, the differences between the two above-mentioned mechanisms are related to their structures.[8]

The fact that European administrative law is subject to integration, i.e. it is currently undergoing a substantial unification, persuades a number of people to use the term "*Europeanization*" even in the field of administrative procedural law. This phenomenon is strengthened further by several tendencies of law approximation, easily identifiable in connection with the judiciaries and administrative procedural laws of the EU member states as well.[9]

Currently, Hungarian administrative justice is in transition. As from the 1st January 2013 "administrative and labour courts" were set up as the legal successors of the former "labour courts", which has been the biggest revolution in the judiciary since the implementation of the Regional Courts of Appeal. Additionally, the work of establishing the autonomous rules of procedures on which administrative lawsuits are to be built, has started.

II. INTERNATIONAL COMPARISON: ORGANIZATIONAL MODELS OF ADMINISTRATIVE JUSTICE

In the French judiciary system there are two coexisting bodies providing legal control: ordinary courts (*jurisdictions ordinaires*) and administrative courts (*jurisdictions administratives*).[10] So basically, the French model focuses on separating the administrative court system from the ordinary judiciary. In fact, the French administrative jurisdiction is a product of history, as the post-Revolutionary acts established not only the separation of

3 RÁCZ Attila, A közigazgatás törvényességének követelményei [Requirements of the Legality of Public Administration] In: Csefkó Ferenc (ed), Szamel Lajos Tudományos Emlékülés. [Commemoration of Lajos Szamel] (A Jövő Közigazgatásáért Alapítvány 2000) 149.

4 Cf. MONTESQUIEU, A Törvények szelleméről [On the Spirit of the Laws] (translated by Imre Csécsi and Pál Sebestyén) (Akadémia, 1962) 312.

5 *"La Loi n'a le droit de défendre que les actions nuisibles à la Société. Tout ce qui n'est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas."* (Art. 5 de la Déclaration des Droits de l'Homme e du Citoyen de 1789)

6 IMRE Miklós (ed), A közigazgatási bíráskodás [Administrative Justice] (HVG ORAC, 2007) 10.

7 IMRE (n 6) 11.

8 PETRIK Ferenc, Százéves a magyar közigazgatás [Centenary of Hungarian Public Administration] (Jogtudományi Közlöny 6/1996) 345.

9 ROZSNYAI Krisztina, A közigazgatási bíráskodás európai dimenziója [The European Dimension of Administrative Justice] (Jogtudományi Közlöny 9/2007) 383.

10 DARÁK Péter, A közigazgatási bíráskodás európai integrációja [The European Integration of Administrative Justice] (Thesis PhD, 2007) 5.

administrative functions from jurisdictional ones but also the untouchability of administrative cases for ordinary courts.[11]

The organs of the administrative court system (State Council = *Conseil d'État*, Administrative Court of Appeal = *Cour administrative d'appel*, administrative courts = *tribunaux administratifs*) are entitled to proceed if one of the parties is an administrative body and the procedure comes within the scope of administrative law.[12] The State Council is the highest judicial authority in France which judges as a final resort the legality of public administrative acts.

In France, administrative justice is regulated by a separated code (*Code de justice administrative*), which entered into force in 2001 and includes the rules related to administrative courts and procedures which had been formerly separated according to judiciary levels. French administrative judges study at the *École Nationale d'Administration* founded in 1945, in a system different from that of ordinary judges.

British and American administrative justice has developed mainly in the same way. At the beginning, ordinary courts had exclusive judicial control over public administration. However, the wide range of cases led to the implementation of *administrative tribunals*. Special administrative procedural law does not exist, civil procedural law is applied in administrative disputes.[13] The Administrative Court is part of the Queen's Bench Division of High Court of Justice and it is provided with general jurisdiction. In conclusion, the pragmatic importance of the administrative branch has compelled the transformation of the judiciary.[14]

Since the 1960s Germany has introduced an administrative court system which has been independent both from the executive power and the ordinary judiciary.[15] The entire range of remedies is provided by administrative courts, guaranteeing the observance of legality.[16] Hungarian administrative science is based on the German one, although, there is an important difference to emphasize: a German administrative judge is obliged to clarify the factual basis of an administrative decision, i.e. /s/he is not bound by the motions for evidence the parties had submitted – in contrast to the Hungarian practice – does not exclude the possibility of submitting action for a declaratory judgment. The German-Austrian model is the model of autonomous administrative courts.[17] Nonetheless, Germany has separate administrative rules of procedure is separated, although the legislators of the states have the authority to introduce further rules and statutory exceptions.

