Pázmány Péter Catholic University
Doctoral School of Law and Political Sciences

Fundamental questions of the right to local self-governanment

Theses of the PhD dissertation

Ádám Varga

Supervisor:
Dr. András Varga Zs. professor and head of department

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Contents

I. Brief summary of the research objective set forth

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, 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 has also 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, and for today they are also a necessary elements of the democratic structure.

Why does the State need to recognize the autonomy and self-determination of local self-governments anyway? And what makes this a right to self-government? Just because of tradition stipulated by history, or some kind of dickering with democratic establishment, or simply on grounds of expedience? What does the idea of local self-government include, who does it and why?

In my dissertation I examine the fundamentals of local autonomy, but not specifically from the governmental or administrative point of view. I will address the right to local self-governing, but not from the fundamental rights perspective. Instead, the focus of my research is on the conditions under which local self-governments are unvarnished dealt with. What is more about local self-government than local self-administration or local government? Are there any components of the constituting elements of local self-governments, which in their eventual absence, would relegate the autonomy to a formal role?

It is a fact that local self-governments have been involved in the crossfire of various reforms for decades. When examining the causes, aims and contradictions of these reforms, I am increasingly convinced that in many cases the various ideas, even of contradictory nature, focus only on partial issues, while often neglecting the general goals of self-government. My other observation was that, as a general rule, even extremely valuable researches on local self-governments have often failed to give me reassuring answers about the reasons. Because of all these observations, I have turned my attention from marginal questions to examine the principles that govern the essence of autonomy of self-governing structures.

When shuffling a bit the concepts, it turns out that many questions researchers have been asking for centuries still keep them ebullient. These are questions that cannot be answered purely on the basis of current trends in the constitutional system, consequently we must go back to the foundations of social cohabitation.

There are several types of self-governing bodies, of which only one type is the subject of my dissertation: it is the local self-government organized on a territorial basis. The task is extremely complex anyway, so I do not aim to fully present how self-government is shaped or the system of local self-governments that implements it. I do not even attempt to go into the details of the Hungarian local self-government system. Instead, I will be offering principles, paths, and trends that, in my view, bring me closer, as a whole, to a deeper understanding of the role of local self-governments in democratic states, and especially in Hungary.

My dissertation has a framed structure, as I start out, according to the goals set forth, from the traditions of the Hungarian public law and, with respect to the Fundamental Law, will return to the Hungarian system, without specifically examining the structure of the Hungarian local self-governments. The traditions of self-governing structures autonomy in Hungary and the examination of the provisions of the Fundamental Law shall provide a framework to the general principles of autonomy. Indeed, the central question of my dissertation is to examine what the right to self-government is composed of through the discovery of the principles that shape autonomy. After the change of regime in Hungary, the right to local self-government became the focus of attention concerning local self-governments, besides as it was considered a fundamental collective right turned out to be an exclusive constitutional solution. However, the approach of the Fundamental Law seems radically different as the assumption of the right to self-government is lacking. For the most researchers this change explains to some point or in full why self-government lost out in importance, but I am convinced that the right to self-government can be doubtless interpreted as a right, regardless of the fundamental rights approach, in fact as a result of local communities exercising democratic power with regard to local public affairs. The implementation of this does not simply take place in the interests of the state, rather as a necessary implication of the genuine organization of society.
To my mind, the right to local self-government is composed of different principles that are applied. In order to identify these principles, the purpose of local self-government shall be subject to investigation. An important goal of the present dissertation is to examine whether the system of local self-governments based on the Fundamental Law meets general expectations.

In summary, the objective of my dissertation is to clarify the concept and role of the right to local self-government whilst exploring the goals of local self-government, as well as to what extent all these shall prevail over the system of the Fundamental Law. My results are intended to guide legislators and the law implementing bodies in addressing specific issues affecting local autonomy, and to better put into practice solutions based on the needs required by the right to local self-government.

II. Brief description of the research performed, method of research

In order to achieve the goals set forth, I used for my dissertation available Hungarian as well as international literature relevant for scientific research on the topic. In addition to the works of Hungarian researchers, I particularly relied on the works of German authors, because of similarity with the German local self-government system, moreover the specific approach of German researchers was of great help when developing the subject.

