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THE MAIN CHANGES IN THE SYSTEM OF LOCAL GOVERNMENTS IN HUNGARY AFTER THE COMMENCEMENT OF THE FUNDAMENTAL LAW[1]

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I. Starting Point

1. The territorial division of Hungary

Article F of the Fundamental Law determines the territorial division of Hungary. According to it, the capital of Hungary shall be Budapest, and as it is formulated in Paragraph 2: "The territory of Hungary shall be divided into castle counties, cities and towns, and villages or smaller communities. Districts may be formed in cities or towns".

a) Determining Budapest as the capital was taken over from article XIV of the former Constitution – "[the] capital of the Republic of Hungary and its national symbols". The *territorial division*, however, – and along with it – lists only in the fourth modification of the Fundamental Law the *capital as a component of the territory* of Hungary.

b) The *districts of the capital are extra specified* only in the fourth modification of the Fundamental Law, and the formation of districts appears as a possibility.

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Article 41 (2) of the Constitution still fixed it clearly that the capital was divided into districts meaning that the capital was to have had at least two districts by virtue of the Constitution. According to the present regulation, however, it would be possible that there were only two districts in the capital or that the system of districts would cease to exist at all.

2. The subject of the local government

Article 42 of the previous Constitution clearly stated that "[the] *community of the constituents* of the communities, of the town, of the capital and its district, furthermore the castle counties are *entitled to the right of the local self-government*. The local self-government is the independent, democratic management of the local public affairs concerning the community of the constituents and the exercise of the local public power".

On the other hand, the Fundamental Law *does not state expressis verbis* who is entitled to the right of the local government. Pursuant to Article 31 (1), "in Hungary local governments shall function to manage local public affairs and exercise local public power". It is seemingly a substantive change, considering however, that the Fundamental Law includes the institution of the immediate exercise of power by the local constituents, the local citizens do not lose this right of theirs. According namely to Article XXIII (7) point 2): "Everyone having the right to vote in elections of local government representatives and mayors shall have the right to participate in local referendums". Article 31 (2) also deals with the local referendum, i.e. the direct way of exercising local power and Article XXIII defines its subject. Consequently, if local constituents are entitled to the direct form, *they are the subjects of the indirect exercise of power as well*.

3. The exceptional form of the exercise of local power: Local referendums

Article 31 (2) makes it obvious that in the local exercise of power the indirect form is the general one, and the direct formation of will appearing in the local referendum is the exceptional one. Namely, "[the] local referendums may be held on any matter within the functions and powers of the local government, as provided by an Act".

The legislator, when making up the cardinal Act for the regulation of the local referendum, had to pay attention so that the institution can properly perform its place and role. *It is to be sated clearly if the regulation acknowledges the two*

types of local referendum at the same time, namely the local referendum declaring an opinion (plebiscite) and the decisive local referendum. It should be clarified as well *what* the phrase *"affair belonging into its functions and powers" exactly refers to* in this context. In spite of this phrasing with seemingly clear content (it is to be established by the Constitution and the Local Government Act as well, and it is fixed in the Fundamental Law as well) there have been some cases when it was questionable if a certain issue belonged to the functions and powers of the local government (representative body); there have been local referendums on investments to be realized in other settlements or even in another country [instead of or besides starting an administrative procedure as a party][2]. The rules of the local referendum on the initiative of a referendum, the European Citizens' Initiative, and the referendum procedure are incorporated by the Act CCXXXVIII of 2013.

4. The sphere of aspects to be taken into account in the course of exercising the functions by local governments

The Fundamental Law incorporates several specific matters in connection with the budget management of the self-governments (as well) as compared to the Constitution.

a) According to article N (1) of the Fundamental Law "Hungary observes the principle of balanced, transparent and sustainable budget management"; and Paragraph (3) says that – among others – local governments "are obliged to observe this principle" "in performing their duties". This rule itself provides only a general guidance as to the course of the performance of duties, which is made obvious by statutory limits. So much is clear that the principle includes the requirement of the economical and rational budget management, i.e. it intends to block unreasonable economic decisions causing wastage[3]. The reasons annexed to the first submitted version of the Fundamental Law determines as the goal of the rule that the social and economic balance of the country should not be endangered by serious state

[2] See e.g. about the cement plant to be built in Nyergesújfalu in 2006 by the local referendums at Tokod, Tát, Esztergom and Mogyorósbánya, or the investment planned at the Austrian Heiligenkreuz by the local referendums of Szentgotthárd and the neighbouring settlements in 2008; http://valasztas.hu/hu/ovi/26/26_2_index.html; access: 01.09.2014.