In the mixed system, characterizing Italy, Belgium and Switzerland, various courts provide the judicial review of public administrative orders at the same time. The competence of ordinary courts, though, are highly restricted in administrative disputes, they are solely empowered to declare the infringement of law.[18]

III. THE HISTORY OF HUNGARIAN ADMINISTRATIVE JUSTICE

Already in Medieval law a number of rules were supposed to protect noble's rights against the abuses of the royal or the central power. These regulations were merely casual, they were not systemized and protected only the wealthy – or one part of them, e.g. barons or prelates – in lieu of the entire society. Sinking into oblivion already in the times of Turkish Occupation

11 Art. 13. de la Loi sur l'organisation judiciaire des 16-24 août 1790
12 HAID (n 1) 154.
13 HAID (n 1) 164.
14 DARÁK (n 10) 6.
15 HAID (n 1) 154.
16 HAID (n 1) 154.
17 VARGA Jenő, A közigazgatási határozatok bírósági felülvizsgálata I. [Judicial Review of Public Administrative Orders I.] http://munkaadoilevelek.hu/1999/07/a-kozigazgatasi-hatarozatok-birosagi-felulvizsgalata-i/ [7 Nov 2014]
18 HAID (n 1) 161.

and Habsburg sovereignty, these feudal statutes could not be and were obviously not the antecedences of the following bourgeois administrative justice.[19]

The existence of the legal institution already at the end of the 19th century testifies that Hungary was on a par with the evolution of the European models in respect of administrative jurisprudence as well. However, there was a prerequisite to the creation of our administrative justice: the structural separation of the executive and the legislative power. Other preconditions of the judicial control over public administration were the disappearance of customary traces from administrative law, acts regulating state action and the definition of its function by norms at least in form of decrees. Additionally, the concept declaring the priority of state interests needed to give space to a kind of social claim for the protection of citizen rights.[20]

The intention of referring the protection of the rights related to public administration to the judicial power spread widely in political and legal circles.[21] Act V of 1848, of the so-called April Laws, expressed the aim of establishing an administrative justice system, when, in certain cases, it vested judicial powers in the central committees that were to be established. Section 19 listed the scope of remedies which shall be judged by this body. Thus, this was the first agency with legitimate jurisdiction in administrative disputes.[22]

The intention of separating public administration and judicial power had been expressed in the middle of the century, though, it became achievable only following the Austro-Hungarian Compromise. Section 1 of Act IV of 1869 on exercising judicial power declared that *"the administration of justice shall be separated from public administration. Neither the judiciary nor the administrative bodies may intervene in each other's competence."* Therefore, the division between the two branches of power was realized, removing an important obstacle from the introduction of administrative justice.

Furthermore, the adoption of Act XLIII of 1883 was another significant step in this process, establishing the Financial Administrative Court. This body has competence to review administrative resolutions passed in tax and duty cases. Later on, several members of administrative science were in favour of an administrative court with general competence and Act XXVI of 1896 established the Royal Administrative Court.[23]

In the national jurisprudence at the time, administrative justice was considered one of the cardinal requirements of the rule of law: *"In an administrative procedure the individual and the administrative body stand against one another, yet the authority is not merely a party, but also the representative of public interest, thus it is who decides. In contrast, administrative justice means that the conflict between the body and the citizen is judged by a third party, independent of both public administration and the individual and has the advantages of judicial independence."*[24]

The Royal Administrative Court set up by Act XXVI of 1896 was the highest authority of judicial hierarchy and it was separated either from public administration or from the ordinary court system. It worked as a single-instance special court and its competence included the

[19] Herbert KÜPPER, Magyarország átalakuló közigazgatási bírákodása [Hungary's Changing Administrative Justice] http://jog.tk.mta.hu/uploads/files/mtalwp/2014_59_Kupper.pdf [1 Apr 2015]

[20] PETRIK Ferenc, A magyar közigazgatási bíráskodás története. [History of Hungarian Administrative Justice], In: Wopera Zsuzsa (ed.), Polgári perjog. Különös Rész. [Civil Procedural Law. Special Part.] (Budapest, 2005) 193.

[21] PETRIK Ferenc (n 20) 193.

[22] STIPTA István, A közigazgatási bíráskodás előzményei Magyarországon. [Antecedents of Administrative Justice in Hungary.] (Jogtudományi Közlöny 3/1997) 118.