I mainly relied on the works of foreign authors in establishing the research and examining certain areas of principle importance. I paid great attention to conflicting views and to exploring differences arising from different approaches in each country, possibly highlighting common denominators. In order to better elucidate the investigated issues, I also applied a comparative legal approach in my dissertation.

Due to the strong historical context of the present topic I relied on the main works of significant authors (especially the Hungarian law expert, Zoltán Magyary and István Ereky) from the 19th and the first half of the 20th century.

I paid close attention to create a synthesis from their positions and tried to draw my main conclusions based on them.

For the examination of the Hungarian system I relied primarily on analysis of the sources of law, filtered the provisions of the Fundamental Law through the conclusions drawn in the preceding chapters, and to the extent necessary, undertook the analysis of judicial and constitutional court practice.

My approach is one of jurisprudence, but considering the role of local self-governments within the organization of the State, I have always kept in mind the political ramifications of the system, therefore I necessarily had to consult studies of political sciences. In addition, I had to use some works from different parallel disciplines (e.g. sociology), which published the results of researches focusing on the operation of local self-governments and the implementation of principles. In addition to the above, I have also occasionally presented meta-juristic positions that are needed to better understand the issue being studied and to answer the questions that arise from it.

Following the section highlighting the historical context of autonomy, I examined the purpose of local self-government. The basis of my approach is that the primary purpose of local self-government is to manage a wide range of local public affairs. However, this can only be

achieved within the framework of the rule of law through democratic exercise of power. Therefore, the objective that focuses on efficient performance of tasks is accompanied by another, which necessarily complements the quality principle of democratic performance of tasks and at the same time limits the possibilities of the system. These objectives lead to the principles which, when prevailing, give the essence of democratic self-government. I have examined these principles separately as their content and role are not obvious. The purpose of all of this was to justify the existence of the right to local self-government and to explore its significance in principle. I have been mindful of the international recommendations in particular of the European Charter of Local Self-Government adopted under the auspices of the Congress of the Council of Europe. These are imprints and indicators of the right to local self-government, which is why they were important references for my study.

During the examination of the local self-government system based on the Fundamental Law, I did not attempt to analyze the local self-government regulation created by the law, as this was not my objective. This is in line with the general objective naming I did not attempt to explore specific local self-government regulations, but to examine what framework, and on what principles, it is possible to investigate individual problems at all. Therefore, as far as the Hungarian system is concerned, specific issues were examined only if they directly arise from the Fundamental Law. Otherwise, I just focused on what should arise from the Fundamental Law.

III. Summary of the new scientific results of the dissertation

Following the research my hypothesis has become a conviction: local self-government is a historically established, principal value for the rule of law, the fundamentals of which deserve more attention. Local self-governments cannot be fully understood by analyzing only one component of it at a time. When only assuming it is a decentralized body it lacks self-regulation, when emphasizing only autonomy we may lose efficiency, when emphasizing only the importance of subsidiarity its normative content would be incomplete. Although the perception of the role of local self-governments varies by epoch and country, there are some elements that, to varying degrees, when triumphing, supply with the fine blend that makes the right to local self-government. Thus, in my view, local self-government can be defined as a mixture of several principles.

I have come to the conclusion that defining the structure and tasks of the system of local self-governments cannot be limited to validating the political-economic aspirations of a given epoch. It is my belief that the primary purpose of the existence of autonomous self-governing structures is to provide local public affairs with its own powers and responsibilities (without it, the autonomous structure is just an empty and pointless framework). However, it is essential to complete local democracy from the constitutional point of view. As a principle of the rule of law democracy is an end in itself, thus can local democracy become a primary constitutional goal (as far as required efficiency is necessarily part of the game). The two objectives are interdependent, since local public affairs are primarily managed by those empowered by the local authorities.

The focus is on the local community or its members when it comes to exercising local public power. Local communities carry out tasks in their own benefit that are of particular interest to them. It is based on the fact that a municipality (possibly a city district or a city block within a city), as the natural life environment of the citizens is more than an abstract concept. It is indeed a physically delimited area, a place where people spend a significant part of their quotidian lives. They necessarily have problems in common, specific needs, and face situations they want to solve themselves. Therefore, they have common interests that do not necessarily coincide with those at the neighboring municipality or at central state level. This is the essence of local public affairs.