[3] This rule has a meaningful content within the frames of a rule of law in the case of the local governments – which is somewhat contradictory to the same expectation of the Constitutional Court and other courts. See further about it in my paper: **P. Tilk**, *Az Alkotmánybíróság az Alaptörvényben* [The Constitutional Court in the Fundamental Law], Közjogi Szemle 2011/2.

budgetary problems. According to the reasoning "the sufficient balance serves the dependable operation of the state, the transparency serves the democratic public life with the participation of well informed and responsible citizens, and the sustainability serves the responsibility for the posterity of future generations besides the primary financial goals". Sufficient legal detail and elaboration are, however, necessary in order to achieve the objective: failing to do so, the statutory requirements may become lex imperfecta.

b) Article 38 of the Fundamental Law gives further clues concerning the budget management. It states on the one hand that "the property of the local governments shall be national assets" [Paragraph (1)], on the other hand it fixes that "[the] management and protection of national assets shall aim at serving public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations. The requirements for preserving and protecting national assets and for the responsible management of national assets shall be laid down in a cardinal Act"[4]. According to Paragraph (5) "[b]usiness organisations owned by the State or local governments shall manage their affairs *in a manner determined in an Act, autonomously and responsibly according to the requirements of lawfulness, expediency and efficiency*".

II. Functions and powers

1. General observations

a) Article 32 (1) of the Fundamental Law lists the functions and powers of local governments. It should be noted that the phrase "fundamental rights of local governments" is not used by the Fundamental Law[5] – which was included by

[4] A further rule – and a barrier as regards to the budget management of the local government – in connection with it are Paragraphs (3) and (4): "[n]ational assets may only be transferred for purposes specified in an Act, with the exceptions specified in an Act, taking into account the requirement of proportionate values", and "[c]ontracts for the transfer or utilisation of national assets may only be concluded with organisations of which the ownership structure, the organisation and the activity aimed at the management of the national assets transferred or assigned for utilisation is transparent".

[5] In connection with it, it has been established several times by the Constitutional Court that these "fundamental rights" are actually groups of functions and powers with the aim of the protection against the Government and the central organs of the state government 4/1993 (II. 12.) Constitutional Court decision. ABH 1993, 48, 71.

the Constitution; it clearly calls the individual elements functions and powers[6]. It can be stated in general that there are no major differences as compared to the former Constitution.

b) The Fundamental Law formulates it more obviously that all functions and powers can only be practiced *within the framework of an Act.* The Fundamental law does not refer to it in the case of the individual elements – very correctly – but in connection with all listed items; making thus obvious that had been stated by the Constitutional Court in connection with the Constitution[7].

c) It is clearly stated by the Fundamental Law, too that all the functions and powers are carried out "*in the management of local public affairs".* This is of importance mainly if in the course of exercising a certain function or power the local government does not carry out the implementation of law but makes use of another possibility (e.g. It may request information, initiate decisions, express an opinion[8]; it may establish associations for the representation of its interests[9] etc.). This general formulation states as well that these possibilities can only be in connection with local public affairs.

d) Not only the phrase "the fundamental rights of the local self-governments" was *left out of the text of the Fundamental Law but at the same time the following as well*: *"[t]he legitimate exercise of the power of the self-government enjoys judicial protection, in order to protect its rights, the self-government is entitled to turn to the Constitutional Court"*. It should be noted, however, that this rule still can be found in an Act. The Constitutional Court has ruled concerning this possibility that it does not confer power itself but the courts and the Constitutional Court implement this rule through their existing powers[10]. In the case of the local governments, there seems to be a decrease in the protection level of the Constitutional Court as regards to the fact that the possibility that anyone can

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6 Article 32 (1) point l) – leaving the hierarchy open – states: "[s]hall exercise *further* functions and powers laid down in an Act".

7 4/1993. (II. 12.) Constitutional Court decision, ABH 1993, 48, 70.