[23] VARGA (n 17)

[24] MAGYARY Zoltán, Magyar közigazgatás. [Hungarian Public Administration]. (Budapest, 1942) 624-625.

review of administrative cases itemized by the Act. Its President obtained equal rights to the Curia's President and its judges had to meet high requirements.[25]

Although following the French model in the main structure of the single-instance court, German-Austrian effect prevailed during the elaboration of the details.[26] The body had two departments: a general administrative and a financial one. The competence of the first department comprised e.g. parish matters, public health, religious and public educational cases, meanwhile the other one administered justice in tax and duty cases.[27] Dealing with questions of fact and of law, the body was authorized to pass a new resolution, to amend and – in some exceptions – to annul one.[28] It is worth mentioning, though, that there were no judicial remedies against political decisions. Disputes may not be referred to the court in case of the silence of public administration or police jurisdiction.[29]

The exigency of transforming administrative justice into a double-instance system had been expressed a number of times. First, during the preliminary debate of the draft of Act XXVI of 1896, then in 1924, during the elaboration of the second draft which aspired to introduce first-instance administrative courts.[30]

Despite surviving the First World War, the Royal Administrative Court's caseload suffered a radical recession. The Constitution of the First Hungarian Republic aimed to provide it with greater significance but it was not realized. This phenomenon led to the gradual decline of the Court's activity, up until 1949 when Act II abolished this institution.[31] According to the Reasoning, the people's democracy considered the fact that state power was exercised by the people the guarantee of citizen rights, thus, executive power was consigned to authorities which focused on common interests. As a consequence, administrative justice was merely unnecessary.[32] In other words, the new state machinery did not need the legal control over public administration and, in the name of the fight for "the consolidation of the socialist state and social system", abolished the institutionalised administrative court practice.[33] In conclusion, the end of administrative justice was triggered by the fact that it had aspired to become and, for a short while, it had actually become the guardian of the Constitution.

Parallel to the dissolution of the Court, so-called arbitration committees were established, dealing with tax and duty cases. It is worth adding, though, that the activity of these bodies cannot be identified as administrative justice, as they ensured executive and not judicial control.[34]

With the approval of Act IV of 1957 on General Rules of State Administrative Proceedings the opportunity of judicial review of administrative orders was re-established, yet with considerable restrictions.[35] The supervision created by the Act aimed to protect "socialist legality."

Nonetheless, the Act introduced two significant changes: first, it ensured judicial remedy against those administrative resolutions which constitute administrative relationship, then, it

[25] PATYI András – VARGA Zs. András, Általános közigazgatási jog. [General Part of Public Administration]. (Dialóg Campus, Budapest – Pécs, 2009) 225.
[26] KENGYEL Miklós, Magyar polgári eljárásjog. [Hungarian Civil Procedural Law]. (Osiris, Budapest) 470.
[27] IMRE (n 6) 24.
[28] PATYI – VARGA ZS. (n 25) 225.
[29] IMRE (n 6) 25.
[30] GÁTOS György, A közigazgatási bíráskodás útjai. [Ways of Administrative Justice]. (Magyar Jog, 3/1996) 158.
[31] VARGA (n 17)
[32] GÁTOS (n 30) 158.
[33] KENGYEL (n 26) 471.
[34] VARGA (n 17)
[35] VARGA (n 17)

defined the main types of administrative decisions that could be reviewed.[36] Some examples are: refusal or abolishment of registration, refusal of correction in the register of births, marriages and deaths; refusal of approval to exchange of flats; decision of confirming tax or duty obligation in respect of the legal ground of the imposition.[37]

The 2nd Amendment of Act III of 1952 on the Code of Civil Procedure consigned administrative disputes to the first-instance authority. The 3rd Amendment inserted Chapter XX, entitled "Procedures of Challenging Administrative Decisions". The 4th Amendment did not introduce any remarkable transformation in the system of administrative disputes.[38]

Act I of 1981 on Modification and Consolidation of the Act IV of 1957 on General Rules of State Administrative Proceedings empowered the Council of Ministers to define the range of reviewable resolutions. According to the Act, the client may have right to the review of the administrative decision listed in the council decree only the order deprived him of or limited his Constitutional or other fundamental rights.[39] In other words, the review covered exclusively the spectrum of the cases itemized by the decree, from which the provisions related to the exercise of fundamental rights were excluded.At the dawn of the democratic transformation, Act XXXI of 1989 on the Amendment of the Constitution facilitated the *renaissance* of Hungarian administrative justice.

