Metamorphosis of the sanction power of local self-governments[1]

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Introduction

The paper introduces the most recent processes taking place within the Hungarian administrative sanctioning system. These include the realignment discernible between subjective and objective sanctions, with the latter gaining more and more ground. It discusses how the Constitutional Court evaluated the changes and showed that according to the constitutional body the state – complying with such legal principles as the rule of law or the requirement of human dignity – has the opportunity to implement changes within the scope of the sanctioning system with the aim of enforcing administrative law. In 2012, however, several important changes took place simultaneously. The new Act on Offenses shifted towards criminal law while it terminated the right of local governments to regulate offenses. In parallel with this, the Act on Local Governments at the beginning provided an opportunity for the local governments to sanction anti-social behavior which was revoked by the Constitutional Court in the same year. The paper investigates the effect of the decision and analyzes the opportunities of local governments within the present legal framework to create sanctions and defines those criteria on the basis of which the legislator could settle the current situation.

I. Antecedents

The Fundamental Law of Hungary took effect on 1 January 2012 as the fundamental rule of constitutionality and it induced the extensive reexamination and reframing of the legal system. As part of this process, the new law on local self-governments was created in 2011 and the new law on offences (misdemeanors) was created in 2012. In many respects, it has started a new chapter in the history of administrative criminal jurisdiction. In parallel with this change the system of public administration was transferred also significant.

Following the political transformation in Hungary, Act II of 2012 is already the third law on offences to be applied in our country, however, in many respects jurisdiction has not reached a point of rest this time either. A basic way of subdividing the administrative sanctioning system is to distinguish between subjective and objective sanctions. Such division also has major practical significance. The most important constitutional change recently has been the realignment of these two groups with an obvious shift towards objective sanctions. This process was clearly speeded up by the Act on Offences adopted in 2012. This legislation, on the one hand, significantly decreased the number of (petty) offences by terminating the right of local governments or other public administrative bodies to sanction offences. On the other hand, it repelled the so far so typical Janus-faced nature of offences, as the legal institution shifted it towards criminal law and anti-administration was even eliminated from the preamble specifying the objectives of the legislator.

The realignments that took place in the sanctioning system could be perceived even earlier, although they have received wider publicity due to the introduction of the so-called objective

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traffic fines in 2007.[3] This time the legislator transferred certain actions, speeding for example, that until then belonged to offences and were protected by offence guarantees, into the realm of objective sanctions (also). This reclassification was only partial at the beginning but became complete later on. This was the first time that it arose significantly that the state shall specify certain criteria that can be applied to administrative sanctioning. The situation was complicated by the fact that neither the former Constitution, nor the current Fundamental Law include expressis verbis any stipulations regarding the administrative sanctioning system, thus, in its resolutions, the Constitutional Court had to deduct those criteria that have to be considered in this matter from the general principles.

II. The Realignments of the Administrative Sanctioning System

Resolution no. 498/D/2000 examined the relationship between the Constitution and the sanctions specifically, which at that time already acknowledged the free discretion of the legislator in connection with the regulation of the sanction's application conditions and degree of the sanction by claiming that this discretion is limited by the stipulations of the Constitution. Such a standard should suit especially the principle of the rule of law or personal freedom and human dignity.[4]

Constitutional Court decision no. 60/2009. (V. 28.)[5], establishing the constitutionality of objective traffic fines, acknowledged the objective sanctions based on statutory laws starting from the common basis of administrative sanctions. In this decision, the Constitutional Court stated that objective responsibility in itself is not unconstitutional and is not against the principle of the rule of law. In traffic, major emergencies can occur, as a result of which there is an overriding public interest related to the observance of traffic rules. The latter can be enforced by the state by means of sanctions, which makes it possible that the offending party shall take responsibility for his/her behavior. According to the opinion of the constitutional forum, the objective sanctions (that in the public opinion are perceived as the non-guilty offender being fined) do not threaten legal security, to the contrary, they encourage and facilitate it. The legislator is free to decide what form of liability it establishes within the frameworks of the particular branch of law, this way it also has the opportunity to create a new field of law besides the already existing branches, thus also reflecting on and reacting to new social phenomena. In this respect efficiency is a key factor, which is clearly promoted by the almost unavoidable sanctions.

The strict liability of operators that is independent of culpability is not unconstitutional either if it meets the following criteria: the norm containing the sanction and the presumption of liability has a clean and fair content and the presumption has to be rebuttable. In case the sanction fulfills these criteria, then the violation of the rule of law cannot be established.

