The Protection of the Right to Local Self-Government in the Practice of the Hungarian Constitutional Court

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Abstract

A specific trait of local self-governments is that they exercise public power, while public power is also exercised against them. This means that those functions and powers that are obligations on the side of local self-governments, can be construed as rights against central public bodies. For this reason, the protection of the right to local self-government is a priority. The Charter of Local Self-Government takes the view that the autonomy of local self-governments shall be guaranteed against central public bodies. It is necessary to establish a legal framework which ensures that strong central public bodies cannot enforce their own political or professional preferences against the will of local communities with different political or professional beliefs. In my opinion, the central issue, also in Hungary, is that local self-governments are entitled to the protection of the Constitutional Court. Decision No. 3311/2019. (XI. 21.) AB sets out that local self-governments are entitled to turn to the Constitutional Court in their own right by submitting a constitutional complaint if the law violates their rights guaranteed in the Fundamental Law (including powers enshrined in the Fundamental Law). While the decision is still very recent, nevertheless, thanks to its local self-governments may expect the substantive review of their petitions by the Constitutional Court in the future.

Keywords: right to local self-government, protected powers, European Charter of Local Self-Government, Hungary, Constitutional Court of Hungary.

1. Introduction

Local self-governments are special members of the governing structures, confirmed on the one hand by their role in history, and on the other, by their vertical position within the state. However, this institution having a centuries-old history throughout Europe is completely different from one state to another, and therefore has different structures and functions from one country to another. They depend on the state, but also influence it. They are highly respected,

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nevertheless their transformation is an ongoing topic. They are close to the citizens, but their true significance is difficult to recognize. They are the most mysterious formations of the governing bodies, dependent on how we approach them.

Local self-governments acquired an important role in the Hungarian public law system, and over the centuries they have become one of the bastions of our constitutional system. Today they are indispensable elements of the democratic state structure.

Following the change of regime in Hungary, the right to local self-government became the focus of attention. Besides being deemed a fundamental collective right, it also turned out to be a unique constitutional solution. However, the approach of the Fundamental Law seems radically different, since the erstwhile assumption of the right to self-government is missing from the constitution. To most researchers, this change explains why self-government lost its importance, yet I am convinced that the right to self-government can still be interpreted as a right, regardless of the fundamental rights approach. In fact, it arose from the exercise of democratic power by local communities in local public affairs. This is not merely implemented based on the interests of the state but represents the natural organization of society.

A specific trait of local self-governments is that they exercise public power, while public power is also exercised against them. This means that those functions and powers that are obligations on the side of local self-governments towards citizens, can be construed as rights against central public bodies. For this reason, control over the activities of local self-governments and the protection of the right to self-government are priorities. The former ensures that the exercise of local self-government powers remain within the boundaries of the law, while the latter is to ensure that legally exercised powers of local self-governments are not violated by other bodies of the state. In practice, the two instruments are closely linked; in a broad sense, they can be considered as two facets of legal protection (since the lawful performance of tasks is protected, it necessarily guarantees both sides: the local self-government is entitled to exercise its powers, but only as long as it does not abuse them). Within the frameworks of the present study, I restrict my analysis to the questions relating to the legal protection of local self-governments, which is meant to ensure the lawful performance of local self-government tasks.

2. Thoughts on the Importance of Local Self-Government

The basic idea behind self-governance is the following: if we want something done right, we do it ourselves.[1] The focus is on the local community or its members when it comes to exercising local public power. Local communities carry out tasks that are of particular interest to them, for their own benefit. This is based on the

1 Zoltán Magyary, *Magyar közigazgatás – A közigazgatás szerepe a XX. sz. államában a magyar közigazgatás szervezete működése és jogi rendje,* Budapest, 1942, pp. 116-117.

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fact that a municipality (a city district or a larger housing block), as the natural environment of citizens is more than an abstract concept. It is indeed a physically delimited area, a place where people spend a significant part of their everyday lives. They necessarily have problems in common, specific needs, and face situations they want to solve themselves. In the words of Alexis de Tocqueville, "the general interests of the country touch its inhabitants only from time to time. The interests of locality, every day."[2] In Reinhard Hendler's view the purpose of self-government is to provide more legal influence over the management of matters to those who are particularly affected by certain public matters, than to other citizens.[3] John Stuart Mill adds, that

> "the very object of having a local representation is in order that those who have any interest in common which they do not share with the general body of their countrymen may manage that joint interest by themselves."[4]

Locals may namely have common interests that do not necessarily coincide with those residing in the neighboring municipality or the interests of the central state level. This is the essence of local public affairs.[5] In addition, based on the survey of the Eurobarometer, the outstanding role of municipalities is reinforced by the fact that the level of trust in local authorities is higher than the trust in national governments or parliaments.[6]

Local self-governments cannot be defined as entities against the state, nor do they merely assist in executing the central will. The significance of local self-governments lies in their role in the division and balancing of powers.[7] They were originally established as safeguards against absolutist state power in many countries, but in a globalizing world it is no longer possible to interpret the local self-government in its original sense, since we are all democrats.[8] In a parliamentary democracy people are no longer opposed to state power, instead, it is the various groups of the people that are against each other. On this basis, the

2 Alexis de Tocqueville, *Democracy in America*, Liberty Fund, Indianapolis, 2010, p. 583.

3 Reinhard Hendler, 'Grundbegriffe der Selbstverwaltung', *in* Thomas Mann & Günter Püttner (eds.), *Handbuch der kommunalen Wissenschaft und Praxis. Band 1 Grundlagen und Kommunalverfassung. Dritte, völlig neu bearbeitete Auflage,* Springer, Berlin-Heidelberg-New York, 2007, p. 20.

4 John Stuart Mill, *Considerations on Representative Government*, The Floating Press, Auckland, 2009, p. 324.

5 In a negative approach, all those public affairs may be considered local, which are not primarily tied to the whole-state level, but are limited to some territorial unit. *See* Herbert Küpper, 'A helyi önkormányzás joga', *in* András Jakab (ed.), *Az Alkotmány kommentárja II.*, Századvég, Budapest, 2009, p. 1507.

6 Andreas Ladner *et al.*, *Patterns of Local Autonomy in Europe,* Palgrave Macmillan, 2019, p. 8.

7 Klaus Stern, 'Die Verfassungsgarantie der kommunalen Selbstverwaltung', *in* Günter Püttner (ed.), *Handbuch der kommunalen Wissenschaft und Praxis. Band 1 Grundlagen. Zweite, völlig neu bearbeitete Auflage,* Springer, Berlin-Heidelberg, 1981, p. 204.