In this process, 32/1990. (XII. 22.) ABH Constitutional Court Decision annulling Council Decree 63/1981. (XII. 5.) and Section 72 (1) of Act I of 1981 received a cardinal role.[40] As a result, the National Assembly generalised judicial remedy in administrative cases with Act XXVI of 1991, yet did not restore autonomous administrative justice – despite the centenary traditions.[41]

On the 1st November 2005 Act CXL of 2004 on General Rules of Administrative Proceedings and Services entered into force, launching several modifications in the former system.[42] Needless to say, these new rules triggered the review of the Code of Civil Procedure, i.e. this Act introduced impressive reforms not only in public administration in general but also in the evolution of administrative justice. Chapter I of Act XVII of 2005 on the Amendment of the Code of Civil Procedure and on the General Rules of Non-Litigious Procedures summarized the special rules of administrative non-litigious procedures, while Chapter II defined the modifications in connection with administrative procedures.[43]

IV. THE SYSTEM OF ADMINISTRATIVE JUSTICE

Since it is commonly approved that the general rules of the most important legal institutions of the state of law shall be established by the Constitution, there is a growing tendency to include the basic regulation of administrative justice in a country's fundamental law.[44] According to Article 50 (2) of Act XX of 1949 on the Constitution of the Republic of Hungary *"the courts shall review the legality of the decisions of public administration"*, yet there are no further indications.

---

[36] KISS Daisy, A közigazgatási perek. [Administrative Procedures]. In: Németh János (ed.), A polgári perrendtartás magyarázata. [The Explanation of the Civil Procedure]. (Közigazgatási és Jogi Könyvkiadó, Budapest, 1999). 1356.

[37] Section 57 (1) of Act IV of 1957

[38] GÁSPÁRDY László, A közigazgatási perek. [The Administrative Procedures]. In: Wopera Zsuzsa (ed.), Polgári perjog. Különös Rész. [Civil Procedural Law. Special Part.] (Budapest, 2005) 168.

[39] Section 72 (1) of Act I of 1981

[40] KENGYEL (n 26) 472.

[41] PETRIK (n 8) 345.

[42] For instance, the Act ensures right to appeal against rulings for the termination or the suspension of the proceedings, excludes the right to appeal in wider range of cases, annuls the suspensory effect of the appeal in terms of the implementation of the decision, specifies provisions related to the prosecutor's intervention.

[43] KENGYEL (n 26) 473.

[44] HAID (n 1) 150.

The present role of courts in judging administrative orders results from a structural solution created in the Socialist era, namely from the integrity of the judiciary.[45] According to the former provision, the judicial review of administrative decisions was provided by two levels of the ordinary court system: by county (metropolitan) courts and by the Supreme Court, i.e. the Constitution did not restore the Administrative Court itself.

According to Section 326 (1) of the Code of Civil Procedure, the competence is based on the seat of the administrative body which heard the case in the first instance. If the authority's competence covers the entire country, solely the Metropolitan court is empowered to administer justice.

In principle, since the 1st January 1999 a single judge shall hear the administrative case in first-instance courts. This judge has to embody everything indispensable for the appropriate judicial review of an administrative order, e.g. the knowledge of a wide range of statutes and acts, of general and special procedural rules, and self-confident orientation in specialised fields of administrative law.[46]

It is worth mentioning that in an administrative case a new purpose arises, which is to review the legality of the administrative decision. Thus, a special concept of supervision-review is required.[47]

In the case of "special complexity of the dispute" the law ensures another solution: a chamber composed of three professional judges shall hear the case. This way our legislator probably aspires to minimalize the eventual mistakes of the single-judge system.

With regard to the remedies against judicial review, in principle no appeal may be lodged against the judgement of a court. However, there is one exception: *"If the administrative proceeding was instituted to the judicial review of a resolution passed by a body whose competence covers the entire country and the court is entitled to modify it."*[48] (Except: expulsion by immigration authorities, decision passed in an asylum proceeding.) In spite of the fact that no remedy is in principle guaranteed against a resolution in force, law can introduce exceptions, as the Code of Civil Procedure does by declaring that this general rule may not be applied in administrative proceedings.[49]

V. THE NEW SYSTEM IMPLEMENTED BY THE FUNDAMENTAL LAW AND BY ACT CLXI OF 2011 ON THE ORGANIZATION AND ADMINISTRATION OF THE COURTS

Article 25 of the Fundamental Law in force since the 1st January 2012, declares that *"The organisation of the judiciary shall have multiple levels. Separate courts may be established for specific groups of cases."* Consequently, the Fundamental Law aims to provide administrative courts with autonomy within the judiciary equal to labour courts, putting an end to the long-lasting dispute whether efficiency shall be guaranteed by administrative courts within or out of the judiciary. This solution results from Hungarian legal traditions (too), as in the collective consciousness a separated body might not be given as much respect as another incorporated in the classic judiciary.