In connection with offences, the problem of the abuse of rights can also emerge, in view of those expressed in the Constitutional Court's Resolution no. 31/1998. (VI. 25.). Based on the decision of the Constitutional Court "*that stipulation is also unconstitutional that is against the mentioned prohibition because the legislator used a legal institution for a purpose not*

[3] Nagy, Marianna: Objektíven a közigazgatási objektív felelősségről [Objectively about the objevctive administrative liability] Közigazgatási Szemle 2008. 2, 2-14.
[4] CC decision no. 498/D/2000 ABH 2003, 1202, 1206.
[5] CC decision no. 60/2009. (V. 28.) ABH 2009. 501.

intended within its legal system."[6] In connection with the reclassification of offences to objective sanctions, the objective of the administrative sanction was the starting point, which is nothing else but the enforcement of administrative law, while one of the generally prevailing functions of administrative sanctions is prevention. The administrative fine strongly fulfills this function according to the body, while the grounds for exclusion of culpability are the characteristic feature of another branch of law, criminal law, the application of which is not a constitutional obligation. Therefore, according to the resolution, it is not an abuse of rights from the part of the legislator if in the case of administrative fines it does not stipulate the application of the presumption of innocence and the grounds for exclusion of culpability.

However, from this decision it also follows that the offence sanctions become more independent in many respects and are separate from other administrative sanctions. Although offences currently belong to the realm of administrative law, as a branch of law, in their operation there are such principles of criminal law prevailing as the presumption of innocence or the grounds for exclusion of culpability. These principles, however, do not form a constitutional hindrance for the legislator to reclassify offences to objective sanctions due to preventive considerations and for the purposes of enforcing administrative law as an objective. This presumably does not apply to the typically criminal type offences, whose aim is not to enforce the administrative law. In connection with and exactly because of this Tibor Madarász already established it in 1989 that these exemplify that the objective of the administrative sanctions specified by law is wider than the theoretical objective, i.e. the enforcement of administrative law.[7] These actions were included in the offences law undoubtedly because of the need for decriminalization, however, their character affects offences as a whole and practically entails the need for higher level guarantees.

III. The Constitutional Court's Resolution no. 38/2012. (XI. 14.)

The Constitutional Court's resolution no. 38/2012. (XI. 14.) served as a milestone for several reasons. It evaluated the new Act on Offences of 2012 and classified it as belonging to criminal law at the same time, it stated that the then effective regulation of homelessness was unconstitutional, and annulled the stipulation of the Act on the Local Governments of Hungary authorizing local governments to create sanctions. According to the latter, the significantly antisocial behaviors can be penalized by means of fines and on-the-spot fines.

In this decision the Constitutional Court expressly stated that the offence lost its role in the sanctioning of anti-administration behavior and its "petty criminal law" feature became dominant. As a result, the offence has practically become the third, most moderate level of the (not yet existing) trichotomous criminal law system, similarly to the rules of the misdemeanor criminal code. As a result of this, the already existing postulate has become general, stating that in the case of criminal offenses endangering human life, physical safety, health or law or violating accepted rules of cohabitation, the sanctioning can be of ultima ratio type.

In line with the Constitutional Court's 2011 decision discussing garbage picking, the management of social issues with sanctions was classified as unconstitutional and pointless. At this point it should be emphasized that due to the shifting of the offence area of law

[6] CC decision no. 31/1998. (VI. 25.) ABH 1998, 240, 245-246.
[7] MADARÁSZ Tibor: *Az államigazgatási jogi szankció fogalma és fajtái*. [The definition and types of the state administrative sanction] ELTE, Budapest, 1989. 37-42.

towards criminal law, those criteria with which sanctioning can be evaluated have changed or at least seem to be changing. From now on, based on those mentioned above, it is its ultima ratio feature deriving from criminal law that is governing in terms of the necessity for the given regulation or sanction. Of course, the legislator has to consider the already existing regulatory environment as there are several types of behavior in the legal system that are related to the rules of cohabitation and the use of public spaces and hurt the rights of others or are a threat to public order. These include, among others, begging, breach of the peace, sanitation violation, prohibition of the consumption of alcoholic beverages, illegal gambling, endangering with dogs, breach of public morality or vandalism. In the case of the occurrence of these situations, the homeless person or any other person is already punishable, who is using the public space in a way threatening public order.