8 Fundamental Law, Article 32 (1) point j).

9 Article 32 (1) point k) of the Fundamental Law.

10 According to the Constitutional Court, this rule has given power only to the legislator as regards to the issue to create concrete rules of power and procedure from this rule, on the basis of which it is able to come up to this expectation of the Constitutional Court. According to the establishment of the Constitutional Court, it is not possible to make use of the process of the representative body on the basis of this rule. 37/1994. (VI. 24.) Constitutional Court decision. ABH 1994, 238, 248–249.

initiate the posterior standard control ceased to be on 1st January 2012[11]. Considering that the phrase "protection of its rights" actually means the protection of powers and in this context the standpoint of the Constitutional Court continues to be correct, namely that the functions of the local governments are to be protected in particular against the Government and the central organs of the state government (against their unlawful interferences)[12], *the level of the protection has decreased in this respect.*

2. The individual functions and powers

The functions and powers provided for the local governments are listed in Article 32 (1) of the Fundamental Law, applying an open prioritising: according to point l), the local government "shall exercise further functions and powers determined by an Act". The functions and powers of a "local government" are exercised – mutatis mutandis – by its representative body[13].

a) Among the first three elements of the list of powers, the following duties are to be found: "adopt decrees", "take decisions", and "administer autonomously". These correspond to the phrase "regulates and manages independently" of the former Constitution.

b) The phrase "determine the rules of their organisation and operation" is not a new element either; the change in this context is that the expression "independently", which is to be found in the Constitution, does not appear here in the Fundamental Law: it is, however, because of the phrase "within the framework of an Act" of no importance.

c) There are several elements dealing with the assets, the management, and the revenues. According to Article 32 (1) point e) [it] "shall exercise the rights of ownership with respect to local government property"; according to point f) [they] "shall determine their budgets and autonomously manage their affairs on the basis of thereof"; point g) provides: "may engage in entrepreneurial activities with their assets and revenues available for this purpose, without jeopardising the performance of their mandatory duties"; and finally Point h): "shall decide on the types and rates of local taxes".

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[11] See Article 24 (2) point e) of Fundamental Law.
[12] 4/1993. (II. 12.) Constitutional Court decision. ABH 1993, 48, 71.
[13] Article 33 (1) of the Fundamental Law.

ca) As regards to the exercising of the property rights within the framework of an Act, the rule of the Fundamental Law (discussed above) provides further clues: Article 38 places the property of local governments into the sphere of the national assets and it also fixes the goals to be considered mandatory in connection with their management. The last sentence of Article 38 (1) provides: "[t]he requirements for preserving and protecting national assets, and for the responsible management of national assets shall be laid down in a *cardinal Act*", in this respect the phrase "within the framework of an Act" refers also to the sphere of cardinal Act or Acts, respectively.

Article 32 (6) – at a somewhat strange place, beyond the detailed rules of the measure – establishes that "[t]he property of local governments shall be public property which shall serve for the performance of their duties."

cb) The *determination of the budget and the independent management thereupon* made up a part of the autonomy of the self-government earlier as well, however *the definition of the budget was not to be found expressis verbis in the Constitution*. In Article 44/A. (1) point b), the phrase "manages independently its revenues and may engage in entrepreneurial activities on its own responsibility", the second element of which is reflected in Article 32 (1) point g) of the Fundamental Law.

Not only the law may restrict the possibility of the independent management of revenues but the Fundamental Law itself includes some limitations as well. According to Article 34 (5): "[i]n order to preserve a balanced budget, *an Act may provide for any borrowing* or for other undertaking of *commitments* by local governments to the extent determined in an Act, certain conditions and/or the *consent* of the Government shall be *required*".

The aim of the rule is to restrain an excessive process of indebtedness, the rationalising of the management of the revenues of the local governments, and at the same time it allows for a stronger state intervention as well (through the contribution of the Government). This can also mean the constraint of the autonomy of the local government: the evaluation of the actual situation will be possible on the basis of the guarantee elements of the legal regulation.

cc) According to Article 32 (1) point g) the local government "may engage in entrepreneurial activities with their assets and revenues available for this purpose, without jeopardising the performance of their mandatory duties".