According to Ferenc Petrik, in Hungary separate courts were more affected by political changes than courts implemented in the unified court system, thus "*our history, the examples*

[45] PATYI – VARGA ZS. (n 25) 227.
[46] PATYI András, Közigazgatási bíráskodásunk modelljei. [Models of Our Administrative Justice]. (Logod, Budapest, 2002) 168.
[47] PATYI (n 46) 169.
[48] Section 340 (1) of the Code of Civil Procedure
[49] IVANCSICS Imre, A közigazgatási hatósági eljárás. [The Administrative Proceeding]. (Manuscript) (Kódex, Pécs, 2007) 229.

of the judiciary should make us cautious." In his concept, the perfect model is either an administrative department with relative organizational autonomy within the judiciary or a court with totally separated organization. However, any of the two solutions is acceptable, only if the nomination procedure of judges and directors is identical with the general rules on judges and the conflicts of competence between administrative and ordinary courts is resolved by a supervisory body (such as e.g. in France.)[50]

In connection with remedies, before Act CLXI of 2011 on the Organization and Administration of the Courts (hereinafter: Court Organization Act) entered into force, solely on the bases of the Fundamental Law it was not clear whether administrative courts should be integrated in the ordinary judiciary or provided with separated remedy system. In other words, it was equivocal whether the local regional courts should review appeals lodged against the decision of the administrative court or not. Nevertheless, as Court Organization Act entered into force, it became explicit that in the second instance the regional court of competent jurisdiction shall deal with the appeals lodged against the resolutions of the administrative (and labour) courts.

It is worth to examine why administrative courts were unified with labour courts. According to Sections 19-20 of the Reasoning to the draft of Court Organization Act, the main reason of this fusion is the fact that labour courts have heard several administrative cases, such as social insurance ones. On the other hand, administrative and social insurance disputes do compose different groups of cases, based on totally different substantive and partly different adjective law. Consequently, administrative and labour court practice embodies merely an apparent unity in the present judiciary.[51]

In connection with the relationship between the Constitutional Court and administrative courts, the French model shall be mentioned. According to this, the legal control over the constitutionality of the statutes is not the privilege of the Constitutional Court, but it is divided between the Conseil Constitutionnel, an organ with a constitutional court nature, and the Conseil d'État, an organ with administrative jurisdiction (too).[52] Analysing the Hungarian structure, it is worth quoting András Patyi: *"Administrative and constitutional court practice are »»siblings««, but not »»twins««, as they are not always of the same age."* [53]

In respect of its functions, thus timing and effectiveness, administrative justice ought to comply with the pace of public affairs as well as budget and election cycles. However, this does not favour the unity with Constitutional Court. In the acts in force there is a wide range of administrative fields out of supervision, e.g. questions of administrative charging, projects of town planning, in case of which neither judicial nor constitutional review is guaranteed. Furthermore, citizens are directly affected by the legality of administrative activities, not by constitutional justice.[54]

During the elaboration of the Fundamental Law, the proposals aiming to provide ordinary courts with legal control over local government resolutions instead of the Constitutional Court have multiplied. There were two main reasons: on one hand, it is a matter of fact and not of fundamental rights, on the other hand, dealing with the legality of local resolutions of the

[50] PETRIK Ferenc, Közigazgatási bíróság – Közigazgatási Jogviszony. [Administrative Court – Administrative Relationship]. (HVG ORAC, Budapest, 2011) 216.

[51] KÜPPER (n 19)

[52] KILÉNYI Géza, A közigazgatási bíráskodás néhány kérdése. [Some Questions of Administrative Justice]. (Magyar Közigazgatás, 4/1991) 303.

[53] PATYI András: Közigazgatási bíráskodás de constitutione ferenda. [Administrative Justice de Constitutione Ferenda]. In: Varga Zs. András – Fröhlich Johanna (ed.), Közérdekvédelem. A közigazgatási bíráskodás múltja és jövője. [Protection of the Public Interest. Present and Past of Administrative Justice]. (PPKE JÁK-KIM, Budapest, 2011)

[54] Cf. http://www.kormany.hu/hu/igazsagugyi-miniszterium/a-miniszter/beszedek-publikaciok-interjuk/trocsanyi-laszlo-origo-hu-nak-adott-interjuja [3 Sept 2015]

slightest importance is rather incompatible with the Constitutional Court's profile.[55] In addition, the basis of its competence is declaring violation of the Constitution, while the ordinary court is merely empowered to the reparation of the law infringement.[56] Consequently, according to Article 25 (2) of the Fundamental Law *"Courts shall decide on the conflict of local government decrees with any other legal regulation, and on their annulment; on the establishment of non-compliance of a local government with its obligation based on an Act to legislate."* As stated in Section 24 (1) f) of the Court Organization Act, this case is in the Curia's competence, being the legal successor of the Supreme Court since the 1st January 2012, while the competence related to local government orders belongs to the administrative and labour courts. In other words, constitutional control is still part of the Constitutional Court's competence, but the Curia's chamber of local issues is provided with the legal review.