By virtue of the principle of subsidiarity, there is a natural need for local solutions to problems. However, it does not mean that these matters will remain incongruous at the national level. At the local level communities may need to have sufficient freedom (autonomy) to deal with their

own affairs. However, this does not mean that the municipalities have sovereign power; in fact, the delegation of tasks must be at the wise discretion of the state. Decentralization is the way to go, which in turn means that it is not only an appropriate and practical principle for public administration, but also the corner stone of local autonomy itself. If we are standing on the ground of subsidiarity, the need for autonomy through decentralization necessarily leads to the central bodies of the state being marginalized in these matters, the latter, in a sense, losing their ability to solve the raised issues within their own sphere of competence. From a certain point of view, this can even be called a vertical division of power, which manifests itself as a kind of limited autonomy, which subsists only within the framework of the Acts, due to the unity of the state.The real emphasis is on matters, which may be exercized locally, independently and democratically. I took the view that – by placing the subsidiarity in the center – local communities shall carry out tasks to the extent that 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. The most important step in the process is autonomy, and decentralization (which makes available multi-level governance for the State) and subsidiarity (which requires the same from the local community) play an important role in it. And the powers bestowed on local self-governments based on the latter result ineluctably in a balance of power between local self-governments and the central State; and jointly applied principles lead to a vertical division of powers. Power is divided, but a sovereign body does not limit another sovereign body, rather the State restrains itself by virtue of the principle of democracy. The law shall be made along this process when it comes to the need to protect from the sovereign State ultimately vulnerable local self-governments granted important powers.

I have come to the conclusion that 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 (though autonomy only exists within the Acts), since it cannot erase powers protected by the Constitution. In fact, this creates the right to local self-government. Local self-governments are not bodies other than those of the state (supremacy of the state is therefore not in question), neither they have rights may be opposed to the state, with the exception of a legitimate expectation of their powers being respected. From a legal point of view, the goal of the state and of the local self-governments is equually to serve the public good. This is how they become counterbalancing powers: if there exists a public interest of local nature separated from the central will, it necessarily limits the margin of maneuver of the central public bodies. If autonomy is jeopardized, this can be particularly vigorous, but it must not be an explicit political objective. Consequently, the relation between the goal and the means shall be dealt

with: local self-governments do not operate to counterbalance central power of the state (as opposed to the idea in vogue centuries ago), but only to the extent that the interests on the local level have to be taken 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 with 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 such rules, which shall grant the protection of powers and shall grant the existance of such body which is able to enforce it. This is indispensable for the protection of the autonomy of local self-government.

In my research, I have come to the conclusion that whatever the right to local self-government is called, it is not a fundamental right, but a form of limited power of the State whereby local communities may claim decisions in matters affecting them, that being so respecting sovereignty of the State. Thus, it is in fact a matter of how the State is organized, and needs no eloquent elaboration rather a practice on a day to day basis. It only really starts functioning as a 'right' when the State, abusing from its higher level of power, for some reason, fails to respect the powers of local self-governments. Not being a fundamental right, it is not of necessity to look for a subject and an obliged in the sense of constitutional rights. I agree with those authors who assume that the real basic right of the citizens on the local level is to elect their local representative bodies or, where appropriate, to make their own decisions. It may be valiantly argued that in a democratic state the right of self-government is obviously vested in the people, but depending on whether it is exercised directly or indirectly, people are considered as the source or the subject of the law (in the latter case the subject is the elected body). To an excessive extent I trust that self-government itself is at the root of citizens sovereignty, since the representative body elected by sovereign citizens entrusts certain public affairs to local bodies chosen by definite parts of sovereign citizens (together with certain foreigners living locally).