The phrase "revenues available for this purpose" delivers delegation to the legal regulation in order to establish a category corresponding to the primary assets, i.e. in order to determine the amount of revenues that are not to be used for business goals. Entrepreneurial activities without jeopardising the performance of mandatory

duties are important elements of the Fundamental Law; this goal is, to be reached, however, only by developing the appropriate sanctions and their association.

cd) Paragraph (1) point h) of the same Article fixes that the local government "shall decide on the types and rates of local taxes". This opportunity was present in the Constitution as well, and there is legal regulation for the types of taxes, their rates, conditions, and possible allowances. This authorisation/delegation means a relatively big freedom – even if not a total property management freedom – in the developing of the local taxation policy of the self-governments[14]. The Curia (Hungarian Supreme Court) has stated as well that tax is public income, which makes up the financial basis of the public services on the one hand; on the other hand it is an instrument of the economic policy as it has a direct or indirect influence and orientation on the behaviour of the actors of economic life[15]. Tax is also a means in the hands of the local public power, as the government can put across viewpoints serving the balance of the economy, social policy, local policy, and budget[16]. These viewpoints appear when the local government is considering the introduction of local taxes, it decides which type of the local taxes, from when, in what scopes and with which detailed rules it should introduce them[17].

d) According to Article 32 (1) point i) the local government "may create local government symbols and establish local decorations and honorific titles".

This is one of the elements of the list of the functions and the powers that counts rather as a fundamental right of the local government than a function or a power; the local government may, namely, freely decide whether it wants to use this possibility or not. The phrase "within the framework of an Act" is relevant in this case only if it is the local government that creates local government symbols (it is typically realised in the form of an own coat of arms), i.e. it establishes local awards and honorific titles. The *statutory restrictions* ought to be the *most reserved* in the case of the functions and the powers, the state interest of regulating within the framework of an Act is not dominant in this case[18].

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14 Decision Köf. 5.001/2013/6.

15 Decision Köf. 5.017/2012/8 and decision 5.081/2012/4.

16 Decision Köf. 5.017/2012/8 and decision Köf.5.081/2012/4.

17 See **P. Tilk**, *A Kúria Önkormányzati Tanácsának helyi jogalkotással kapcsolatos elvárásai* [The expectations of the Municipal Council of the Curia in connection with the local legislation], Kodifikátor Alapítvány, Pécs 2014.

18 The Constitutional Court was not concerned about a relatively strong State intervention either; it did not disapprove of that that some sentences were written into municipal coats of arms through Acts of the National Assembly. See 604/B/2009 Constitutional Court decision.

In this connection, I do not consider the content of the IRM regulation 51 (1) (XII.14) of 61/2009 on legislative drafting to be correct as it does not allow for drafting a preamble to the government regulation. It is exactly the appearance of the possibility in Article 32 (1) point i) in a regulation that would require the possibility of the placement of a solemn introduction.

e) According to Article 32 (1) point j) the local government "may request information from the organ vested with the relevant functions and powers, initiate decisions or express opinion". This opportunity – as mentioned above – is ensured only in the "scope of the management of local public affairs" according to the Fundamental Law.

In Article 44/A. (1) point g) of the former Constitution the phrase "can turn to the organs eligible for decision with an initiative concerning the local community" has a broader linguistic interpretation. The rule has, however, only then a substantive content if there is a substantive obligation of reply connected to it in a cardinal Act, and in the case of the initiative of a decision – depending on its type and determined by law – the merits of the case are duly taken into account, either with a positive or with a negative content.

f) Article 32 (1) point k) provides that the local government "may freely associate with other local governments, establish associations for the representation of their interests, cooperate with local governments of other countries within their function and powers, and become members of international organisations of local governments".

fa) The right of the free association did not exclude in the Constitution either the statutory requirements of the obligatory establishment of associations. The Fundamental Law provides an expressive opportunity for this in article 34 (2): "[an] Act may provide that mandatory tasks of local governments shall be performed through associations". The legislator is in this context not bound to goals or conditions, only in that senses that he can provide the association for the performance of a mandatory duty. The requirements of economy, expediency, and efficiency are to play a bigger role than earlier in the realization of associations.

The detailed rules are authoritative in connection with the associations, too. *The willingness to establish an association gets weaker without the appropriate incentives*. The willingness to establish an association is not only to be ensured on behalf of the joining settlement: it may come to a situation when the members of the association are not willing to take in a given self-government. It is possible to apply the cogency in such cases as well; there is an example for it at

present as well in the law, which was not found earlier unconstitutional by the Constitutional Court either[19].

fb) Local governments "may establish associations for the representation of their interests". It is to be noted that only several local governments jointly are entitled to this right, one government can mutatis mutandis not form an association. It is therefore entitled – together with other local governments – to establish representative associations. This right means the opportunity of joining an already existing association; in this case, however, the association may attach conditions to the creation of the membership.