Under the Court Organization Act, administrative and labour courts are led by the President. These courts are not legal entities however the President thereof might undertake obligations in accordance with the rules on the management of public finances in a manner stipulated in the internal rules of the regional court. Groups may be established within the administrative court to handle certain types of cases.[57]

VI. DEVELOPING ADMINISTRATIVE JUSTICE – *DE LEGE DATA* AND *DE LEGE FERENDA*

In its Resolution 1011/2015. (I.22.), the Government ordered to initiate the creation of the autonomous administrative justice within the revision of administrative procedural law. *"The Government aspires to promote administrative justice, in other words, to strengthen the role of courts in the legal control over public administration"* - reported László Trócsányi, Minister of Justice, in his presentation held in the 47th Jurisprudence's Day of Kecskemét, on the 6th February 2015. In the framework of this "strengthening", distinctive attention is paid to the codification of administrative justice rules in a separated act and it has already been started by the Codification Committee of Administrative Procedural Law, an *ad hoc* group of the State Reform Committee set up by Government Resolution 1602/2014 (XI.4.).

Though, what has made the metamorphosis of Chapter XX of the Code of Civil Procedure into an autonomous administrative adjective law turned so indispensable?

First of all, in consonance with the concept of the new Civil Procedural Law, the legal control over administrative rules and orders composes a group of cases isolated from criminal or civil disputes even in constitutional level. An administrative conflict differs from the others essentially, thus the enforcement of the specific human rights established by the Fundamental Law is better facilitated by separated procedural rules. Civil suits aim to ensure subjective protection of law, while administrative disputes consider objective protection, i.e. they enable anyone capable of proving their interest to take legal action in the name of legality. The applicant is not bound to prove the violation of any of his/her substantive rights by the legal act, he can merely refer to conflict of interests. Civil suits are characterized by coordination, administrative suits are characterized by subordination already due to the administrative proceeding prior to the court case.

Furthermore, the special principles of civil procedure, such as equality and free disposition, are not compatible with administrative cases, thus there is a remarkable conceptual difference between the two types of suit. It is worth adding that the introduction of a separated adminis-

[55] TRÓCSÁNYI László Jr., A közigazgatási bíráskodás hatásköri és szervezeti kérdései. [Competence and Structural Questions of Administrative Justice]. (Magyar Jog, 9/1993) 545.
[56] PETRIK (n 50) 237.
[57] Section 19 (2)-(4) of the Court Organization Act.

trative procedural law would not burden the central budget as much as the long-lasting proceedings, often repeated owing to the inappropriate rules, which do mean real extra expenses.

Therefore, the present regulation has difficulty in ensuring the accomplishment of ruling tasks, what is more, it is almost impossible due to the enlargement of administrative justice chores. In addition, separate administrative procedural law would contribute to the improvement of professionality and would promote the appearance of the administrative judge.

Further condition of the efficient fulfilment of administrative justice is the installation of administrative colleges in every single administrative and labour court, not only in the Metropolitan Court of Budapest.[58] As stated by Section 20 (1) of the Court Organization Act, *"Independent from the activities of colleges and besides them, regional administrative and labour colleges shall operate in a number and with the territorial jurisdiction as defined in a separated legal act."*

In administrative literature a number of views[59] promote the generalization of chambers composed of three professional judges with the condition that these judges should exclusively hear administrative cases and should be banned from hearing either civil or financial ones. In this respect, it should be highlighted how important it is that three-judge panels could be set up any time which is rather unimaginable in nowadays' courts. Furthermore, increasing the number of judges bears the risk of leading to loss of respect.

There are some who would promote the extension of the judiciary with administrative officials with special expertise and experience in some specific fields.[60] In this context, it is convenient to refer to the former Royal Administrative Court in Hungary, which consisted on one hand of administrative officials, on the other hand of judges.