8 Dieter Hoffmann-Axthelm, *Lokale Selbstverwaltung – Möglichkeit und Grenzen direkter Demokratie,* VS Verlag, Wiesbaden, 2004, pp. 13-14.

importance of the protection of local self-governments arises when it is necessary to protect the preferences of smaller communities against state power.[9]

Autonomy is one of the most significant attributes of self-government. While autonomy and self-government are commonly considered to be synonymous, autonomy – in relation to public bodies – is in fact about self-regulation based on authorization under the law.[10] Thus, autonomy is the right of a community other than the state to adopt law itself.[11] It is necessarily limited; autonomy does not protect action that does not comply with the legal framework. As the autonomous body is part of a greater political system, the principle of autonomy shall be reconciled with the principle of unity.[12]

According to the principle of subsidiarity, there is a natural need for local solutions to problems. This principle – without it being mentioned in the Hungarian constitution – is still one of the most important basic principles.[13] It prohibits higher forums of power from interfering unreasonably – *i.e.* in a way that is incompatible with the requirement of the public good – in the area of jurisdiction of lower forums of power,[14] and specifies that the higher level may only intervene in lower level relations in order to assist these forums. However, this does not mean that these matters are no longer of national relevance. At the local level, communities must have sufficient freedom (autonomy) to deal with their own affairs. The principle of subsidiarity defines and limits their freedom of action. The legitimate authority to substitute for failing actors if need be.[15] For this reason, allocating certain tasks, which are unresolvable at the lower level, to a higher level instead, is also a part of the principle of subsidiarity.[16] The European Charter of Local Self-Government (Charter) lays down that public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.[17]

However, this does not mean that municipalities have sovereign power; in fact, the delegation of tasks must be at the 'wise discretion' of the state. This may be implemented through decentralization, which is not only an appropriate and practical principle for organizing public administration, but also the cornerstone

9 Hans Peters, *Grenzen der kommunalen Selbstverwaltung in Preussen,* Springer, Berlin, 1926, p. 43.
10 Hendler 2007, p. 12.
11 Peters 1926, pp. 37-38.
12 Ladner *et al.* 2019, pp. 175-176.
13 Franz-Ludwig Knemeyer, 'Subsidiarität – Föderalismus, Dezentralisation: Initiativen zu einem "Europa der Regionen"', *Zeitschrift für Rechtspolitik*, 1990/5, p. 174.
14 János Frivaldszky, 'Szubszidiaritás és az európai identitás a közösségek Európájáért', *in* János Frivaldszky (ed.), *Szubszidiaritás és szolidaritás az Európai Unióban*, Faludi Ferenc Akadémia, Budapest, 2006, p. 36.
15 Thierry Berthet & Philippe Cuntigh, 'Local Mirrors of State Modernisation: The Case of the Territorialisation of Employment Policy in France', *in* Vincent Hoffmann-Martinot & Hellmut Wollmann (eds.), *State and Local Government Reforms in France and Germany,* VS Verlag, Wiesbaden, 2006, p. 186.
16 Arno Waschkuhn, *Was ist Subsidiarität? Ein sozialphilosophisches Ordnungsprinzip: Von Thomas von Aquin bis zur "Civil Society",* Springer, Wiesbaden, 1995, p. 59.
17 Article 4(3) of the Charter.

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of local autonomy itself.[18] In light of the principle of subsidiarity, the need for autonomy through decentralization necessarily leads to the central bodies of the state being marginalized in these matters, in a sense, the latter lose their ability to solve the issues raised within their own sphere of competence.

From a certain point of view, this can even be considered a vertical division of power, because it is in the constitutional definition of fundamental powers (and in the statutory provision implementing it) that the transfer of certain public powers may be found,[19] which, moreover, serves to divide political power.[20] The division of executive power between the public administration subordinated to the Government and independent local self-governments, does not call into question the local self-government's affiliation with the executive power. As such, it is practically an internal division of powers.[21] In essence it manifests itself as a kind of limited autonomy, which – due to the unity of the state – subsists only within the confines of the relevant laws.

The real emphasis is on matters that are exercised locally, independently and democratically. I took the view that – by focusing on subsidiarity – local communities shall carry out tasks as long as they are truly local and can be achieved by their own means (with the active support of the central public bodies). These are the functions and powers of local self-governments. In light of the foregoing, jointly applied principles lead to a vertical division of power. Power is divided, which, nonetheless, does not mean that one sovereign body limits another; it is rather the case of the state restraining itself by virtue of the principle of democracy.

The European states typically do not consider the right to local self-government to be a collective fundamental right jointly exercised by the local community.[22] Even though there are constitutions declaring certain rights, formally they do not appear as fundamental rights (that is, under such name).[23] One of the reasons behind this is that the 'power' of self-governments lies usually not in their entitlement for fundamental rights, but in their ability to enforce their interests.[24]

Regardless of what the right to local self-government is called, it is not a fundamental right, but a form of limitation to the state's power, which allows local communities to claim decisions in matters affecting them, while also respecting the sovereignty of the state. Thus, it is in fact a matter of how the state is organized and, instead of an eloquent definition, it rather requires to be applied

18 *Cf.* Edit Soós, 'A szubszidiaritás mint a többszintű kormányzás működését meghatározó alapelv', *in* Péter Ákos Ferwagner & Zoltán Kalmár (eds.), *Távolabbra tekintve: tanulmányok J. Nagy László 65. születésnapjára,* Universitas Szeged, Szeged, 2010, p. 57.

19 Antal Ádám, 'Az önkormányzati rendszer alkotmányi összefüggéseiről', *in* Imre Verebélyi (ed.), *Egy évtized önkormányzati mérlege és a jövő kilátásai,* MKI-MTA PTI-MTA RKK, Budapest, 2000, pp. 151-152.

20 Hendler 2007, p. 15.

21 Küpper 2009, pp. 1503-1504.

22 Róbert Kovács *et al.*, *Önkormányzatok jogállása*, Dialóg Campus, Budapest, 2018, p. 8.

23 István Temesi, 'Gondolatok az önkormányzati alapjogokról', *Új Magyar Közigazgatás*, 2010/12, p. 27.

24 Lóránt Csink, *Mozaikok a hatalommegosztáshoz*, Pázmány Press, Budapest, 2014, p. 160.

in practice on a day to day basis. It only really starts functioning as a 'right' when the state, abusing its higher level of power for some reason, fails to respect the powers of local self-governments.

The system of local self-governments shows significant differences in every state. Although, the list of components of the system is practically the same everywhere, their proportion, however, varies to a very high extent. These can be grouped along different research approaches, but the most fundamental difference can be observed in connection with the powers. Accordingly, we can talk about a system of general clause and system of enumeration.

