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Judicial Review in Hungary: The Turmoil of Organisational Changes through the Lenses of Procedural Law

Abstract

The last decade of Hungarian administrative justice and public administration has been marked by organisational changes. These changes affected the effectiveness of judicial review and of legal protection against administration in general. The article aims to trace these changes back and show how they are affecting procedural rules and diminishing legal protection against administration. First, a chronicle of the continuous changes of the organisation of administrative justice is given, together with the repartition of competences, to then turn to the interdependencies of administrative procedures and administrative litigation in the centralisation processes and their effects on the remedy system in administrative litigation. Finally, the rules on the composition of court as a third layer of organisational issues are analysed to conclude that the legislator somewhat set aside the policy goal of ensuring effective legal protection through the rules of judicial review.

Keywords: effective judicial protection, appeal, centralisation, administrative justice, composition of judicial panels

I A Rollercoaster of Five Organisational Models in Ten Years

Since 2011, Hungarian administrative justice has been the target of a constant desire for reform. This was not only a political wish, but initially emanated from scholars in view of the organisational reforms in other post-socialist countries during the preparation of the new Hungarian constitution. The aspirations within the judiciary for the rescue of autonomous labour justice, as well as the possibility of cost reduction twisting and distorting the original aim of establishing an autonomous administrative justice, finally led to the emergence of a

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hybrid solution, labelled by the legislator as a specialised court, but which cannot be classified as such. Act CLXI of 2011 on the Organisation and Administration of Courts established the so-called Administrative and Labour Courts (ALC) on the basis of the former labour courts, typically with a majority of labour-law judges and a labour-law judge as president, under the direction of the president of the General Court of the same territorial unit.[1] The next step was drafting the Code of Administrative Procedure, the preparation of which resulted in a proposal for a five-party consensus solution, aiming at replacing these 'pseudo-specialised courts' with eight administrative tribunals.[2] As consensus was not finally reached, the legislator used procedural tools to concentrate administrative cases into eight ALCs. It also designated the Metropolitan General Court as a 'Higher Administrative Court', as a special mixed forum for administrative cases. Although not creating a new court, the provisions of the Code of Administrative Procedure on the Higher Administrative Court, adopted by the National Assembly on 6 December 2016, were declared unconstitutional by the Constitutional Court in its Decision No 1/2017. (I. 17.) AB on the motion of the President of the Republic. The procedural tools remained, so a three-tier system of fora started its work on January 1, 2018, eight ALCs being designated as general first instance courts, the other twelve ALCs with competences in social adjudication only, the Metropolitan General Court as a mixed forum (first instance cases, mainly emanating from regulatory agencies and appeals against decisions of the ALCs), and the Curia as a forum for revisions and appeals from the Metropolitan General Court.

Subsequently, the Seventh Amendment to the Fundamental Law separated administrative justice from ordinary courts at constitutional level and created a two-headed justice system. Upon this new regulation, Parliament adopted Act CXXX of 2018 on Administrative Courts, the entry into force of which was later postponed by the National Assembly until mid-2019, when Parliament repealed the Act on the entry into force of Act CXXX of 2018.[3]

A series of surprises then started: upon the initiative of an opposition party,[4] the Eighth Amendment to the Fundamental Law was enacted with the support of the governing

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[1] Küpper defines this as a 'pseudo-mixed system', Herbert Küpper, 'Verwaltungsgerichtsbarkeit in Ungarn' in Armin von Bogdandy (ed), *Handbuch Ius Publicum Europaeum*. Band VIII. (Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren, C.F. Müller 2018) 717–826.

[2] At the same time transferring the remaining labour disputes, the number of which by that time had become quite small, to the general courts.

[3] Act CXXXI of 2018 on the entry into force of Act CXXX of 2018 and on certain transitional rules was repealed by Act LXI of 2019, § 1, as of 9 July 2019. Since a separate Act provided for its entry into force, the National Assembly cannot repeal the Kbtv. itself. See the translated acts at <https://njt.hu/translations/-:-:2018:-/1/10>. Cf. Krisztina F. Rozsnyai, 'Administrative Law 2018 Hungary: Droit administratif 2018 Hongrie' (2019) 30 (4) European Review Of Public Law 1431–1461; Renáta Uitz, 'An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts' VerfBlog, 2019/1/02, <https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/>, accessed 30 August 2022, https://doi.org/10.17176/20190211-223946-0

[4] It was the 'Párbeszéd Magyarországért' party.

parties. This amendment reversed all amendments in relation to the twin peaks of the court system and reinstated its unity – as much moreover, it went further and even abolished the constitutional basis for establishing special courts. The government was surprisingly more than ready to follow this line of legislation. Soon it initiated the enactment of an omnibus bill[5] titled the 'Act amending certain acts in connection with the establishment of single-tier district office procedures' (hereinafter: STDAP). As a quite remote connection, this bill also amended the acts on the organisation of administrative courts and on administrative court procedure: it abolished administrative and labour courts with effect from March 31, 2020. This marks the end of an almost *decade-long* process, by which the Hungarian court system has sought to move closer to the dualist system of administrative adjudication. At the same time, the other existing features of the dualist system, separate procedural law and separate adjudicative forums, remain in place despite the full integration into the ordinary court system, and administrative justice's separation from the civil and the criminal branches will even be reinforced, so there is only an organisational rewind, which does not mean that the new solution will fall into the monist category.[6]