The Fundamental Law does not set any limits in this context, even the smallest settlements – independently from the number of the inhabitants – are entitled to use this right. The National Assembly has the opportunity, however, to select from among the organisations wishing to perform representative functions as regards to the question which it considers to be representative. The former law foresaw that only the opinion of the national government associations was required in connection with regulations concerning the local governments and the drafts of other decisions by the State, and it provided a list of the conditions of the *national* qualification, which appears in this case as the synonym of the word *representative*.

The weight of the representation of interests depends on that under what conditions they are considered to be negotiating partners by the State. In the absence of these conditions, however, although they are to be created on the basis of the Fundamental Law as well, they will not be able to perform the function because of which they have come into being. The opportunity within the framework of an Act provides them occasionally a relatively narrow space for manoeuvre but it opens wide opportunities for the National Assembly. This itself would not necessarily be a problem; there are considerable differences among the individual big associations of local governments as far as the professional background and the scope of activities are concerned; these can be taken into account by the State when shaping the conditions of the reconciliation.

fc) Local governments "may cooperate with local governments of other countries within their functions and powers, and become members of international organisations of local governments". It should be noted in connection with it: in spite of the imprecise formulation, the cooperation is also possible with Hungarian local governments as well; it is clearly indicated by the possibility of establishing and joining associations and organisations of interest.

[19] See 3/2003. (II. 7.) Constitutional Court decision.

III. The adoption of decrees by local governments

1. The basic rules of the adoption of decrees

a) Article 32 (1) point a) specifies the power of adopting decrees by local governments. According to Article T (2) of the Fundamental Law legal regulations shall be Acts of Parliament and as such, according to Paragraph (3) no legal regulation shall conflict with the Fundamental Law.

b) In connection with the adoption of decrees (and with the legislation in general), the fundamental Law settles the validity requisites, as well, with respect to, as included in Article T) (1) "[g]enerally binding rules of conduct may be laid down in the Fundamental Law or legal regulations adopted by an *organ having legislative competence* and specified in the Fundamental Law which is published in the Official Gazette. *A cardinal Act may lay down different rules for the publication of local government decrees* and of legal regulations adopted during any special order".

Paragraphs (2)–(5) deliver more details for the background of the adoption of decrees.

c) The Constitution made it possible for the body of representatives to adopt decrees within their functions, the Fundamental Law, however, – in connection with the procedure within the frames of its functions – specifies expressively both types of statutory power: to *regulate local social relations* not regulated by an Act, and/or on the basis of authorisation by an Act.

d) According to 32 (3) "[n]o local government decree shall conflict with any other legal regulation".

The phrase "of higher level" of the Constitution is exchanged for "any other" legal regulation. Its importance is merely that the hierarchy of sources of law are laid out/organized in a different way by the Fundamental Law as by the Constitution; namely in a way, that it is fixed in the case of each regulation with what other regulation it cannot conflict. A local government decree cannot conflict with any other legal regulation, furthermore it cannot conflict the Fundamental Law either. The phrase "any other legal regulation" does naturally not concern another decree of the local government (because of the different administrative territory), the legislative relation between the capital and districts (as long as they do not cease to exist) is regulated by the Local Government Law. The new phrase has one worthwhile aspect: in the case of an eventual conflict of the decree of one local government with another decree of the same government, it comes to

a conflict with the Fundamental Law and to lawlessness, while according to the Constitution – following the practice of the Constitutional Court – the conflict between regulations of the same level did not automatically cause the violation of the Constitution[20]. This problem will probably not dominantly be present in the operation of local governments.

e) Beyond the general rules of the appropriate promulgation, Article 32 (4) provides – in the scope of the legal supervision – that "[l]ocal governments shall send local government decrees to the capital or county government office *immediately after their promulgation*. If the capital or country government office finds the local government decree or any of its provisions to be in conflict with any legal regulation, it may initiate a judicial review of the local government decree."