The Anglo-Saxon states consider local self-governments as bodies subject to parliamentary sovereignty, therefore their functions and powers extend only to matters, which have been exactly determined by the parliament. Its application seems simple; however, it raises significant challenges if the separation of powers is not clear in the acts. The case-law has extended the principle so that only the rules of substantive powers have to be regulated by an act (*i.e.* not the implementing powers), which has been further eased in the US by increasingly acknowledging the autonomy of local self-governments.[25] In the UK the functions can be divided into necessary services, protective services, convenience services and occasional services.[26]

The approach of the general clause system is radically different: in this system the autonomy of self-governments is acknowledged in general. The basis of the regulation is that the local self-governments have autonomy in local public affairs, referred to in a generic term.[27] Accordingly, the local self-governments – besides fulfilling their obligatory functions – enjoy wide freedom regarding additional voluntary functions they take on.

The Charter is based on the general clause system; however, states applying the enumeration model are not excluded from it either. Namely, although in the spirit of the Charter the lawfulness of the provision of duties must be presumed, measures can be taken if misused.[28]

3. The Significance of Protecting Right to Local Self-Government

The legal protection of local self-governments usually covers a vast number of areas. These include the questions of norm control related to self-governments, as well as the possibilities of review of various individual decisions, since they are protecting the members of the local community against the abuses of the self-government. However, I consider these issues primarily as control instruments. In my interpretation, issues regulated in Article 11 of the Charter fall within the scope of legal protection of local self-governments. According to this:

25 István Hoffman, 'Modellváltás a megyei önkormányzatok feladat- és hatásköreinek meghatározásában: generálklauzula helyett enumeráció?' *Közjogi Szemle,* 2012/2, p. 27.

26 Dániel Iván, 'Devolúció és önkormányzatiság', *Kisebbségkutatás*, 2015/1, p. 86.

27 Hoffman 2012, p. 27.

28 Colin Crawford, 'European Influence on Local Self-Government?', *Local Government Studies*, 1992/1, p. 76-77.

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> "Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation."

In this sense, the issues that I consider to fall within the scope of this group are the ones related to the autonomous exercise of powers. In my view, the purpose of the legal protection of local self-governments is, that – in many respects – the local self-governments are in a subordinate position within the organizational hierarchy of the state.

The Charter assumes that the autonomy of local self-governments shall be guaranteed against the central public bodies.[29] It is necessary to create the legal framework ensuring that central public bodies with a stronger power would not enforce their own political or professional preferences against the will of local communities with different political or professional beliefs.

The analysis of this issue is essential, for it reveals how the state views local self-governments, and whether it really recognizes self-government as a right.

Due to the necessity of having legal protection of local self-governments, in this context, it shall be salient to grant the legal system with rules that ensure the protection of powers;[30] moreover, to have a body able to enforce it.

The legal protection is indispensable for the protection of autonomy. The permanence of substantive independence is also essential for having autonomy; legal restrictions on local public affairs are only constitutional as long as they do not result in the complete elimination of independence.[31]

The need to protect powers arises from the balance of power: it prevails primarily over the central executive power, but the legislative power has no room for maneuver either (notwithstanding the fact that autonomy only exists within the confines of the law), since it cannot erase powers protected by the Constitution. In fact, this creates the right to local self-government.

It is noteworthy, that in several states this protection is explicitly manifested in high standards. According to the Czech Constitution, for instance, the local self-government may submit a constitutional complaint against an unlawful encroachment by the State,[32] and the Croatian Constitution also makes provisions for an investigation by the Constitutional Court if local self-government was violated.[33] Although at a lower level in terms of source of law,

29 Anita Szabó, 'A Helyi Önkormányzatok Európai Chartája és Svájc', *Themis*, 2005/2, p. 116.

30 Herbert Küpper sees this rule in protected powers, which provides protection against unlawful deprivation of powers. *See* Küpper 2009, p. 1546. Imre Verebélyi also considers an 'eternal age rule' to be conceivable, which would provide protection even against subsequent amendments of the Constitution. *See* Imre Verebélyi, 'Az önkormányzatiság alkotmányos alapjai', *in* Imre Verebélyi (ed.), *A helyi önkormányzatok alkotmányi szabályozása,* KJK-MTA ÁJTI, Budapest, 1996, pp. 29-30.

31 András Patyi, 'Gondolatok a magyar helyi önkormányzati rendszer általános szabályairól', *in* Katalin Szoboszlai-Kiss & Gergely Deli (eds.), *Tanulmányok a 70 éves Bihari Mihály tiszteletére,* Universitas-Győr Nonprofit Kft., Győr, 2013, p. 389.

32 Constitution of the Czech Republic, Article 87(1).

33 Constitution of the Republic of Croatia, Article 129.

but the German legislation also contains similar provisions,[34] according to which municipalities and associations of municipalities may lodge a constitutional complaint based on the violation of the provision of the *Grundgesetz*[35] which stipulates that the right of local self-government shall be guaranteed to the municipalities. In Poland, the Constitution declares the need for jurisdictional protection of self-government,[36] and in other countries the Constitution entitles the Constitutional Court or other court to resolve conflicts of competence between the local self-governments and other public bodies.[37]

The above mentioned German solution is not only outstanding for being brought to life by practice and for having had a strong effect on the practice of the Hungarian Constitutional Court following 1990, but also for clearly demonstrating that the local self-governments do not have fundamental rights, but protected groups of competencies. The Federal Constitutional Court of Germany ascertained in the so-called *Rastede decision* that the legislation based on the term 'within the framework of an Act' should not be in violation of the core areas of local self-governments; the legislation cannot lead to the emptying of the principle of local self-government.[38] Moreover, it must be taken into consideration that the constitutional power has assigned specific tasks to the local self-governments, which the legislative power shall take into account beyond the core areas.[39]

As far as I am concerned, I do not see the need to have a strong normative emphasis on the importance of legal protection, as it is essentially about the relationship among public bodies.[40] Within the framework of the rule of law (provided that the state is based on the principle of division of powers), if the Constitution or other high-level legislation determines certain local public affairs to be managed autonomously by the local self-government, and furthermore, if there are procedures before the Constitutional Court or another court through which the local self-government may enforce this, then there is sufficient guarantee for the local self-governments. Moreover, in fact, creating the option to enforce is only necessary if the possibility of the violation of the rights to self-government arises in the relationships of the state. As a matter of fact, in this respect this is in some way a matter of legal culture.