With this amendment by the STDAP, the administrative court forum system became a two-tier system. It is true that the historical system of administrative justice was originally conceived as a two-tier system, but it did not materialise in 1896, nor later. In 1896, only the (supreme) Hungarian Royal Administrative Court could be established and all subsequent attempts to set up lower courts failed, so there was only one forum for administrative disputes until its abolition in 1949.[7] 1990 found Hungary already with an (almost entirely) monist three-tier system, the general courts (as civil courts) exercising appellate jurisdiction between the district courts and the Supreme Court. The idea of a two-tier system appeared again in the Act on Administrative Justice and was finally realised within the ordinary justice system – but only for a short time, from April 2020 to February 2022.

In terms of the number of instances, since the restructuring of the Austrian system there are now two or three levels of administrative adjudication everywhere. Historically, the three-tier system (i.e. first instance, appeal and review) was first introduced by Germany, and we find other three-tier systems established or developed over time, for example in France, Spain, Portugal and Greece. Recent changes to the English system can also be seen as an approximation to the German model. Many European countries, such as Austria, Poland, the Czech Republic, Latvia, Lithuania, Croatia, Slovenia, Bulgaria, the Netherlands,

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[5] Act CXXVII of 2019 on the amending of certain acts in connection with the establishment of single-tier district administrative procedures.

[6] Krisztina F. Rozsnyai, 'The Procedural Autonomy of Hungarian Administrative Justice as a Precondition of Effective Judicial Protection' (2021) 30 (4) Studia Iuridica Lublinensia 491–503, https://doi.org/10.17951/sil.2021.30.4.491-503.

[7] András Patyi, 'Rifts And Deficits – Lessons Of The Historical Model Of Hungary's Administrative Justice' (2021) 1 (1) Institutiones Administrationis – Journal of Administrative Sciences 60–72, https://doi.org/10.54201/iajas.v1i1.8

Finland and Austria, have only a two-tier court system.[8] Even in countries with a three-tier forum system, there is a trend towards two-tier jurisdiction, with an increasing number of countries opting for fewer forums to ensure the timeliness of judgments, such as in Greece and Spain, where there are significant exceptions, both by excluding appeals and by transferring first instance jurisdiction to higher courts. Consequently, even in the three-tier system, there are many cases where administrative court procedures are conducted on only two instances at most, and even exceptionally only on one single (first and last) instance. As another solution, appeals are, if not excluded, significantly limited in some three-tier models, or there is a possibility to not to allow appeal (e.g. Germany).

This tendency is fuelled not only by the requirements of the reasonable time requirement of the right to fair trial, but also by the experience that the *quality of judgments* does not necessarily improve with the number of judicial fora that one may access in a single case: contrary to the general opinion, it is mainly *influenced* by *the expertise of the judge(s)*.[9] As already noted, it an important tendency to observe that the accessibility of fewer levels does not generally lead to a reduction in the number of fora, but rather to a preference for differentiated distribution of competences. Moreover, in countries with only a two-tier forum system, there is a recurring demand for an intermediary level (e.g. in Bulgaria).

Neither is the number of instances necessarily related to the area and population of the countries. In countries similar in size and population to Hungary, a two-tier system is typical, but it is also found in much larger countries (e.g. Poland). Conversely, a three-tier system is mostly found in larger countries (e.g. France, Germany, Spain, Ukraine), but Portugal, for example, which is similar to Hungary with regard to number of inhabitants and size, has also established a three-tier system.[10]

This trend was also followed by the original system of Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: the CACP). Adapting a mixture of the German and the Spanish models, certain cases were put into the first instance competence of a higher court – a solution widely used in civil and criminal cases. After less than two years of this new system, without experiencing problems in the case-law, the only argument of the legislator for the decrease of the number of instances was that the system, 'with two and a half instances', was too complicated and it would suffice to have two instances. The new president of the Curia soon began to complain about the workload of his court, and,

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[8] Karl-Peter Sommermann, Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019, Berlin–Heidelberg); Karl-Peter Sommermann, 'Die Europäisierung der nationalen Verwaltungsgerichtsbarkeit in rechtsvergleichender Perspektive' in Ralf P. Schenke, Joachim Suerbaum (eds), *Verwaltungsgerichtsbarkeit in der Europäischen Union* (Nomos 2016, Baden-Baden) 189–211. https://doi.org/10.5771/9783845276472-189

[9] Cf. Kovács András Gy., 'A bírói határozatok karakterisztikája komplex döntéseknél' (2006) (2) Állam és Jog 269–289, 277.