In addition to the general questions, I also examined the system of local self-governments based on the Fundamental Law and concluded that the Fundamental Law establishes a system for the local self-governments which may be interpreted in too many ways, allowing scientific conclusions of high diversity. The many approach concerning local self-government is perhaps

the reason why researchers draw very different and contradictory conclusions from the existence (or even absence) of the same rules. Another reason is that many start from what is missing from the Fundamental Law compared to the previous version of the Constitution, instead of evaluating what it actually contains. However, according to 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-government are directly emanating from the Fundamental Law. As I witnessed the suppression of autonomy in many areas myself, although I do not find such statements entirely convincing when extended to the Fundamental Law. Undoubtedly, the Fundamental Law has made many innovations, but it does not necessarily represent a step backwards; rather, it seems that the Fundamental Law has shifted its focus to the exercise of local public power and actual operation. As far as I am concerned, however, as a general rule, far more radical changes do not result 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, but this does not necessarily mean retrograde action if powers are safeguarded. In my view, the step backwards is represented by special provisions which impose the limits of autonomy (such as authorization for borrowing on credit, replacementary regulations, compulsory association). It is undeniable that these special rules undermine the coherence of the system. They are of significant importance (considered as a minimum), but the existing paradigms are not altered; they have special content indeed, in fact, they are exceptions to the rule reinforcing it. The reason for this is that these are provisions that would probably not have been included in the Fundamental Law if the bursting of the frames of the system had not been an option.

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 it is contradictory to the fact that the previous interpretation of the Constitutional Court coincides with the fact that collective fundamental rights were abandoned), which makes it certain that the new regulation (especially in the case of very strict legal regulation) might even consolidate a different interpretation of the law, but it would hardly be appropriate to impose this on the Fundamental Law alone. My concern is that the

establishment of local self-governments is jeopardized by those special provisions that have been included in the Fundamental Law, hardly cannot this be contradicted, in order to pave the constitutional way to laws enacted in a similar spirit.

On the whole, I believe that the results of the present thesis do not solve the undeniable problems of the system of the Hungarian local self-governments, but I hope that they provide a coherent framework for assessing and solving problems in a uniform manner. In my opinion, the system of the Fundamental Law requires the management of a wide range of local public affairs by democratic local self-governments, as well as the protection of the rights of local self-governments. Whether this is actually happening or not, is another question.

IV. List of Publications

A) Publications on the topic

1. VARGA Ádám – SZABÓ István: A helyi önkormányzás. In: CSINK Lóránt – SCHANDA Balázs – VARGA Zs. András (szerk.): A magyar közjog alapintézményei. Budapest, Pázmány Press, 2020.
2. VARGA Ádám: Mérlegen a rendeletpótlás. *Magyar Jog*, 2018/1.
3. KURUNCZI Gábor – VARGA Ádám: Dilemmák a fővárosi közgyűlés megválasztásával és működésével kapcsolatban. *Iustum Aequum Salutare*, 2017/2.
4. KURUNCZI Gábor – VARGA Ádám: Problems of Regionalisation in Hungary – An Unsuccessful Pilot. In: Grzegorz LIBOR – Dorota NOWALSKA-KAPUSCIK – Robert PYKA (szerk.): *Regionalisation in Europe – State of affairs*. Katowice, Wydawnictwo Uniwersytetu Slaskiego, 2015.
5. VARGA Ádám: Szubszidiaritás – Hangzatos szólam vagy működő elv? In: KOVÁCS Péter (szerk.): *Religio et Constitutio*. Budapest, Pázmány Press, 2014.
6. KURUNCZI Gábor – VARGA Ádám: A Dél-Dunántúl mintarégió – Egy rossz kérdésre adható egyetlen lehetséges válasz? In: GERENCSÉR Balázs Szabolcs (szerk.): *Modellkísérletek a közigazgatás fejlesztésében: Az ún. „pilot projektek" határai elméletben és gyakorlatban.* Budapest, Pázmány Press, 2013.
7. KURUNCZI Gábor – VARGA Ádám: Southern Transdanubian Sample region: The only acceptable solution to an unwise question? In: GERENCSÉR Balázs Szabolcs (ed.): *Pilot projects in Public Administration Management: Summary of a Research at Pázmány Péter Catholic University Faculty of Law and Political Sciences, Vol. 1*. Budapest, PPKE JÁK, 2013.

B) Other publications

1. GERENCSÉR Balázs – JAKAB Hajnalka – VARGA Ádám: Az ügyészség szervezete és működése. In: CSINK Lóránt – VARGA Ádám (szerk.): *Bírósági-ügyészségi szervezet és igazgatás*. Budapest, Pázmány Press, 2017.