34 Act on the Federal Constitutional Court, Section 91.
35 Grundgesetz, Article 28.
36 Constitution of the Republic of Poland, Article 165(2).
37 *See e.g.* Constitution of the Republic of Bulgaria, Article 149(1).
38 István Hoffman, 'Az Alkotmánybíróság döntése a "lex Margitsziget" alaptörvény-ellenességéről szóló alkotmányjogi panaszról', *Jogesetek Magyarázata,* 2015/1, p. 7.
39 BverfGE 79, 127.
40 Detailed regulation is not typical even if the Government withdraws the powers of the Parliament. The solution for such cases can be deducted from the general provisions of the constitutions.

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4. The Status of the Legal Protection of Local Self-governments in Hungary

In view of the above, there is no question for me about the protection of the local self-government's powers to be indispensable for truly speaking about the right of local self-government. For this purpose, I have to examine whether the protection of the right to local self-government under the Fundamental Law is implemented or can be implemented.

Legal protection mainly guarantees that, in the event of the issuance of a source of law in violation of the protected powers of the local self-government, they are entitled to turn to the Constitutional Court, or they may initiate proceedings before a court against an individual administrative act adversely affecting protected competencies.[41] Furthermore, the Constitutional Court's protection should to be available not only against the injurious sources of law, but also against the intervention of any state authority hollowing out (or in case of a legislative intervention by the Parliament: rendering ineffective) the protected competencies provided by the Fundamental Law.

Clarity on this issue is also important because Hungary was condemned by the report of the Congress of Local and Regional Authorities – *inter alia* – for deficiencies concerning the legal protection of local self-governments. Pursuant to the monitoring of the Charter's implementation, the Congress concluded that there is no effective legal remedy which fully guarantees the protection of local self-government, with a genuine and extended right of local authorities to lodge a complaint with the domestic courts in order to secure the free exercise of their powers and respect for such principles of local self-government.[42]

4.1. The Right to Local Self-government in the System of the Fundamental Law

The Fundamental Law contains no explicit mention of the principle of local self-government. This is definitely an important circumstance, because the Charter requires that "the principle of local self-government shall be recognized in domestic legislation, and where practicable in the constitution."[43] Although, this Article contains the phrase 'where practicable', the Venice Commission[44] (and consequently the report of the Congress of Local and Regional Authorities[45]) has still criticized the Fundamental Law for this deficiency.[46]

In accordance with Article 31(1) of the Fundamental Law, the purpose of local self-government is twofold: on the one hand, it is the management of local public affairs and, on the other hand, it is the exercise of local public power. This,

41 Judit Siket, 'A helyi önkormányzati jogok védelme', *Közjogi Szemle*, 2016/1, p. 52.
42 Recommendation 341 (2013) para. 4(f).
43 Article 2 of the Charter.
44 Opinion No. 621/2011, CDL-AD(2011)016, para. 116.
45 Recommendation 341 (2013) para. 4(a).
46 The latter report also blames the Act on Self-Governments for this, but in my view, the Act on Self-Governments clearly contains this principle, namely by stating the right to local self-government. However, there is no doubt that the report explicitly lacks a literal statement of the 'principle of local self-government'. *See* Recommendation 341 (2013) paras. 94 and 101.

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especially as regards the exercise of local public power, necessarily implies having autonomy and a decentralized system.

The previous Constitution stated as follows: "Eligible voters of the communities, cities, the capital and its districts, and the counties have the right to local self-government."[47] Within a single sentence, it defined the subjects of self-government and declared them entitled to the right to self-government. It would be in vain to search the Fundamental Law for a reference of a collective fundamental right, it only stipulates (as described above) that, in Hungary, local self-governments shall function to manage local public affairs and exercise local public power.[48] There is no doubt that a number of criticisms relate to this provision (more precisely: to the absence of the erstwhile provision). Already the fact that this provision was not included in the Fundamental Law is considered by many researchers to be a step backwards. The reason for this is that, in the past, the local self-government system was clearly based on the collective fundamental rights providing a sense of security by ensuring the inviolability of local self-governments.[49]

According to one researcher, there is a difference between the collective fundamental right entitled to the community of local voters and the local self-government, which is determined as a form of managing public affairs and exercising public powers. According to the effective text, the local self-government embodied in its given organizational form is only one manifestation of how self-governance can be the exercised.[50] Another scholar argues that with this change, the constitutional power created the opportunity for the Parliament to withdraw, even as a general rule, the right to execute municipal public functions and to entrust them to governmental bodies.[51] Again others point out that subsidiarity and the enforcement and the protection of autonomy have been relegated to the background.[52] It is, however, true that the general clause-based approach remained; in terms of the new wording, local self-governments are still bodies of general competence, also extended to the management of local public affairs.[53] Another researcher explicitly considers that the special Hungarian conception of local self-government was the structural problem of the previous system. This was, in principle, a serious source of conflict, which only did not cause any difficulties because the collective human rights approach was never taken seriously by anyone (he attributes the Constitutional Court's former views

47 Act XX of 1949, The Constitution of the Republic of Hungary, Article 42.

48 Fundamental Law of Hungary, Article 31(1).

49 Of course, the issue of local self-government still has a connection to fundamental rights, as Article XXIII of the Fundamental Law lays down the most important rules regarding the right to vote.

50 Tamás M. Horváth, 'Kiszervezés – visszaszervezés: A helyi közszektor változása', *Fundamentum*, 2012/2, p. 5.

51 Marianna Nagy, 'A helyi-területi önkormányzatok és az Alaptörvény', *Közjogi Szemle*, 2017/4, p. 19.

52 Péter Szegvári, 'A helyi önkormányzatok szerepváltozása a rendszerváltozás utáni alkotmányos rendszerben', *in* Nóra Chronowski *et al.* (eds.), *A szabadságszerető embernek – Liber Amicorum István Kukorelli,* Gondolat, Budapest, 2017, p. 766.

53 Hoffman 2012, p. 31.

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on the fundamental rights of local self-governments to this).[54] One other scholar also highlights – although not necessarily as a criticism – that in the absence of the voters' fundamental right, the absence of a functioning General Assembly cannot infringe the right either; it can only affect the constitutional provisions guaranteeing their powers.[55] Finally, there are researchers who bluntly claim that the change is dogmatically eligible, because conceptualizing it as a fundamental right has been criticized several times before; for instance, for the inapplicability of the fundamental rights tests.[56]

One thing is certain: the Fundamental Law establishes a system for the local self-governments, which may be interpreted in too many ways; allowing highly diverse scholarly conclusions. The multiple approaches concerning local self-government is perhaps the reason why researchers draw very different and contradictory conclusions from the existence (or even the absence) of the same rules. Another reason for this is that many take as premise the fact of what is missing from the Fundamental Law as compared to the former version of the Constitution, instead of evaluating what it actually contains. However, in my view, the system is very coherent. The Fundamental Law is not an amendment to the old Constitution, which is why they cannot be compared in their content; moreover, it only contains the most indispensable rules.