[10] Krisztina F. Rozsnyai, 'Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure' (2019) (1) Central European Public Administration Review 7–23, https://doi.org/10.17573/cepar.2019.1.01

as another surprise, a new intermediary level has been inserted into the forum system: the appellate court, namely the Metropolitan Appellate Court. All appeal procedures against first instance decisions (mainly procedural orders) were transferred to this court – more precisely given back to this court, as it had the same competences before 2012. With this last step, Hungarian administrative justice almost arrived back to the starting point of the reforms initiated through the new constitution. One big difference is that the intermediary level now exclusively handles appeals, whereas before – both before 2012 and in the original solution of the CACP from 2018 to 2020 – it also had first instance competences. It is thus worth having a look at the repartition of competences.

II The Repartition of Competences

The dynamics of the static organisational system lies in the arrangement of competences.[11] Of course, there is always the question of, which is first, which is the determinant factor: should the organisation be developed according to the requirements of competences and procedures, or should the procedures be determined by the organisation? Even if we do not cut the Gordian knot, there are at least *three pillars of the* competence regime that are worth exploring: (1) in addition to ensuring access to courts against administrative action (2) the allocation of cases between administrative courts (material and territorial competence and the remedy system) plays a great part, and so do (3) the provisions on the composition of the court. It is therefore worth taking a closer look at these questions of administrative court procedural law, in parallel with the significant changes of organisation since the 1997 judicial reform.

As we have indicated above, there is an international trend of creating a differentiated repartition of competences, both in ordinary and administrative courts. This leads to the creation of courts with mixed competences: they proceed both on first and on second instance, which can enhance professionalism. Apparently, in a two-tier system, this is not possible except for a few cases because of the requirements of remedies, so the shift to the two-tier system necessarily led to the abolition of the differentiated repartition of competences, which although not a completely new phenomenon of the CACP, was however applied systematically for the first time in Hungary. Even so, it proved to be as ephemeral as previous attempts to create such rules. Article 6 of Act XXVI of 1991 transferred to the first instance jurisdiction of the county courts (now the general courts, at that time the courts of second instance in administrative cases), the first instance competence in administrative cases 'in which the administrative body of first instance proceeded with a territorial competence over the whole country'. This innovative solution was only in force

[11] Erdei Árpád, 'Gyógyítható-e a perorvoslati rendszer?' in Varga István, Kiss Daisy (eds), *Magister Artis Boni et Aequi – Studia in Honorem Németh János* (ELTE Eötvös Kiadó 2003, Budapest) 161–186.

for about a year, until 31 December 1993. The second pioneering attempt took place in the field of communications: in 2011 the Metropolitan Court of Appeal was granted successively competences to examine certain acts of the media and communications authority as a first instance court. This solution was also abolished quickly, at the end of 2012 by an amendment linked to the start of the operation of the ALCs.[12] The *CACP* institutionalised the differentiated repartition of competences in administrative justice on a general scale from 2018 on. As a substitute for the organisational changes, it *has had two directions to increase professionalism*. On the one hand, the Metropolitan General Court[13] was given the competences of a mixed court: it proceeded not just in appellate procedures against decisions of the ALCs, but also had the (exclusive) competence to proceed in some administrative disputes of priority, mainly disputes in connection with regulatory issues and professional bodies. On the other hand, it was necessary to concentrate administrative disputes in general on fewer fora than before, so there was also a repartition of competences between the 20 ALCs, as explained in the previous part: eight ALCs were mandated to proceed as general first instance courts with a regional territorial competence while the other 12 ALCs were only given the competence to proceed in administrative cases 'close-to-the-people': these were mostly groups of cases in certain areas of social administration. This meant that *four different allocations of* administrative disputes at first instance were *possible* under the CACP, since in addition to the eight ALCs, all 20 ALCs or the Metropolitan General Court could proceed at first instance, as well as the Curia as first and last resort in election and referendum disputes and in disputes relating to the right of assembly. This differentiated repartition of competences disappeared with the conversion to a two-tier system and the system really did become less complicated, as the regulation of disputes over material competences between administrative courts became redundant in the absence of several fora having competence for first instance procedures.

Thus, at least from this perspective, it is no wonder that the elements of a more sophisticated organisational solution[14] were put aside when (re)introducing the Metropolitan Appellate Court as a court proceeding in administrative cases. It would have contradicted

[12] Cf. Krisztina F. Rozsnyai, 'A közigazgatási és munkaügyi bíróságok felállításával kapcsolatos törvénymódosítások margójára' (2013) 68 (3) Jogtudományi Közlöny 147–153, 150–152.

[13] The Metropolitan General Court would have been named the 'higher administrative court' in the CACP. The name was finally abandoned following the constitutionality veto of the President of the Republic, who objected to it and referred the CACP to the Constitutional Court. Decision 1/2017. (I. 17.) AB of the Constitutional Court declared this solution to be of organisational nature and thus in lack of the supermajority unconstitutional. However, the functions were retained by the Metropolitan General Court with the exclusive competences being declared [sections 7(2) and 13(11) of the CACP]. See in detail in Nóra Chronowski, 'A sarkalatosság árnyalatai' (2017) (2) Közjogi Szemle 62–63.