In connection with homelessness specifically, the constitutional body has stated that the fact that the use of public spaces for habitual residence carries in itself the violation of other people's rights, the possibility for the threat to public order, cannot be deemed as a legitimate reason for criminalization. In harmony with Constitutional Court resolution no. 176/2011. (XII. 29.), it was confirmed in general as well that the abstract constitutional values relating to public order and peace in themselves cannot justify the creation of preventive-type offence situations. "*Otherwise the majority of activities in public spaces could be sanctioned as these in a lot of cases have a negative effect on the image of the city, the wellbeing of the residents and in most cases are noisy."*[8]

These findings, therefore, have set a general limit for the local governments with respect to what antisocial rules they want to sanction and it was made clear that preventive reasons in themselves do not necessarily provide enough justification. It shall also be considered, however, that the above mentioned resolution was passed specifically in connection with the offences that have become more criminal-law-like, which criteria may change in case of non-offence type sanctioning, as the fundamental objective of administrative sanctioning is to make people observe the administrative rules, thus the question might even be asked in the following way: what kind of administrative rules can be established and to what extent can local governments regulate cohabitation?

The decision also stated that the legislator has to describe the objective of sanctioning in a clear way, as it is expected in connection with today's regulation of homelessness as well. Amendment Four to the Fundamental Law remedied the problem with regard to homeless people because in Article XXII it specified those considerations in the case of which habitual residence in public spaces is against the law. These are the following: public order, public safety, public health and the protection of cultural heritage.[9]

The 2012 decision touched upon another important issue at the same time: sanctioning by local governments, which by now does not mean the passing of offences at all. Of course, today the biggest question in this respect is whether such sanctions can be formed or not. The authorization granted by the Act on Local Governments would have made all this clear but this authorization was annulled by the Constitutional Court due to its bianco and endless nature.

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[8] CC decision 176/2011. (XII. 29.) ABH 2011, 622, 630. and CC decision 38/2012. (XI. 14.) ABH 2012, 185, 203.

[9] See ÁRVA, Zsuzsanna: Kommentár Magyarország Alaptörvényéhez [Commentary of the Hungarian Fundamental Law], Complex, Budapest, 2013, 184-187.

The body, starting from the principle of the rule of law, confirmed in connection with the authorization that the authorization has to specify the scope and limits of the legislative power. The panel also examined if there is any other law that would limit the local government's statutory authority to sanction but no other regulation besides the Act on the General Rules of Administrative Proceedings concerned this power. In this respect, the Act on the General Rules includes subsidiary-type rules compared to other financial rules (limitation period, considerations regarding the imposition of fines, etc.) besides certain rules of proceeding, which although provide procedural guarantees, are not suitable for remedying the shortcomings of the authorization. Moreover, the body considered the financial interest of the local governments problematic also, besides the fact that the authorization did not meet the requirement for the clarity of norms either. This way, for example, it could not be established either to which legal entities does the establishment of the sanction apply (natural persons or organizations, too).

IV. The Sanction Power of Local Governments- de lege ferenda and de lege lata

Although the resolution includes a certain reference to the fact that statutory authority is needed for sanctioning, the Act on Local Governments includes several rules currently as well with regard to which the establishment of such a sanction can be founded.

According to the justification of the resolution, the imposition of such a fine or sanction as a legal consequence of illegal conduct which provides an opportunity for the application of state constraint does not belong to the scope of local public affairs. Such rules can be created by the local government only based on authorization by law – in accordance with Article 32 Section (2) paragraph 2 of the Fundamental Law – and within the framework of such authorization. Such legislation is in harmony with the requirement of the rule of law deriving from Article B) Section (1) of the Fundamental Law only with substantive law guarantees and clear authorization described by law.

At the same time, Article 32, Section (2) of the Fundamental Law expressly stipulates that the local governments – acting within their function – can regulate independently such situations of life that are not regulated by other law, thus the enactment of the sanctioning decree cannot be deemed as one against the Fundamental Law. The principal tasks and functions of local governments are specified on the one hand by the Fundamental law, and on the other, by the Act on Local Governments. According to Article 4 of the Act on Local Governments, in connection with the notion of local public affairs, the creation of these stipulations may fall within the scope of specifying the conditions of cooperation with the public. In Article 143, Section (4), Point d) of the Act on Local Governments, the legislator expressly authorized the local governments to specify the "*basic rules of cohabitation and the legal consequences of the failure to meet them."*

As a justification for the function, Article 8, Section (1), Point b) of the Act on Local Governments might be called, on the basis of which members of the local community as subjects of the local government are obliged to observe and have others observe the basic rules of cohabitation and according to Section (2) the representative body of the local government may determine in its decree the content of the obligations included in Section (1) and the legal consequences of the failure to meet them. The reasoning attached to the Act on Local Governments also entails the option to sanction because the legislator in its reasoning clearly expressed the intention that the representative bodies of the local governments shall establish such sanctioning rules by decree (according to the reasoning, with extensive social support).