There is no doubt that, for many authors, changes to local self-governments are interpreted as directly emanating from the Fundamental Law. As far as I am concerned, even though I have witnessed the suppression of autonomy in many areas myself, I do not find such statements entirely convincing when extended to the Fundamental Law. Undoubtedly, the Fundamental Law has introduced many innovations, but it does not necessarily represent a step backwards; it rather seems that the Fundamental Law has shifted its focus to the exercise of local public power and to being operation-oriented.[57] For my part, however, I do not see far more radical changes resulting from the Fundamental Law. It maintains the decentralized system of local self-governments; provides the essential powers necessary for the exercise of autonomy; and limits the ability of central public bodies to intervene in matters on the local level. Although it lacks the idea of a collective fundamental right, this is not necessarily a regression if the powers are safeguarded.

In fact, defining it as a fundamental right was only suitable for protecting the system of local self-governments – revived after decades – at the highest possible level in the difficult period of the change of the regime, thus protecting the system from possible governmental intervention.

54 Zoltán Szente: 'Sarkalatos átalakulások – Az önkormányzati rendszer', *MTA Law Working Papers,* 2014/29, p. 4.

55 Patyi 2013, p. 387.

56 András Jakab & Emese Szilágyi, 'Sarkalatos törvények a magyar jogrendben', *in* György Gajduschek & András Jakab (eds.), *A magyar jogrendszer állapota,* MTA TK, Budapest, 2016, pp. 302-303.

57 András Patyi & András Zs. Varga, *Általános közigazgatási jog (az Alaptörvény rendszerében)*, Dialóg Campus, Budapest-Pécs, 2012, p. 312.

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The Constitutional Court has used this elusive fundamental right in its decades-long practice to deduce from it why local self-governments can have protected groups of powers. Several authors draw attention to the fact that the fundamental rights of the local self-governments were, in fact, protected groups of powers, which could not be limited on the basis of the general test of fundamental rights, since the practice of the Constitutional Court only prohibited them being hollowed out (the examination of the legitimate aim, necessity and proportionality of the restriction was, therefore, not a requirement); moreover, several self-government power had already been granted only within the framework of an Act.[58]

It is my firm belief that taking all these into consideration, the Fundamental Law does not bring a necessary step backwards regarding the right to local self-government;[59] it has only adapted the concepts to the previous practice. Nothing demonstrates this better than the fact that the legislative body has come to the same conclusion; since, according to the ministerial motivations of the Act CLXXXIX of 2011 on Local Self-Governments of Hungary (Act on Self-Governments), the fundamental aim is to ensure the unaltered and complete exercise of the citizens' right to local self-government.[60] In my view, the most important measure of this is – regardless of its name – guaranteeing the protection of the rights/powers of the local self-governments by the Constitutional Court and other courts. This does not primarily depend on whether it is expressly settled in the Fundamental Law, since, based on the above, this is implied, which the legislator has interpreted as such by enshrining it in the Act on Self-Governments.[61]

There is no doubt that the Fundamental Law could have relied even more on the judicial and constitutional court practice consolidated after the change of regime, but the lack of this does not in itself constitute a step backwards. The Fundamental Law has not exploited the two decades of jurisprudence (although this is contradicted by the fact that the deletion of the collective fundamental rights coincides with the Constitutional Court's former interpretation of the matter), which makes it the possibility of the new regulation consolidating a different interpretation of the law (especially under a very strict legal regulation) a certainty; but it would hardly be appropriate to attribute this to the Fundamental Law alone.

58 Csink 2014, p. 164; Patyi 2013, p. 382; Péter Tilk; 'Az önkormányzatok bírósági és alkotmánybírósági védelme az Alaptörvény és az új sarkalatos törvények tükrében', *Kodifikáció és Közigazgatás*, 2012/1, p. 42.

59 *Cf.* Lajos Csörgits, *A magyar helyi önkormányzati rendszer átalakítása – A demokrácia, a helyi közügyek és a helyi önkormányzás egyes kérdései*, NKE, Budapest, 2014, p. 25.

60 Act on Self-Governments, ministerial motivations.

61 Act on Self-Governments, Section 5.

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4.2. Normative Frameworks

The Constitution in force before 2012 stated that

> "the lawful exercise of the powers of local self-government is afforded the legal protection of the courts and any local self-government may appeal to the Constitutional Court for the protection of its rights."[62]

There is no similar provision in the Fundamental Law. Many authors see this as a step backwards in terms of legal protection, which is necessarily related to the aforementioned issue, namely that the Fundamental Law recognizes groups of powers instead of fundamental rights. According to a well-known point of view, this has radically changed the constitutional character of local self-governments; the local self-governments are institutions within the governing structure that cannot be confronted with the State.[63] I do not share this view.

Section 5 of the Act on Self-Governments declares that "The legal exercise of the functions and spheres of authority set forth in Article 32(1) of the Fundamental Law is protected by the Constitutional Court and other courts." At first sight, this provision seems reassuring in terms of the legal protection of local self-governments; however, on the one hand it is not a constitutional provision, and on the other hand, – as the Constitutional Court has stated – *per se* it is not a rule of competence; therefore it may only serve as a basis for legal protection if the legislator also establishes concrete rules of competence applying for the Constitutional Court.[64] I can agree with the view that this rule is only a kind of basic principle, which prevails in specific legal institutions of the Act. Based on this, in the event of a dispute, it should be assumed that the legislator intends to promote the lawful exercise of the functions and powers of local self-governments. Therefore, legal disputes may be brought before a court in accordance with the general rules, which are adjudged by the court within the framework of guarantees under the Fundamental Law. At the same time, it is also true that the protection of rights of local self-governments can only be interpreted if the subjective rights of the local self-governments are enshrined both in the Fundamental Law and in an Act.[65]

As for the details, opinions are, of course divided in this regard as well. In Marianna Nagy's interpretation, for instance, this rule only protects the exercise of competences, but not the rights of the local self-government. She is concerned about this for a number of reasons, even if the previous regulation has also only established the theoretical basis for legal protection.[66] András Patyi, placing the emphasis elsewhere highlights the following important circumstance: the Act on Self-Governments, by ensuring the protection of the legal exercise of functions

62 Act XX of 1949, The Constitution of the Republic of Hungary, Article 43(2).

63 Imre Ivancsics & Adrián Fábián, 'A helyi önkormányzatokra vonatkozó szabályok az Alaptörvényben', *in* Tímea Drinóczi (ed.), *Magyarország új alkotmányossága,* PTE ÁJK, Pécs, 2011, p. 106.