[14] See, for example, the various special administrative courts (mainly in tax, social, competition and migration matters) that already exist in several European countries, Krisztina F. Rozsnyai, *Hatékony jogvédelem a közigazgatási perben: A magyar közigazgatási perrendtartás európai fejlődési tendenciákhoz illeszkedő kodifikációjának egyes előkérdései* (ELTE Eötvös Kiadó 2018, Budapest) 85–87.

the prior argumentation on the necessity to reduce the number of instances due to complexity. Besides the appellate procedures, the decisions over territorial competence disputes between general courts and for the designation of the proceeding administrative authority have been transferred to the Appellate Court. On the system of appeals, nothing changed; there are no appeals in priority cases and neither have they been transferred to the middle instance, according to the original design of the CACP. So, within four years there have been three different systems of the repartition of competences, the one most in line with European trends not being the present system.

III Administrative and Judicial Remedies as a Complex System

The remedies against administrative action, be that inner-administrative (often referred to as pre-trial) remedies or judicial remedies before an independent impartial court are in practice two (or more) parts of one procedure. The case law, both on the requirement of reasonable time of Art 6 ECHR (as well as other elements of fair trial) and on Art 13 ECHR is also grounded on this perception. It is not futile to shed light on the changes in a comprehensive manner.

1 The Elimination of Appeals of the Systems of Inner-administrative and Judicial Remedies

Another cardinal change, indicated in the title of the STDAP, was the transformation of administrative procedures into single-instance procedures and consequently in most administrative cases, appeals were abolished. In itself, abolition of the appeal procedure was not from evil intent: it depends on several factors whether the system of legal protection and the functioning of public administration can do without appeal. Among others, the guarantees of the first instance procedures as well as the professionalism of civil servants and public administration also play a great role, and, of course, there are also other means of control that play a part in safeguarding the legality of administration.[15] If we look at the different regulations in the German Länder, we can see that both models are applied and work well – there are Länder where there is a *Widerspruchverfahren* and others where there is none.[16]

This policy goal was already formulated at the drafting of Act CL of 2016 on the General Administrative Procedure (hereinafter: GAPA), but was successfully opposed (to some

[15] Wolfgang Kahl, 'Begriff, Funktionen und Konzepte von Kontrolle' in Wolfgang Hoffmann-Riem, Eberhard Schmidt-Assmann and Andreas Voßkuhle, *Grundlagen des Verwaltungsrechts,* Band III[2] (C.H. Beck 2013, München) 459–591, Rn. 139 ff., 208 ff.

[16] See a broader European perspective: Anoeska Buijze, Philip M. Langbroek and Milan Remac, *Designing Administrative Pre-Trial Proceedings* (Eleven 2013, Den Haag).

extent at least) by the public administration back then. Compared to Act CXL of 2004 on the General Rules of Administrative Procedure and Services (Ket.), the real change in the system of legal remedies had only been in the logic of the regulation and has had little actual effect. While the Ket. had considered appeal as a general remedy and specified the cases in which it was excluded and thus access to court was immediately available, the GAPA applies the opposite logic: it designates court action as the general remedy and allows appeal as an exception only. It was also a factual necessity that led to this change, as in the Government's bureaucracy-reduction programme, a heavy centralisation process took place, which resulted in the merger of most government agencies into the ministries, which did not want to deal with day-to-day second instance and supervisory procedures.[17] As the government agencies are however set up on two instances, these agency competencies could be transferred to them and the first instance procedures again transferred from government offices to selected district offices, these second instance procedures could be retained in quite a lot of fields of administration. This readjustment of competences was reflected in the initial text of Article 116(2)(a) GAPA, which, as an exception, allowed for appeals against the decisions of the district office. Thus, all this had resulted in a significant increase in the number of cases handled by the district offices,[18] so that appeals were possible in quite a large proportion of administrative cases, and there were only a few procedures which actually became single instance ones. This was again a transitory phase, as the STDAP eliminated this rule without giving any explanation. Since the entry into force of this provision of the STDAP, appeals only prevail in a general manner in tax administration and in local government and police administration cases.[19]

The elimination of appeals from the system of judicial remedies in administrative cases began with the 1997 judicial reform. At that time, the possibility of appeal against judgments of the court of first instance was largely abolished in administrative litigation and revision was only available against judgments of first instance – but for a long time it functioned like an appeal as, due to the absence of appeals, the restrictions that applied in civil proceedings for revision could not be applied.[20] This change was based, on the one hand, on the fact that, in connection with an administrative act – together with the appeals,[21] there could typically be a procedure over five instances with four remedies, which was deemed to be too much. On the other hand, according to the Constitutional Court's

[17] István Hoffman, János Fazekas and Krisztina F. Rozsnyai, 'Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-municipal Associations in the last Decades' (2016) 14 (3) Lex Localis 451–471, https://doi.org/10.4335/14.3.451-471(2016)

[18] Approx. 30 million cases a year according to OSAP (the Hungarian PA Statistical Database).

[19] Tax authority procedures are exempted procedures and regulated by the General Tax Procedural Code.

[20] Section 340/A of the former Act III of 1952 on Civil Procedure Rules (CPR). The amending Act of CXVIII of 2012 contained restrictions on the review of the value of the subject-matter of the action as of 1 September 2012.