2. GERENCSÉR Balázs – JAKAB Hajnalka – VARGA Ádám – VARGA Zs. András: Az ügyészség feladatai. In: CSINK Lóránt – VARGA Ádám (szerk.): *Bírósági-ügyészségi szervezet és igazgatás*. Budapest, Pázmány Press, 2017.
3. JAKAB Hajnalka – VARGA Ádám: Alapvetések. In: CSINK Lóránt – VARGA Ádám (szerk.): *Bírósági-ügyészségi szervezet és igazgatás*. Budapest, Pázmány Press, 2017.
4. VARGA Ádám: Az ügyészek és ügyészségi alkalmazottak jogállása. In: CSINK Lóránt – VARGA Ádám (szerk.): *Bírósági-ügyészségi szervezet és igazgatás*. Budapest, Pázmány Press, 2017.
5. RÁTH Olivér – VARGA Ádám: Gondolatok az információs kárpótlás aktuális kérdéseiről. *Pázmány Law Working Papers*, 2015/8.
6. VARGA Ádám: Irányítószámok a közigazgatás szürke zónájában. *Új Magyar Közigazgatás,* 2015/4.
7. VARGA Ádám: Igazságosság kontra igazságosság? – Gondolatok a jogbiztonság, az igazságosság és a tisztességes eljárás kapcsolatáról. *Iustum Aequum Salutare*, 2015/3.
8. VARGA Ádám: Az ügyészi szervezet felépítése, az ügyész feladat- és hatásköre. In: CSINK Lóránt (szerk.): Alkotmányjog. Budapest, Novissima, 2014.
9. VARGA Ádám: A magyar állampolgárság keletkezése, megszerzése, megszűnése. In: CSINK Lóránt (szerk.): Alkotmányjog. Budapest, Novissima, 2014.
10. VARGA Ádám: A nemzetiségek jogai, a nemzetiségi önkormányzatok. In: CSINK Lóránt (szerk.): Alkotmányjog. Budapest, Novissima, 2014.
11. CSINK Lóránt – KURUNCZI Gábor – VARGA Ádám: A jogi szabályozás szerepe a modellkísérletekben. In: GERENCSÉR Balázs Szabolcs (szerk.): *Modellkísérletek a közigazgatás fejlesztésében: Az ún. „pilot projektek" határai elméletben és gyakorlatban.* Budapest, Pázmány Press, 2013.
12. CSINK Lóránt – KURUNCZI Gábor – VARGA Ádám: The role of legislation in pilots. In: GERENCSÉR Balázs Szabolcs (ed.): *Pilot projects in Public Administration Management: Summary of a Research at Pázmány Péter Catholic University Faculty of Law and Political Sciences, Vol. 1.* Budapest, PPKE JÁK, 2013.
13. KURUNCZI Gábor – VARGA Ádám: Gondolatok az új Alaptörvényről, különös tekintettel a Nemzeti hitvallásra. In: VARGA Norbert (szerk.): *Az új Alaptörvény és a jogélet reformja.* Szeged, SZTE ÉJK, 2013.
14. VARGA Ádám: Az ügyész büntetőjogon kívüli tevékenysége az Olasz Köztársaságban. In: VARGA Zs. András – PINTÉR Zsuzsanna (szerk.): *Az ügyészek büntetőjogon kívüli tevékenysége.* Budapest, Pázmány Press, 2013.

15. VARGA Ádám: Jogbiztonság a büntető igazságszolgáltatásban. In: VEREBÉLYI Imre (szerk.): *Az állam és jog alapvető értékei a változó világban*. Győr, SZE ÁJDI, 2012.
16. UJHELYI Dávid – VARGA Ádám: Bodó Balázs: A szerzői jog kalózai – recenzió. *In Media Res*, 2012/1.
17. KURUNCZI Gábor – VARGA Ádám: Identitásválasztás kontra identitásvállalás. In: POGÁCSÁS Anett – SZILÁGYI Pál (szerk.): *TehetségPONT 2011*. Budapest, PPKE JÁK, 2011.