64 Decision No. 3311/2019. (XI. 21.) AB, Reasoning [33].

65 Siket 2016, p. 56.

66 Nagy 2017, pp. 22-23.

and powers by the Constitutional Court and other courts as declared in Article 32(1) of the Fundamental Law, generates that besides the concept of public affairs determined in the Act, the functions and powers to be considered as the most important local public affairs are the ones enshrined in the Fundamental Law.[67]

In fact, the most contested issue is the protection of local self-governments by the Constitutional Court. What happens if the groups of powers enshrined in Article 32(1) of the Fundamental Law are violated? In this case, since a provision of the Fundamental Law is infringed, a proceeding before the Constitutional Court is needed. There is, however, no specific provision about this.

4.3. Theoretical Opportunity for the Proceeding of the Constitutional Court

It is obvious that the procedure of the Constitutional Court requires specific competence regulated by Act CLI of 2011 on the Constitutional Court (CC Act), which allows the procedure. The CC Act does not contain any named competence that would protect explicitly the local self-governments (as opposed to the German regulation already mentioned above), but this does not mean that legal protection cannot be achieved. The question is whether the competences of the Constitutional Court are suitable for a 'self-government-friendly' judgment, since considering that its main task, in principle, is the protection of fundamental rights.[68]

Under the previous Constitution, anyone could have initiated posterior norm control at the Constitutional Court. Under the current system, it is not excluded that a petitioner entitled to request a posterior norm control (*e.g.* the Commissioner for Fundamental Rights or one quarter of members of the Parliament) may turn to the Constitutional Court on behalf of the local self-government, but the local self-government in its own interest – after the abolition of the *actio popularis* – can only rely on the opportunity of constitutional complaint. This function, however cannot be fully applied, because – in light of the above – the right to self-government does not, in principle, enjoy the fundamental rights' legal protection at a constitutional level.[69] Moreover, in case of finance-related acts, in relation to Article 37(4) of the Fundamental Law, even this is limited,[70] since the National Assembly has generally narrowed the scope of competences of the Constitutional Court.[71] Conversely, it should also be emphasized that even an individual judicial decision may be contested in a

67 Patyi 2013, p. 393.

68 Zsolt Balogh, 'Önkormányzati jogvédelem', *Fundamentum*, 2012/2, p. 16.

69 Siket 2016, p. 54.

70 Tilk 2012, p. 44; Siket 2016, p. 54.

71 Fundamental Law of Hungary, Article 37(4): "As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its powers set out in Article 24(2)(b) to (e), review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. […]".

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constitutional complaint, which would obviously not be possible in case of a norm control.

Indeed, most authors emphasize that in the absence of being qualified as a fundamental right, the level of legal protection inevitably decreases. However, these authors do not necessarily take into account that the base of turning to the Constitutional Court is not the violation of a fundamental right; since the CC Act uses the term "rights guaranteed in the Fundamental Law".[72] The CC Act thus allows a person or organization involved in an individual matter to submit a constitutional complaint, if the petitioner's right guaranteed in the Fundamental Law was violated. Although, in terms of common sense, these concepts are very close to each other; the different wording may have a great significance, nonetheless. It has been a centuries-old practice for the state not to have fundamental rights, therefore it is impossible to violate a fundamental right of a public body. Of course, the issue is more sophisticated in reality, because the state acting as the possessor of public power and the Hungarian State acting as a private individual cannot be subjects to the same assessment. Perhaps that is precisely why the CC Act does not use the term 'fundamental right'; the right guaranteed in the Fundamental Law is a broader category since, depending on interpretation, it may include any constitutional rule the violation of which would cause the infringement of rights in some way. Clearly, this basically means the fundamental rights, but due to the division of powers, the respective rights of public bodies to one another are also not excluded, *e.g.* judicial independence or the groups of competences of local self-government.

In my opinion Article 32(1) of the Fundamental Law contains powers that should be interpreted as rights guaranteed in the Fundamental Law regarding local self-governments (several of them are the adaptation of certain fundamental rights to local self-governments), because in the event of their infringement, the autonomy which the Fundamental Law intends to ensure is impaired. If local self-governments were unable to turn to the Constitutional Court in order to protect these powers, they would become vulnerable to the central bodies of the executive power, as well as to the judicial decisions and legal regulations contrary to the Fundamental Law.

Even in this case, however, it is questionable what the measure of intervention might be: violation or hollowing out? Thus, the question is whether the intervention of the Constitutional Court requires the complete withdrawal or impairment of the task. Some say that impairment is unequivocally the measure,[73] since the Fundamental Law allows the local exercise of functions and powers 'within the framework of an Act', therefore the possibilities of the National Assembly in this respect are quite wide-ranging.[74] No wonder that some

72 According to ministerial motivations of the CC Act, it is important that constitutional complaint is submittable not only in case if fundamental rights were violated, but also in case if rights guaranteed in the Fundamental Law were violated.

73 Gábor Kecső, *A helyi önkormányzatok pénzügyi jogi jogállása – A jogállást meghatározó jogintézmények modelljei a bevételi oldalon. Anglia – USA – Magyarország*, ELTE Eötvös, Budapest, 2016, pp. 217-218.

74 Tilk 2012, p. 43.

see a decline in the level of legal protection by the Constitutional Court and other courts.[75]

In my opinion, this issue is more nuanced than that, since the legal protection does not only protect against the law created by the National Assembly. I also agree that only hollowing out can be the measure against the National Assembly, as autonomy only exists within the framework of an Act. However, the protection afforded by the powers may be broader in the event of a judicial decision contrary to the Fundamental Law or of a governmental intervention.

Clarification of the emerging issues is only possible on the basis of the practice of the Constitutional Court, as it is the only thing that can provide an answer to the question whether, in addition to the theoretical possibility, the protection of the local self-governments can be implemented in Hungary. The big questions are whether there is even a right to be constitutionally protected (this can be questioned in case of any petitioner who acts in the interest of the local self-government) and whether the local self-government can turn to the Constitutional Court in its own right.

4.4. The Practice of the Constitutional Court

The practice of the Constitutional Court in relation to the legal protection of local self-governments has only slowly begun to manifest in the recent years and one cannot distinguish a clear development curve in it. In fact, there have been only a few constitutional complaints[76] submitted by local self-governments which, by their content, would have forced the Constitutional Court to make a substantive statement on these issues. Since it is not really possible to find a logical connection between the decisions, I present the most interesting or important decisions in chronological order.