[21] At that time, the inner-administrative appeal still was the general remedy against administrative decisions.

established practice on the right to remedy,[22] the provision of a single remedy instance is sufficient, since there is no constitutional provision on the number of levels, and the number of levels of remedy available against a decision is therefore a matter for the legislator.[23] Since the appeal and the court action were both regarded as remedies for the means of this right, but the requirement of judicial control over the administration has also to be respected, according to the Constitutional Court, the legislator thus fulfilled all criteria for the right to a remedy in administrative matters by providing for a single-instance court procedure, where an action may be brought by anyone whose right or legitimate interest is affected by an administrative decision.[24]

2 Is There an Interplay between the Appeal in the Administrative Procedure and the Appeal in the Administrative Court Procedure?

It is very interesting to observe the logics of the Hungarian legislator in view of the appeal procedures. Although they have the same name, they have a quite different function and shape in the administrative and the court procedures respectively. Whereas in the administrative procedure, the appeal is a procedure intended as a means of self-correction of the administration and as a means of evading judicial review, whereas the court procedure of second instance is centred around the legality of the first instance court procedure. Nevertheless, as both procedures can lead to the annulment (or even amendment) of the administrative act, their final goal is the same: that of ensuring subjective legal protection. However, this led to very differing legislative solutions.

When the second instance court procedure was abolished in general from 1999 on, there was an exceptional case where the appeal remained possible. It was reserved for cases where the court could amend the administrative act and only a single-instance proceedings has preceded the administrative action. This rule seems to have been intended to make it clear that, contrary to the view of the Constitutional Court, a single instance of judicial review is not sufficient where the court has the power to amend the decision and where there was no internal appeal.[25] It was later altered, and appeal was only granted in cases

[22] This is a human right guaranteed by Hungarian constitutional rules, which is quite unique in its scope as it offers not protection against the administration, but in general a remedy against the decisions of authorities and courts.

[23] Decision 9/1992 (I. 30.) AB, ABH 1992, 68. On the evolving practice of the Constitutional Court: István Hoffman, 'A jogorvoslathoz való jog érvényesülése a közigazgatási hatósági eljárásban – különös tekintettel a közigazgatási határozatok bírósági felülvizsgálatára' [2003] Themis: Electronic Journal of the ELTE Doctoral School of Law and Political Sciences 27–38, 34.

[24] István Varga, 'A jogorvoslathoz való jog – Alkotmány 57. §' in András Jakab, (ed), *Az Alkotmány kommentárja* (Századvég Kiadó 2009, Budapest) 2053–2174. On the constitutional bases of administrative justice evolving between the right to remedy and the principle of control over the administration: András Patyi, *A magyar közigazgatási bíráskodás elmélete és története* (Dialóg-Campus 2019, Budapest) 188–211.

[25] The former CPR Chapter XX Section 340 para (2). However, since in addition to those two conditions, the rule in question initially, until 2009 included the additional conjunctive condition that the decision must have been made

where there actually was an amendment. Consequently, there were hardly any amending judgments – but that was only one of the reasons not to amend.

Institutionalising several types of actions besides the contestation action,[26] a differentiated approach was necessary in the codification process of the CACP. Because of the widening of access to court, there could be cases where the court procedure is not preceded by an administrative procedure, in view of which the first instance action would already be deemed to be a remedy. And while one of the starting points for codification in the case of contestation actions was thus according to the case law of the Constitutional Court that the scope of the remedies could be narrowed, for the other types of action this issue required complex examination. It has also become clear, however, that neither the power to amend nor the single instance nature of the preceding procedure makes it absolutely necessary to provide for additional remedies. However, these considerations have not led to a curtailment of the system of appeals, the main reason being the large-scale reduction of appeals in the parallel codification of administrative procedural law. To counterbalance the envisaged single-instance-model of administrative procedures, the first proposal of the CACP, submitted for public consultation by the Ministry of Justice on 3 April 2016, provided for an ordinary remedy against court judgments: judgments would have been subject to a referral to the second instance court.[27] The name itself shows that, at the same time, this ordinary remedy against judgments would have differed significantly from the appeal, namely on the issue of generality. The lodging of a referral would not in itself have created an obligation to adjudicate, there would have been a screening by means of an admissibility test, and the second instance court would have essentially only accepted appeals which met one of the criteria laid down by law. In principle, this model would have applied, but not in all cases, precisely because of the different construction of the preceding proceedings. Where there was no prior administrative procedure, there would have been no admissibility test to ensure at least a two-instance adjudication, nor would there have been any admissibility test for appeals against orders. Given the principle of effectiveness, the proposal was intended to concentrate the second instance procedures primarily on the examination of illegality and to discourage possible dilatory behaviour. Therefore, the invocation of a new ground or fact in second-instance proceedings would have been possible only as an exception. In the event of a referral being successful, the court would have exercised a mandatory amending power, except for the most serious vices which would have led to annulment.

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by an administrative body with a countrywide territorial competence, a condition which called into question the relevance of that connection. So did the fact that the original concept would have provided for an appeal in general in the case of payment obligations exceeding HUF 2 million – a condition in accordance with the logic of civil law, but not really viable in administrative litigation. The latter condition was taken out of the judicial reform package by Article 5 of Act LXXI of 1998, which amended Act LXXII of 1997 amending the former CPR three days before its entry into force.