Furthermore, it would be highly agreeable to transform the single-instance court system into a double-instance one,[61] since the present solution based on regional courts is far from perfection. Mistakes mainly result from the absence of a unified court practice. Appeal may be lodged only in a few cases, e.g. related to some orders or if the court proceeding in first instance is authorized to modify the order at issue. As a consequence, administrative disputes are rarely heard in second instance, that is why, on one side, there is no separate administrative department in regional courts (except the Regional Court of Budapest), only as part of the civil department, and, on the other side, the administrative and labour college works joined to the civil one.

Appeals lodged against administrative decisions are heard by civil judges working in the administrative department, which is quite problematic not only because they are civil judges, experts in civil law, but also because they are not familiar with the special ethos of administrative court practice.[62] Up until the end of 2012 the Regional Court of Appeal of Budapest had administered justice in second instance with countrywide jurisdiction, which had seemed a plausible solution at first impression, as it had ensured the uniform application of law. However, in the overloaded Regional Court of Appeal the cases had been dragging on for unreasonably long periods.

To sum up, special administrative bodies inserted in the ordinary judiciary are currently proceeding in first instance, yet ordinary courts are administering justice in second and third

[58] ROZSNYAI Krisztina, A közigazgatás feletti bírói ellenőrzés fejlesztésének lehetséges irányai – a közigazgatási bíráskodás terjedelmét meghatározó főbb tényezőkről. [Possible Ways of the Development of Legal Control over Public Administration – About the Main Factors Determining Administrative Justice]. http://ajkold.elte.hu/doktoriiskola/ajk/fokozatosok/Rozsnyai%20Krisztina%20-%20Tezisek.pdf [5 Nov 2014]

[59] Cf. ROZSNYAI Krisztina, A közigazgatási bíráskodás Prokrusztész-ágyban. [Administrative Justice in Procrustean Bed]. (ELTE Eötvös, Budapest, 2010)

[60] Cf. TRÓCSÁNYI László Jr. (n 55) 547.

[61] Cf. TRÓCSÁNYI László Jr. (n 55) 546.

[62] KÜPPER (n 19)

instance. This peculiar Hungarian solution can be called 'pseudo-mixed system', in contrast to 'real mixed systems', in which ordinary court proceeds in one instance, while autonomous administrative court in the other instance, i.e. the administrative court system is composed of courts belonging to two separated judiciaries.[63] In this respect, the introduction of the Supreme Administrative Court is warmly welcomed, which would remedy the above-mentioned disputed points and would give the final touch to the structure of administrative justice.

VII. CONCLUSION

The Fundamental Law refers to the structural transformation of the administrative courts with one sentence only, providing a solution that will probably be realized for reasons of cost efficiency.

Entering in force, the Court Organization Act specified the constitutional provision and outlining the direction of the organization of administrative justice which remains within the framework of the ordinary judiciary even after setting up the administrative and labour courts. Nevertheless, administrative court practice in first instance is much more transparent than prior to the reform. Bodies named 'administrative courts' do work, which makes the public, the legal profession and the judiciary more conscious of their existence, rather than mere administrative committees. In consonance with this, the separation of the first-instance administrative justice might be considered the first step to eventual independence.[64]

The French model could serve as a basis for the further organizational transformation, although we should not forget that France has had democracy since the 18th century, while Hungary is lagging far behind the West in this respect and the difference is tangible even nowadays.[65] First, the legislator should examine his choice of solution, then he should proceed by realizing it in a coherent way, without internal ambiguities. The present 'pseudo-mixed system' meets these requirements only in part.

In my opinion, Hungarian administrative justice ought to be /trans-/formed by examining international models and by implementing elements allegedly compatible with our legal system. Nonetheless, it is worth keeping an eye on the historical fact that from the 19th century a separate administrative court worked in Hungary, some solutions of which (e.g. creating a double-instance system) could be applied even nowadays, although with some modifications. The past shall be discovered not merely because it seems interesting. As Sir Edward Coke, an English pioneer of administrative justice stated: *"Let us now peruse our ancient authors, for out of the old fields must come the new corn."*

KEY WORDS

judicial control, public administration, administrative justice, Hungary.

KĽÚČOVÉ SLOVÁ

Súdna kontrola, verejná správa, správne súdnictvo, Maďarsko.