Order No. 3239/2012. (IX. 28.) AB did not deal with the right of motion, it just stated that the "disputed provision is a rule without direct effect",[77] therefore there is no place for the so-called direct complaint (a type of complaint without a previous procedure of a court). In *Order No. 3381/2012. (XII. 30.) AB* the local

75 Péter Tilk, 'A helyi önkormányzatok az Alaptörvényben', *Új Magyar Közigazgatás*, 2011/6-7, p. 23.

76 It is important to note that the CC Act regularize three types of constitutional complaints. According to Section 26(1) person or organization affected by a concrete case may submit a constitutional complaint if, due to the application of a legal regulation contrary to the Fundamental Law in their judicial proceedings their rights guaranteed in the Fundamental Law were violated. According to Section 26(2) Constitutional Court proceedings may also be initiated – by exception –, if due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision. According to Section 27 persons or organizations affected by judicial decisions contrary to the Fundamental Law may submit a constitutional complaint if the decision made regarding the merits of the case or other decision terminating the judicial proceedings violates their rights guaranteed in the Fundamental Law (or their powers contrary to the Fundamental Law). In all three types the possibilities for legal remedy shall have already been exhausted (or no possibility for legal remedy is available).

77 Order No. 3239/2012. (IX. 28.) AB, Reasoning [8].

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self-government referred to the discrimination against students, and the Constitutional Court stated that

> "The petitioner is a public administrative body – self-government –, they may request the adjudication of the constitutional complaint with reference to the violation of fundamental rights of self-government guaranteed in the Fundamental Law."[78]

It does not elaborate on what qualifies as a fundamental right of the self-government under the Fundamental Law. However, *Order No. 3050/2013. (II. 28.) AB* already stated that "groups of powers to be considered as fundamental rights of settlement municipalities are currently declared by Article 32(1) of the Fundamental Law."[79] The Constitutional Court did not state that these groups of powers were not protected, only that they do not include the right complained of in the motion.

Although it is also 'only' an order, but *Order No. 3105/2014. (IV. 17.) AB* has become a significant decision. The decision contains curiously contradictory statements, because according to its explanation the petitioning local self-government "did not indicate a right guaranteed in the Fundamental Law to which the local self-government is entitled."[80] Before stating this, the order also includes the following:

> "The Fundamental Law does not provide for the fundamental rights of self-governments, Article 32(1) of the Fundamental Law defines the components (elements) of local public affairs by listing the functions and groups of powers protected at a constitutional level and which can be exercised by the local self-governments when managing local public affairs."[81]

According to this, groups of powers enjoy, in principle, the protection of the Fundamental Law; however, they cannot serve as basis for a constitutional complaint. The order does not specify the procedure under which these groups of powers may be protected.

In *Order No. 3123/2014. (IV. 24.) AB* the Constitutional Court stated (although, clearly on the basis of the terminology prior to the Fundamental Law) that:

> "The constitutional complaint is one of the means of protecting the fundamental rights regulated in the Fundamental Law. The purpose of fundamental rights is to create constitutional guarantees against the power of state in order to protect the rights of citizens, individuals, or a community, and to ensure their autonomy of action. […] A public authority does not have

78 Order No. 3381/2012. (XII. 30.) AB, Reasoning [12].
79 Order No. 3050/2013. (II. 28.) AB, Reasoning [19].
80 Order No. 3105/2014. (IV. 17.) AB, Reasoning [8].
81 Id.

> fundamentals right that provide guarantees against the power of state and that would entitle it to submit a constitutional complaint."[82]

In contrast, in *Order No. 3269/2014. (XI. 4.) AB* the Constitutional Court stated that

> "The petitioning self-government has turned to the Constitutional Court as an organization affected by a concrete case, because, according to the petitioner, their constitutional rights have been violated. The Constitutional Court declared that the petitioner is affected and their possibility for legal remedy had already been exhausted."[83]

A major change was brought – although still not by a substantive decision – by *Order No. 3149/2016. (VII. 22.) AB*, which explained that, on the one hand, the Fundamental Law does not provide for the fundamental rights of self-governments, only for the protected groups of powers; on the other hand, however, there is no constitutional or statutory provision that would restrict or exclude the right for motion of local self-governments.[84] In relation to constitutional complaints, it concluded as per Section 27 of the CC Act (this is a constitutional complaint that can be requested against a judicial decision), that

> "The self-government may also submit a constitutional complaint according to Section 27 of the CC Act, if in the case affected by the legal dispute – serving as basis for the constitutional complaint – they act as a private legal entity and not as an entity exercising public power. Thus, regarding the right of motion, it is not the – otherwise special – legal status of the self-government that has relevance, but whether in the underlying case the self-government acted in a hierarchical relationship exercising its public power or acted as a coordinated entity of financial transactions."[85]

Although, this order contains important statements, it does not in fact present a self-government-specific argument; it rather shows that, in court proceedings, bodies that otherwise exercise public power, can find themselves in a position of any other private entity. However, there is also an additional, single-sentence continuation of the explanation cited above, which, somewhat confusingly, is not in line with this argument, attempting to turn this, otherwise logical, line of thought into an exclusive opportunity for action. According to this:

> "All these do not contradict the fact that, pursuant to Section 5 of the Act on Self-Governments – on the basis of motions submitted by other authorized persons and organizations – the Constitutional Court grants protection to

82 Order No. 3123/2014. (IV. 24.) AB, Reasoning [15].
83 Order No. 3269/2014. (XI. 4.) AB, Reasoning [9].
84 Order No. 3149/2016. (VII. 22.) AB, Reasoning [14]-[15].
85 Id. Reasoning [18].

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> the self-government in exercising acts of public affairs enshrined in Article 32(1) of the Fundamental Law."[86]

This sentence has another possible interpretation, namely that petitioners who act on behalf of local self-governments may only turn to the Constitutional Court in the above case, but not in any other cases. It is not surprising that, in light of this, a member of the Constitutional Court expressed in a dissenting opinion his fear that, with this restrictive approach, local self-governments will generally be excluded from the list of persons entitled to submit a constitutional complaint.[87]

It logically follows from the previous case that in *Order No. 3158/2018. (V. 16.) AB* the Constitutional Court specifically stated that:

> "It follows from Article C(1) of the Fundamental Law – according to which the functioning of the Hungarian State shall be based on the principle of division of powers – that when a self-government participates in a court proceeding as a party, regardless of the nature of the legal relation or the legal dispute, they have the right to a fair trial provided by Article XXVIII(1) of the Fundamental Law."[88]

Although, this decision still follows the previous scheme (that is, it is about a court case in which the local self-government participates as one of the parties), but it is a public administration case that has already presented several members of the Constitutional Court with the dilemma of having to think about what the role of a constitutional complaint was. In several concurring opinions appears the argument stating that constitutional complaint was not created with the purpose of providing legal protection to public authorities against other public bodies. However, it should be noted, that this is not the only case where we see the appearance of this opening. The Constitutional Court *e.g.* in *Decision No. 3173/2015. (IX. 23.) AB* and in *Decision No. 33/2017. (XII. 6.) AB* recognized judicial independence as a right guaranteed in the Fundamental Law, while in *Decision No. 23/2018. (XII. 28.) AB* it accepted the right of motion of the National Bank of Hungary in connection with a court decision.