[26] Like actions for failure to act, mandatory and declaratory actions or supervisory actions. See Chapters XXII–XXIV of the CACP at <https://njt.hu/jogszabaly/en/2017-1-00-00> accessed 30 December 2022.

[27] In Hungarian it would have been called 'fellebbvitel' instead of 'fellebbezés' (appeal).

In addition to appeals and complaints, the proposal would have provided for revision and retrial as extraordinary remedies. As regards revision, two important changes were envisaged: the proposal would have *radically reduced the scope of revision* to judgments except for those brought on administrative action not preceded by formal administrative proceedings.[28] These are typically disputes with close links to other areas of law (administrative contracts – civil law, civil service disputes – labour law), which are also dealt with by different courts, so the need to ensure legal unity is even more existent. In the absence of a preliminary procedure, the extraordinary remedy would still 'only' be a third instance procedure in these disputes, which was an argument in favour of fewer restrictions on the revision. The narrowing of the scope of revision would have resulted in a new setting, in which the most important role of the development of the case-law would have been played by the higher administrative court, and not the Curia, the guardian of the uniformity of the whole system of case-law.[29] The design of this remedy system was undoubtedly also influenced by the expectation that the creation of an independent administrative court of second instance could be achieved and make way for professionalisation and autonomy of administrative justice within the unitary model of justice ensuring both subjective protection and the important objective functions of developing and preserving the unity of the administrative court's case-law and the possibility of reacting to interpretative difficulties arising from the introduction of a new system.

The document submitted to Parliament already contained a different system of remedies. The reasons for this were, on the one hand, the criticisms of the administrative bodies against the referral – mostly the admission procedure which was perceived as a hindrance to remedy – and, on the other hand, the objections of the Curia. Thus, instead of the referral, the admission procedure has been abandoned and the appeal has been 'reintroduced' into the system of judicial remedies, but severely limited to three constellations (judgments upon mandatory actions and failure to act actions,[30] and against first instance judgments in priority cases). The revision procedure has been broadened in parallel, with the introduction of an admission procedure. The admissibility grounds were not the grounds for the referral but became admissibility grounds similar to those in the Code of Civil Procedure, reflecting the primacy of the function of securing the unity of law: the need for a preliminary ruling, the importance of the case, the need to ensure the unity of the application of the law and the deviation from the published practice of the Curia. However, the dual role of the Curia in the appeal system was maintained, as the law

[28] The introduction of the referral would have meant that in a typical case (i.e. in authoritative administrative proceedings) the ordinary remedy would have been accompanied by proceedings at least on three instances, or even at four instances, if an inner-administrative appeal was exceptionally granted.

[29] For a detailed analysis see András Gy. Kovács, 'The Curia's tasks in the Code of Administrative Court Procedure' (2018) Tomus LVII, Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominata Sectio Iuridica, 15–25, at www.ajk.elte.hu/annales. https://doi.org/10.56749/annales.elteajk.2018.lvii.2.15

[30] And other administrative acts, where there was no formal administrative procedure for the realisation of the administrative action, like policing measures.

allowed appeals to the Curia against the first-instance decisions (judgments in priority cases and some orders) of the Metropolitan General Court.[31] These features were left prima facie untouched by the STDAP, but all together it was a great change, that judgments in priority cases could not be appealed any more, taken together with the change of the decision powers in revisions.[32] The fact that the inner-administrative appeal was at the same time almost completely abolished from the administrative procedure would have made it necessary to rethink the remedy system.[33] The legislator surprisingly established another causality link: the legislature did not think about how this reduction of legal protection could be counterbalanced, but eliminated the power of the court of first instance to amend administrative action except for those administrative acts that were carried out in a two-instance forum system. In this way, the system of decision powers in the CACP centred around the primacy of the *ius reformandi* has become somewhat obsolete: how are, for example, obligatory grounds for annulment to be interpreted; what is the situation with the amendment as a sanction for non-fulfilment of the judgment? These questions were not addressed, as there was no systematic revision. With the insertion of an additional conjunctive criterion for amending judgments, namely that the administrative act has to be performed in a multiple instance procedure, this power has experienced a serious cutback as, outside of tax administration, there are very few sectors where an appeal would be granted by the sectoral legislator.

IV Changes in the Composition of the Court

Although the constitutional rule was and is principally that 'courts shall adjudicate in panels',[34] this was and is rarely the case at first instance due to the first part of the sentence, 'Unless otherwise provided in an Act'. In administrative justice, the composition of the first instance court as a single judge was the general rule, cases have almost never been transferred to a chamber (in several courts, there has only been one or two judges, so no panel could have been formed at all), and even trainee judges could proceed alone. The CACP tried to return to the general rule of the constitutional principle but, being realistic,

[31] Kovács (n 29) 21.

[32] Aligning the rules of revision in the CACP with the decision of the ECtHR in the *Pákozdi v. Hungary* case of 25/11/2014 (ECLI:CE:ECHR:2014:1125JUD005126907), amendment of the judgment is only possible if the Curia annuls the court judgment together with the administrative action and orders a new procedure. In all other cases, only cassation is possible, which means a much longer procedure than if the Curia would proceed as an appellate court, having the possibility to amend and bring the case to an end.