This regulation has several important effects.

ea) On the one hand, a firm base of the Fundamental Law of the legality supervision is established, which allows for strong state control. It should be noted that the rule should not be taken too seriously in that respect that the obligation of applying to the court should appear: it is justifiable to provide the opportunity that the Government Office should make an attempt to eliminate the infringement by calling the attention of the local government, and it should only apply to the court in the case of failure. This – the principle of gradualness – is expected by the Curia as well. It has been established in a concrete case by the Curia: the Government Office turned to the Curia because of a decree of the local government – and applied for its supervision – in connection with which it did not provide the possibility for the local government in question for the protection of its fundamental rights[21].

In my opinion, it cannot be excluded as the Fundamental Law includes the item "initiate a judicial review at the court" and it would be a mistake to draw the conclusion from it that the Government Office might turn a blind eye over the infringement, i.e. in the case of infringement it should not be obliged to initiate a procedure of the court either. The correct interpretation might be that the Government Office *has the opportunity* to *call the attention* of the local government to the infringement and *as long as the local government does not eliminate it* the Government Office is *obliged to apply to the court*.

It should be noted that the legality supervision cannot be restricted solely to the posterior intervention; this may result from Article 34 (1) the first sentence

[20] 35/1991. (VI. 20.) Constitutional Court decision, ABH 1991, 153, 154–155.
[21] Köf. decision 5.043/2013/2.

of which says: "local governments and state organs shall cooperate to achieve community goals".

It is to be remarked: The possibility of the prior consultation and the various forms of applying for and providing the professional assistance do exist between local governments and government offices in the practice as well.

eb) Because of the obligation of sending the decree to the capital or government office based on the Fundamental Law, there is an especially good opportunity for the establishing a single register of regulations as regards to the decrees of local governments as well. At present it is not true for all local governments at all that they have a full-scale register of their decrees on their homepage (if they have got one at all), on the other hand, the part of the National Collection of Regulations [Nemzeti Jogszabálytár] containing decrees of local governments[22] is not complete either. This rule of the Fundamental Law could be used the creating a system consisting of the summaries of the castle counties and run by the government office (ministry) as well.

ec) This rule will be realized in the case, too, if its detailed regulations appear adequately in Acts. Consequently, it is necessary to regulate how many days the phrase "immediately" means, i.e. a sanction is to be associated with the failure of the obligations. This regulation appears, however, in a ministerial decree as well.

f) It is an important change in the process of the creation of decrees that as regards the decrees of the local governments, the statement of offence of law and the annulment of a decree is now carried out by the courts (former it was done by the Constitutional Court), similarly as in the case of the establishment of the neglect of the statutory mandate of the local government. According to Article 25 (2) point c) of the Fundamental Law, the court decides on "the conflict of local government decrees with other legislation and their annulment"; according to point d) "the establishment of a local government's neglect of its statutory legislative obligation". These two tasks were given to the Curia, the court of the highest level.

It is to be noted that it is the Constitutional Court that decides further on about the conflict between decrees of local governments and the Fundamental Law[23].

According to Paragraph (2) point b) the decision about the legality of the decrees of local governments remains the legitimacy of administrative decisions.

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[22] www.njt.hu; access: 01.09.2014.

[23] See Article 24 (2) points b)–e) of the Fundamental Law. In this connection, in more detail see **P. Tilk**, *Az Alkotmánybíróság*…

2. A new element in the regulation – the right of the head of the government office to adopt decrees within her/his power of remedy[24]

In connection with the adoption of local government decrees, the right of remedy of the head of the government office under certain conditions appears as a new element, which means the conferring the head of the office the competency of adopting decrees. This possibility shows the strong intervention of the state into the operation of local governments.

A differentiated, two-stage system has been established by Article 32[25].

a) The capital or county government office may apply to a court for the establishment of non-compliance of a local government with its obligation based on an Act to adopt decrees or take decisions. If the non-compliance is sated by the court, it provides a deadline for its performance.

b) Should the local government fail to comply with its obligation to adopt decrees or take decisions by the date determined by the court in its decision establishing non-compliance, the court shall, at the initiative of the capital or county government office, order the head of the capital or county government office to adopt the local government decree or local government decision required to remedy the non- compliance in the name of the local government.

There might be several problems arising in connection with the power of the remedy of decrees.