These latter cases have paved the way for the legislative power branch to start thinking about whether the constitutional complaint could serve as a means for public authorities to contest court decisions. Pursuant to Act CXXVII of 2019, it was included into the CC Act that if a judicial proceeding violates the powers of the petitioner contrary to the Fundamental Law, it can serve as grounds to submit a constitutional complaint. As a guarantee, the Act also states that it is essential to examine whether the petitioner exercising public power is entitled to the right guaranteed in the Fundamental Law and indicated in the complaint. Moreover, the Act also stipulates that the petition can only be adjudicated on the merits if the decision contested may result in the serious disruption in the

86 Id.
87 Id. Dissenting opinion by Béla Pokol, [36]-[37].
88 Order No. 3158/2018. (V. 16.) AB, Reasoning [22].

functioning of the petitioner, or violates its powers laid down in the Fundamental Law. Although the practice of the Constitutional Court is not yet known, the CC Act, in principle, resolves the dilemma raised in the cases above; since it clearly provides the opportunity to contest court decisions on this basis (which is also a tendency reflected in the apparent practice of the Constitutional Court thus far). This is obviously a change that also affects the local self-governments; but it does not answer the original, local self-government-specific questions; especially regarding the constitutional complaints, which can be submitted against legal regulations.

However, the Constitutional Court has also taken steps to resolve issues related to the legal protection of local self-governments that have been open for years. *Decision No. 3311/2019. (XI. 21.) AB* is the first and so far the only substantive decision (although some of the decisions cited above have been accepted by the plenary session of the Constitutional Court), which specifically deals with the right of motion of local self-governments and with the groups of powers enshrined in Article 32(1) of the Fundamental Law.[89] In its decision the Constitutional Court stated that local self-governments (in addition to being parts of the unified state system) enjoy relative autonomy *vis-à-vis* central public bodies with regard to local public affairs, which is the essence of local self-governments; the most important elements of which are listed by Article 32(1) of the Fundamental Law. Local self-governments are in a vertical position compared to the classical actors of division of powers; therefore the relationship between central public bodies and local self-governments is quite delicate.[90] The Constitutional Court also held that nothing prohibits the local self-government from submitting a constitutional complaint in order to protect its rights guaranteed in the Fundamental Law.[91] Powers enshrined in the Fundamental Law should be interpreted as rights guaranteed in the Fundamental Law, because, in the event of their violation, the autonomy which the Fundamental Law intends to ensure is impaired. If these powers are infringed (as well as in the case of a violation of a fundamental right) local self-governments are entitled to submit a constitutional complaint.[92] The Constitutional Court has also explained that these powers provide protection especially against central bodies of the executive branch and against judicial decisions contradicting the Fundamental Law; meanwhile, if opposed to the legislative branch (since autonomy originally exists within the frameworks of the Acts) the measure of anti-Fundamental-Law actions can only be if these powers (or rights) are hollowed out.[93]

Based on this, it can be stated that the Constitutional Court clearly assumes the groups of powers set out in the Fundamental Law as rights; and local self-governments are entitled to submit constitutional complaints to the Constitutional Court in order to protect these rights, namely on the basis of

89 The wording of the draft of this decision was prepared by the author of this study.
90 Decision No. 3311/2019. (XI. 21.) AB, Reasoning [31].
91 Id. Reasoning [33].
92 Id. Reasoning [35].
93 Id. Reasoning [36].

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Section 26(2) of the CC Act. Regarding the level of protection, one can establish that, against the National Assembly, it has more limitations (*i.e.* the measure is hollowed out, while against other public bodies, protection is granted in a wider range.

At the time when this study is finished, there is no practice yet based on this recent decision or on the modification of the CC Act; and it is also obvious that we cannot expect in the future such a broad right of motion as the one previously granted by the *actio popularis*. Nevertheless, legal protection by submitting a constitutional complaint may be enough to provide protection for local self-governments against unlawful interventions violating their autonomies.

5. Closing Remarks

Local self-governments also form part of the state structure (supremacy of the state is therefore not in question); nor have they rights that may be opposed to the state, with the exception of their powers being respected. From a legal point of view, the goal of both the state and of the local self-government is to serve the public good. This is how they become counterbalancing powers: if there is a public interest of local nature separated from the central will, it will necessarily limit the margin of maneuver of the central public bodies. If autonomy is jeopardized, this can be particularly intensified, but it must not become an explicit political objective. Consequently, the relation between the goal and the means shall is not negligible: local self-governments do not operate to counterbalance the central power of the state (contrary to the views in vogue centuries ago); they only take this role as far as they must take the interest of the locals into account.

In many respects, local self-governments are in a subordinate position within organization hierarchy of the state. In my view, it is necessary to create the legal framework to ensure that central public bodies with a stronger power would not enforce their own political or professional preferences against the will of local communities having different political or professional beliefs. This is the purpose of the legal protection of local self-governments. In this context the legal system shall contain rules, which grant the protection of powers and there shall be bodies that enable the enforcement of these rules. This is indispensable for the protection of the autonomy of local self-government.

In my opinion, the central issue also in Hungary is that local self-governments shall be entitled to the protection of the Constitutional Court. Since December 2019, also the CC Act stipulates that, in case of a judicial decision, public bodies are entitled to submit a constitutional complaint to the Constitutional Court if the judicial proceedings violate their rights guaranteed in the Fundamental Law or violate their powers contrary to the Fundamental Law. This, in principle, is a relevant change in the text of the Act, but in reality, it only enacted the practice of the Constitutional Court.

The amendment of the CC Act, *per se*, does not determine what can be considered as protected powers and whether local self-governments have such powers. It neither mentions what happens if it is not a judicial decision, but a

legal regulation which is in violation of the right guaranteed in the Fundamental Law. However, *Decision No. 3311/2019. (XI. 21.) AB* sets out that local self-governments are entitled to turn to the Constitutional Court in their own right by submitting a constitutional complaint if a legal regulation violates their right guaranteed in the Fundamental Law (including powers enshrined in the Fundamental Law). The decision is still very recent, but through this, local self-governments may expect the substantive examination of the Constitutional Court in the future as well.

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