[33] The Curia was handling the admission procedure in a very restrictive manner in the beginning. As there were some corrections made by the legislator, the figures improved as well as.

[34] The Fundamental Law of Hungary, Art. 27 (1).

it allowed for single judges to proceed in some cases.[35] The proportion of the two models, originally already quite in favour of the single judge at the end of the codification process, was further pushed in that direction by putting even all administrative cases decided at the lowest territorial level (where there often is less administrative procedural expertise) into that category – another guarantee helping to balance out the lack of pre-trial appeals is weakened.[36]

The reorganisation into a two-tier system had a great impact on case numbers as well. The Curia, becoming competent for all remedy procedures, experienced a great rise of numbers; as all appeals reached this forum: in the first 20 months, there was a quadruplication in the numbers of appeals.[37] A rise was anticipated due to a surprising piece of law: appeals against orders should have been handled by single judges at the Curia. This had only one precedent in the admissibility decision of the revision – a solution that was declared unconstitutional at that time. Because of the criticism, this rule was first altered, and its scope was restricted. The single judge could also decide on transferring the case to a chamber. At the end of 2020, with effect from January 1, another surprise in the Act on the organisation and administration of courts followed, which was heavily criticised by the Venice Commission.[38] The new president (entitled to be nominated president according to the rules of the STDAP) received the power to designate groups of cases where chambers of five judges could proceed instead of the 3-judge-panels. This rule was not altered in view of the criticism, but the rules of the CACP were amended instead. Since the returning to the three-tier system, the general rule for the composition of panels of the Curia – only in administrative matters – is s panel of five judges. With full discretion, the president of the chamber (and not the chamber itself, as is the rule in the first instance procedure *per* CACP section 8) may transfer the case to a panel of three judges. It is an exceptional possibility, yet without any reference to the grounds that could justify such an exception. The requirement of Art 6 ECHR regarding the court established by law is clearly not met in these cases.

The number of Curia judges remains constant, and the problem of having now – at least for some years until the retirement of quite a few judges – too many judges at the

[35] There is a list of matters that can be dealt with by a single judge 'ex lege', and the chamber may also decide that one of the panel members proceeds alone if the case does not present any legal or factual difficulty. The courts in remedy procedures always proceeded in chambers.

[36] The powers of the 'ex lege' single judge have been significantly extended as of 1 January 2020 by the STDAP. In addition, according to section 8(3)(d) of the CACP, the category of cases in the competence of all ALCs, which has become obsolete, has been replaced by cases handled by district offices and local government bodies, which, as mentioned above, represent a very significant proportion of administrative cases. The increase of the threshold to HUF 10 million in Article 8(3)(b) for cases brought on the basis of an action contesting a payment obligation with a basic amount not exceeding HUF 5 million also results in an expansion of the use of the single judge. In addition, the inclusion of the orders rejection and termination of the procedure in § 8(3)(g), alongside the ancillary relief is of little consequence.

[37] See <https://birosag.hu/birosagokrol/statisztikai-adatok/statisztikai-evkonyvek> accessed 30 August 2022.

[38] Opinion CDL-AD(2021)036-e at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e> accessed 30 August 2022.

Curia has not been tackled. Transferring judges, as happened back in the early 2000s,[39] when the Court of Appeal was set up for the first time, and several judges opted for being transferred to the Court of Appeal, would probably not work in the present situation, after so many organisational changes. It might seem an infringement of the independence of judges. The new composition in practice, at least for 5-judge grand chambers – finally and retrospectively – provides a legal basis for the system of grand chambers developed a few years ago, contrary to both procedural law and organisational law.[40] but is still lacking transparency. At least, 'from 16 July 2022 no seconded judges will adjudicate cases at the Curia, and from that date on, the secondment of judges who have been working here until now will cease'.[41]

V Conclusions and Perspectives

The abolition of pseudo-autonomous[42] ALCs is not necessarily a step backwards in itself. Organisational autonomy is not indispensable, though undoubtedly a useful condition for high-quality administrative adjudication and thus the organisational solution followed by the majority. As the ALCs could not be said to be organisationally autonomous from the ordinary courts, their abolition does not in fact affect the autonomy of administrative justice. Professional autonomy is also improved to some extent by the re-institutionalisation of the Administrative College at the Curia and the prohibition of the fusion of administrative colleges with other colleges.[43] The restoration of the three-tier model after a short period with the two-tier system is a reasonable decision. However, the intermediary level should have been redesigned as a mixed forum, not only handling appeals, but also dealing with first instance cases. This would have been essential both for a deeper understanding of procedural issues, and for a more complete competence of the Curia to rule on both procedural and material law. Without the first-instance competences of the Metropolitan Appellate Court, quite a few really important procedural issues cannot reach the Curia,

[39] The judges consented to be transferred as they were offered the position of head of panel and the same salary as at the Supreme Court.