In consideration of the fact that the decision was not made specifically with regard to judging the constitutionality of sanctioning by local governments, based on the quoted rules of the Act on Local Governments, in my opinion the opportunity of local governments to pass decrees (with the qualified majority of the representative body) which regulate local social cohabitation and threaten to place sanctions against those violating these decrees, can still be verified.

It is important, however, that the decree passed this way should really regulate a subject matter with regard to which there is no other regulation and the regulated living condition should not belong neither to the field of criminal law, offence law, nor to administrative law covered by national legislation. It should be noted that the report by the ombudsman also stated that such an enactment of regulations by the local government, in itself, is not against the law. It should be considered, however, that a clarifying rule should be created because the regulation has such cardinal points as the subject matter of the regulation, the organizational, procedural rules as well as the nature and exact scale of the sanction.

Based on the above, I believe that the competition between administrative objective and subjective sanctions seems to be decided nationally for the objective sanctions. Questions regarding reclassification do not pose a problem anymore because the further life of offences existing as subjective sanctions has become questionable and their existence as administrative sanctions has been questioned as well.

The new direction is represented by objective sanctions, which due to the amendment of the Act on General Rules have received uniform substantive law rules as well. The most interesting question nowadays is if the local governments are granted the opportunity for sanctioning, and if yes, then according to what rules. Can there be an administrative criminal law as a result of this new regulation or this will remain only an attempt? These questions can be answered partly from the legislator's point of view and if the answer is yes, then new significant questions emerge: namely, what kind of situations do the local governments wish to sanction?

Constitutionally, a reassuring framework, of course, would be provided by higher level legal regulation, within which the field of administrative criminal law[10] may emerge as protected by guarantees and clarified dogmatically. All this is important also because among the rules there can be such diverse situations that touch upon issues of human rights in many cases. A significant part of rules enacted between January and November 2012 also touched upon such constitutionally sensitive issues as garbage picking, begging and similar situations. This tendency will obviously prevail as these socially most sensitive areas are those that affect the local community as a whole.

Constitutional Court resolution no. 29/2015. (X. 2.) found the regulation power of local self-governments constitutional and it is decided the question and declared, that local governments can regulate offences against "peaceful public coexistence".

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[10] The definition of administrative criminal law: GOLDSCHMIDT, James: *Das Verwaltungsstrafrecht. Eine Untersuchung der Grenzgebiete zwischen Strafrecht und Verwaltungsrecht auf rechtsgeschichtlicher und rechtsvergleichender Grundlage*. Carl Heymanns Verlag, Berlin, 1902., 577. KIS, Norbert – NAGY, Marianna: Európai Közigazgatási büntetőjog [European administrative penal law], Budapest, HVGORAC, 2007. 7., MÁTHÉ Gábor: Közigazgatási büntetőjog vagy "Janus-arcú" büntetőjog? [Administrative criminal law or Janus-faced criminal law?] Magyar Közigazgatás, 2001/6. 321-330.

V. Conclusion

Based on those discussed above, the objective sanctions are increasingly winning ground in the Hungarian administrative sanctioning system against subjective offenses. This tendency was continued by the Act on Offenses of 2012 as after it took effect several actions that had been sanctioned as offenses previously were recategorized as objective administrative sanctions while the right of local governments to legislate offenses was terminated. In order to balance the latter, the legislator provided the opportunity first in the Act on Local Governments of Hungary for the local governments to establish anti-social situations. As a result of this, until November 2012 699 such regulations were created in total, however, after Constitutional Court resolution no. 38/2012. (XI. 14.) even these had to be repealed. The idea came at this time that local governments could pass sanctioning regulations based on the Fundamental Law within original legislative competence as well. These regulations, however, still do not have a uniform legal basis, dogmatic, or procedural rules. For the time being, the regional government offices are trying to prevent the process using persuasion in order to avoid further problems.