BIBLIOGRAPHY

1. DARÁK, Péter: The European Integration of Administrative Justice. Thesis PhD. Pécs 2007. 5-6 p.

63 KÜPPER (n 19)
64 KÜPPER (n 19)
65 Cf. TRÓCSÁNYI László Jr. (n 55) 545.

2. GÁSPÁRDY, László: The Administrative Procedures. In: Wopera Zsuzsa (ed.): Civil Procedural Law. Special Part. Budapest, 2005. 168. p.
3. GÁTOS, György: Ways of Administrative Justice. Magyar Jog, nr. 3. 1996. 158.p.
4. HAID, Tibor: Main Models of Administrative Justice. Bolyai Szemle 2010. XIX. nr. 1. (1 Jan 2010.) 147-160 p.
5. IMRE, Miklós: Administrative Justice. HVG ORAC, Budapest 2007. 10; 24 p.
6. IVANCSICS, Imre: The Administrative Proceeding. (Manuscript) Kódex, Pécs, 2007. 229. p.
7. KENGYEL, Miklós: Hungarian Civil Procedural Law. Osiris, Budapest 470-472 p.
8. KILÉNYI, Géza: Some Questions of Administrative Justice. Magyar Közigazgatás, nr. 4. 1991. 303. p.
9. KISS, Daisy: Administrative Procedures. In: Németh János (ed.): The Explanation of the Civil Procedure. Közigazgatási és Jogi Könyvkiadó, Budapest, 1999. 1356. p.
10. KÜPPER, Herbert: Hungary's Changing Administrative Justice. http://jog.tk.mta.hu/uploads/files/mtalwp/2014_59_Kupper.pdf 2015.
11. MAGYARY, Zoltán: Hungarian Public Administration. Budapest, 1942. 624-625. p.
12. MONTESQUIEU, Charles Lous de Secondat Baron: On the Spirit of the Laws (translated by Imre Csécsi and Pál Sebestyén) Akadémia, 1962. 312. p.
13. PATYI, András: Models of Our Administrative Justice. Logod, Budapest, 2002. 168-169 p.
14. PATYI, András: Administrative Justice de Constitutione Ferenda Administrative Justice de Constitutione Ferenda. In: Varga Zs. András – Fröhlich Johanna (ed.): Protection of the Public Interest. Present and Past of Administrative Justice. PPKE JÁK-KIM, Budapest, 2011.
15. PATYI, András – VARGA Zs, András: General Part of Public Administration. Dialóg Campus, Budapest – Pécs, 2009. 225-227. p.
16. PETRIK, Ferenc: Centenary of Hungarian Public Administration. Jogtudományi Közlöny nr. 6. 1996. 345. p.
17. PETRIK, Ferenc: Administrative Court – Administrative Legal Relationship. HVG ORAC, Budapest, 2011. 216; 237 p.
18. PETRIK Ferenc: History of Hungarian Administrative Justice. In: Wopera Zsuzsa (ed.): Civil Procedural Law. Special Part. Budapest, 2005. 193. p.
19. RÁCZ, Attila: Requirements of the Legality of Public Administration. In: Csefkó Ferenc (ed): Commemoration of Lajos Szamel. A Jövő Közigazgatásáért Alapítvány, Pécs, 2000. 149. p.
20. ROZSNYAI, Krisztina: The European Dimension of Administrative Justice. Jogtudományi Közlöny nr. 9. 2007. 383. p
21. ROZSNYAI, Krisztina: Possible Ways of the Development of Legal Control over Public Administration – About the Main Factors Determining Administrative Justice. http://ajkold.elte.hu/doktoriiskola/ajk/fokozatosok/Rozsnyai%20Krisztina%20-%20Tezisek.pdf
22. ROZSNYAI, Krisztina: Administrative Justice in Procrustean Bed. ELTE Eötvös, Budapest, 2010.
23. STIPTA István: Antecedents of Administrative Justice in Hungary. Jogtudományi Közlöny nr. 3. 1997. 118. p.
24. TRÓCSÁNYI, László Jr.: Competence and Structural Questions of Administrative Justice. Magyar Jog, nr. 9. 1993. 545-547 p.
25. VARGA, Jenő: Judicial Review of Public Administrative Orders I.
26. http://munkaadoilevelek.hu/1999/07/a-kozigazgatasi-hatarozatok-birosagi-felulvizsgalata-i/

27. Art. 5 de la Déclaration des Droits de l'Homme et du Citoyen de 1789
28. Section 57 (1) of Act IV of 1957
29. Section 72 (1) of Act I of 1981
30. Section 340 (1) of the Code of Civil Procedure
31. Section 19 (2)-(4) of the Court Organization Act

CONTACT DETAILS OF AUTHOR

Emese Pál dr. jur.
PhD student
University of Pécs, Faculty of Law, Department of Administrative Law
(7622, Pécs Square 48. 1.)
+3630/4946620
E: pal.emese@ajk.pte.hu