[40] See in detail in Viktor Vadász; András Gy. Kovács, 'A game hacked by the dealer' VerfBlog, 2020/11/10, <https://verfassungsblog.de/a-game-hacked-by-the-dealer/> accessed 30 December 2022, https://doi.org/10.17176/20201110-200050-0, as well as Kovács András Gy., 'Adalékok a Kúria első elnöke jogállamhoz való viszonyának megértéséhez' (2020) (4) Fundamentum 20–34.

[41] See the press release <https://kuria-birosag.hu/en/press/termination-activity-seconded-judges-curia> accessed 30 August 2022, reacting on one of the points of criticism from the Venice Commission and the EU. The problem in detail: Ágnes Kovács, 'Defective Judicial Appointments in Hungary: The Supreme Court is Once Again Embroiled in Scandal' VerfBlog, 2022/9/27, <https://verfassungsblog.de/defective-judicial-appointments-in-hungary/> accessed 30 August 2022, https://doi.org/10.17176/20220927-230658-0

[42] Cf. Küpper (n 1) or F. Rozsnyai (n 12), 147.

[43] The college is formed by all judges assigned to the same section of the Curia. There are at present three such colleges, the Civil Law, Penal Law and Administrative Law College.

like e.g. problems of interim protection. This lack produces lacunes in the case law and the uniform interpretation of statutory law.

At the same time, further amendments to the rules of jurisdiction of the CACP, which are not at all related to the abolition of the ALCs and are not justified on the merits, such as narrowing the scope of judicial protection, the curtailment of the court's decision-making power and the reduction of proceedings in chambers, as well as the expansion of the Curia's chambers, all indicate that the legislator believes that administrative adjudication has become too efficient.[44] The almost complete abolishment of appeals in the general rules of administrative procedure raise a number of questions and fears for the future of effective legal protection against the public administration, which are only fuelled by the introduction of the uniformity complaint and the right of public bodies exercising public authority to lodge a constitutional complaint.[45]

The real goal of the changes to the administrative court procedure may be best revealed by the explanatory memorandum on the change of section 4 and 5 of the CACP. Here, the legislator makes no secret of the fact that it considers this solution – less than three years after having adopted it – to be too progressive, and deems a return to the prior solution criticised for more than a century[46] to be necessary: 'The regulatory logic of the CACP returns to the pre-2018 rules as regards the scope of the CACP, and the possibility of contesting an authoritative measure and the contesting of general act is therefore removed from the general clause.'[47] However, it is not clear from either the general or the detailed explanatory memorandum why this return is necessary.[48] But all the changes listed here

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[44] It was only one and a half years after the entry into force that the STAD was enacted. So, there was rather a fear of legislature of the future: These changes however hollow out the most important improvements brought by the CACP.

[45] The preclusion rules in evidentiary proceedings, for example are conceived for a model where a pre-trial appeal is typically possible and the case is properly clarified in the administrative procedure. Contrary to this perception, there are now even procedures *ex officio*, in which the party does not have to be notified of the procedure if is a decision shall be issued within 8 days. The same is true for the rules on shifting the burden of proof, the *ius reformandi* or the administrative loop (the healing of irregularities and flaws in the administrative action by the administration during the administrative court procedure). Cf. F. Rozsnyai (n 10) 16–19.

[46] See Patyi (n 24) 46–62 for an analysis of the historical model and a summary of the critiques already formulated at that time.

[47] Explanatory memorandum to sections 202 and 203 of the Act adopted.

[48] The eighth amendment to the Fundamental Law of Hungary seems to confirm this. The restoration of Article 25 to the pre-Seventh Amendment wording, in addition to omitting the possibility of establishing specialised courts from paragraph 4, has removed from paragraph 2 the phrase 'in any other matter specified by law' [originally in Article 25(2)(a), and after the Seventh Amendment, coupled with the phrase 'in administrative disputes' in Article 25(3)]. The much-criticised concept of 'administrative decisions' under former Article 25(2)(b) has also been reinstated in this way [see e.g. Patyi (n 24) 211–226]. This is the second time that even the term 'administrative dispute' has been removed from the text of the Fundamental Law. First, the Fourth Amendment removed these words from the rule of Article 25(4) on the possibility of the establishment of specialised courts – after the establishment of the ALCs. The 7th Amendment to the Fundamental Law of Hungary defined the field of administrative courts using the concept of administrative dispute in Article 25(3). The Eighth Amendment

bring us back to the past, to a status quo of 2010. All this shows that, after a short transitional phase,[49] the policy goal of rendering judicial review effective has been set aside, and looking at the present numbers of rejections and dismissals, there is not much prospect for the judiciary upholding that policy goal.[50] But hope abides.

restored the text to the version after the Sixth Amendment, with the two substantive differences indicated and without the division of paragraph 2 into points a)-d).

[49] See on the achievements F. Rozsnyai (n 10).

[50] See for the statistics István Balázs and István Hoffman, 'A közigazgatási hatósági eljárás aktuális kérdései veszélyhelyzet idején' (2022) 2 (1) Közigazgatás-Tudomány 5–27, https://doi.org/10.54200/kt.v2i1.35. Although the approx. 20% is a relatively fair number as to claims being upheld, there is a reduction of 6% for 2021, in spite of the abolition of the appeals, where the rate of success was previously around 25%.