– the main problem in connection with the right of remedy – even before eventual procedural issues – may be caused by that to what extent the given government office will be able to establish adequate statutory provisions for the local conditions (there have been two such cases so far, and in one of them a decree was to be adopted on the enforcement of the local budget instead of the local government);

– in case of the eventual frequent occurrence of omissions in connection with the adoption of decrees it will be a crucial issue to avoid the adoption of pattern-solutions and model-decrees without any creativity;

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[24] See **P. Tilk**, *Gondolatok a kormányhivatal vezetőinek önkormányzati rendeletalkotásra vonatkozó (pótlási) hatásköréről* [Some thoughts about the power of adopting decrees (remedy) of heads of government offices], Új Magyar Közigazgatás 2011/8.

[25] I have analysed the issues in connection with the right of remedy in detail in my paper that appeared in Új Magyar Közigazgatás in August 2011, for this reason I am not dealing with this topic here.

– it is though no procedural problem but a possibility that in the case of some of the local governments to what extent certain representative bodies wishing to avoid unpopular local regulations or without suitable solutions, see here an opportunity to devolve the decision – and at the same time the political responsibility – in this power;

– in the case of the remedy of a decree by the head of the government office, however, the peculiar phenomenon of self-monitoring is to be observed: the act coming into being in the course of the remedy of the decree – as it will formally probably be a decree of the local government – the supervision will belong to the government office.

IV. The organization of local governments

a) There are no crucial changes in connection with the organization of local governments in the Fundamental Law. It specifies the representative body, the mayor, the committee[26]; but it deals with the *notary only in passing,* contrary to the Constitution. In connection with the notary, the Constitution allowed for the establishment of the state government functions and powers by an Act or a government regulation (it is to be noted: those of the clerk of the office of the representative body are not to be found in the Fundamental Law either). The notary remains part of the organization of the local government further on: the representative body is specified as a body by the Law.

b) In connection with the *representative body* (concerning its functions), it is fixed in the Fundamental Law that functions and powers of a local government are exercised by this body.

c) As regards the *mayor*, the leading of the local representative body is declared as his/her task by the Fundamental Law, at the same time it says – as a somewhat interesting reference – that "the president of a county representative body shall be elected by the county representative body from among its members for the term of its mandate".

According to Article 34 (3) of the Fundamental Law "[a]n Act or a government decree based on authorization by an Act, may exceptionally specify functions and powers of state administration for mayors, presidents of county representative bodies and for heads of the office of representative bodies".

[26] Article 33 (1)–(3).

d) Article 33 (3) contains an interesting issue, namely ”[a] representative body may elect committees and establish an office, as provided for by a cardinal Act”. It is questionable if the phrase “as provided for by a cardinal act” refers to an opportunity that the law can forbid for certain settlements to elect a committee or to establish an office. The merge of offices (in the form of mandatory associations) has already been realized in the form of joint municipal offices.

V. The cooperation between the State and local governments; supervision of legality of local governments

1. The cooperation between state and local governments

a) The Fundamental Law prescribes that local governments and state organs shall cooperate to achieve community goals[27]. The obligation of the state organs to cooperate has appeared as a constitutional requirement in the practice of the Constitutional Court so far as well, the Fundamental Law, however, contains its explicit components, too. It fixes on the one hand that an *act may set out mandatory functions and powers for local governments*. On the other hand, it says that “for the performance of their mandatory functions and powers, local governments shall be either *entitled to proportionate budgetary and/or other financial support*”.

b) The fact that a function is only be set out by an Act serves the protection of the autonomy of the local government (it provides protection against the possibility of the direct intervention of the Government).

c) As regards the “proportionate budgetary and/or other financial support” set out for the mandatory functions it is to be noted that this expectation was included in the Constitution as well[28], but the protection through the Constitutional Court concerning this guarantee was minimal. The Constitutional Court actually considers the total desertification as unconstitutional[29], meaning: it is not unconstitutional if it does not come to the financing of a certain function if the complex system of the financing as a whole covers the expenses. The “complex system” did not function unfortunately.

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[27] Article 34 (1).

[28] Article 44/A. (1) point c): “in order to perform its duties determined by an Act, local governments are entitled to adequate own revenue and it receives further state subsidy proportional to these duties”.

[29] See Constitutional Court decree 2/1997. (I. 22.) AB.

In connection with "other financial support" it is to be established: *it is to be suitable for performing the task*, i.e. it is not conform to the Fundamental Law if the financing of the task is not to be used directly for the performance of the task, but the local government gets some assets that has the same value as the financial support (and the local government may not be able to utilize or maintain the assets).