As opposed to this, the solution could be for the state to move the creation of local government sanctions into a realm regulated by law and protected by guarantees by further expanding the uniform legal bases of objective legal sanctions. All this is especially important because the local governments, based on the above, often regulate areas that are closely related to human rights. Such guarantees could include the definition of the scope of sanctioning organizations and the decision whether negligence is necessary for committing these actions or if we can talk only about the sanctioning of objective-based administrative irregularities. It should also be regulated what the type and amount of the fine can be and how execution can take place. These rules could be placed in the Act on Administrative Procedural Rules or the Act on Offenses as well. In establishing the constitutionality of the created regulations, the regional government offices should also participate actively, so that those frameworks can be established as soon as possible within which sanctioning can take place in accordance with the rule of law. Along this way – similarly to the previous local government offenses – the requirement could be met according to which the local governments should have the opportunity to establish sanctioning rules adequate for the local circumstances, while the state have already eliminated these actions from the offenses assuming an increasingly criminal law character.

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Absztrakt[11]

A tanulmány a magyar közigazgatási szankciórendszer körében végbemenő legújabb folyamatokat mutatja be. Ezek közé tartozik a szubjektív és objektív szankciók között megfigyelhető átrendeződés, ahol egyre inkább tért nyernek az utóbbiak. Végigköveti, hogy a változásokat az Alkotmánybíróság hogyan értékelte és rámutat, hogy az alkotmányos testület álláspontja szerint az államnak – olyan jogi elveket betartva, mint a jogállamiság elve vagy az emberi méltóság követelménye - lehetősége van arra, hogy a szankciórendszer körében a közigazgatási jog érvényre juttatása érdekében változásokat hajtson végre, így akár a szubjektív szankciók közül az objektív szankciók közé soroljon át tényállásokat. Ezen változások között szerepel a nagy vitákat kiváltó objektív közigazgatási bírságok bevezetése is, amely új szabályozást az Alkotmánybíróság a 60/2009 (V. 28.) határozata kifejezetten is alkotmányosnak mondta ki az állam életvédelmi kötelezettségére is hivatkozással. 2012-ben több fontos változás zajlott le egyszerre. Az új szabálysértési törvény a büntetőjog irányába mozdult el, miközben megszüntette a helyi önkormányzatok azon jogát, hogy szabálysértést statuáljanak önkormányzati rendelet által. Ezzel párhuzamosan a Magyarország helyi önkormányzatairól szóló törvény eleinte egy felhatalmazás alapján lehetőséget adott a helyi önkormányzatoknak közösségellenes magatartások szankcionálására, amelyet később az Alkotmánybíróság még ugyanebben az évben elvont a 38/2012. (XI. 14.) AB határozat nyomán, megsemmisítve az említett parttalannak minősített felhatalmazást. A határozat emellett azonban más lényeges megállapításokat is tett, így a hajléktalanság szankcionálásáról történt állásfoglalás mellett részletesen elemezte, hogy az új szabálysértési törvény büntető jellege milyen szabályozási elemekben nyilvánul meg. A tanulmány foglalkozik a döntés hatásával, elemzi, hogy a helyi önkormányzatoknak a jelenlegi jogi keretek között - amelyet az Alkotmánybíróság 29/2015. (X. 2.) határozata is megerősített- milyen lehetőségük van szankcióalkotásra, valamint meghatározza azon szempontokat, amely mentén a jogalkotó a helyzetet rendezhetné. A 2012 után kialakult gyakorlat nyomán ugyanis a helyi önkormányzatok részben felhatalmazás nélkül, részben visszautalva az önkormányzati törvény azon rendelkezésére, amely szerint a közösségi együttélés szabályrendszerét meghatározhatja a képviselő-testület, egyre több ilyen szankcionáló rendeletet alkotott. Ezek

[11] A tanulmány az Igazságügyi Minisztérium jogászképzés színvonalának emelését célzó programjai keretében valósult meg.

jogellenessége nem volt már kezdetben sem magától értetődő, hiszen a képviselő-testület szabályozási joga nyilvánvalóan kiterjedt az említett területre, ugyanakkor a helyzetet nehezítette, hogy a szankcionálás keretrendszerét és sarokpontjait a jogalkotó nem jelölte ki. Minden hasonló anomália ellenére egyre több ilyen rendelet született, amelyek megalkotását az Alkotmánybíróság az említett döntés nyomán immáron legalizálta.