2. Supervision of the legality of local governments

Article 34 (4) fixes that "[t]he Government shall ensure supervision of the legality of local governments through the capital or county government offices".

a) The former control of legality has been replaced by the supervision of the legality including stronger powers. It is to be noted that it is not the phrase that is of importance but the scope of means available by the organ performing the supervision, i.e. the forms of intervention and sanctioning, and there have been a big number of organs controlling local governments so far, too. It is another question that the findings of such controls have occasionally had no consequences at all.

It is to be observed in connection with the adaption of decrees that – among others with the appearance of the right of remedy – the instruments have become stronger.

b) Besides the government offices, there are other organs, too, participating (perhaps only with control rights) in the supervision further on. The lawfulness, the expediency and efficiency of the management of local governments is controlled by the State Audit Office.

c) It should be remarked as well: Unlike as in the case of the Constitution, the Fundamental Law does not contain that the decision of the local government could be supervised "exclusively for legal reasons". Although the Fundamental Law has established legal control everywhere (courts, Constitutional Court, government offices), there is no obstacle in the law of the possibility of the creation of decision supervision with other aspects – economy, efficiency. Article 38 (5) delivers an example for it as well, however, only in respect of a smaller scope. According to it "[b]usiness organizations owned by the State or local governments shall manage their affairs in a manner determined in an Act, autonomously and responsibly according to the requirements of *lawfulness, expediency and efficiency*".

VI. The elections of local government representatives and mayors

a) This issue deserves mentioning for reasons of completeness: it is an important innovation in respect of the elections that from the autumn of 2014 on – both in the case of representatives and mayors – *in every fifth year*. It may have unpredictable effects and it might be unfavourable that it might not come to necessary (even if they are unpopular) measures after the parliamentary elections in order to avoid the failure in the case of local government elections. This change will probably not have a good effect on the progressive governance.

b) The basic principles of elections have not been changed[30], and it can be accepted to a full degree what appears expressis verbis in Article 35 (1): the requirement of "elections which guarantee the free expression of the will of the voters".

c) Paragraph (3) settles the basis of a mandate, according to it: The mandate of representative bodies shall last until the day of the general elections of local government representatives and mayors. If no elections can be held due to a lack of candidates, the mandate of the local representative body shall be extended until the day of the interim elections. The mandate of mayors shall last until the election of the new mayors.

d) The representative bodies may declare their own dissolution, as provided by a cardinal Act. At the motion of the Government – submitted after seeking the opinion of the Constitutional Court, the National Assembly shall dissolve representative bodies the operation of which is in conflict with the Fundamental Law. Upon a representative body dissolving itself or upon it being dissolved, the mandate of the mayor shall also terminate.

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It is to be established that the Fundamental Law – although many elements of the Constitution are reflected in it – has brought about important changes in respect of local governments. It should be noted, however, as a general remark that the legislative process shows a tendency from the direction of the system built on autonomy into the direction of the establishment of a system enabling state intervention. Besides the presence of adequate guarantees, this model can serve as a good basis for the system of local governments functioning according to the requirements of lawfulness, expediency and efficiency.

[30] The basic principles of franchise are to be found in Article XXIII.

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Péter TILK

GŁÓWNE ZMIANY W SYSTEMIE SAMORZĄDU TERYTORIALNEGO NA WĘGRZECH PO NOWELIZACJI USTAWY ZASADNICZEJ.

(Streszczenie)

W dniu 1 stycznia 2012 r. na Węgrzech weszła w życie nowa Ustawa Zasadnicza, która wprowadziła m.in. istotne zmiany w zakresie samorządu lokalnego. Przedstawiona analiza odnosi się do węgierskiego ustroju samorządu terytorialnego i zawiera ocenę skutków zmian w zakresie kompetencji organów samorządu terytorialnego, ich struktury organizacyjnej oraz środków nadzoru. Zasady dotyczące samorządu lokalnego są uregulowane w ustawie organicznej, której zmiana wymaga większości 2/3 głosów w Zgromadzeniu Krajowym. Jest to ustawa organiczna CLXXXIX z 2011 r. o samorządzie terytorialnym Węgier.

Słowa kluczowe: węgierska Ustawa Zasadnicza, węgierska ustawa organiczna o samorządzie terytorialnym, węgierski samorząd terytorialny, ustawa zasadnicza