Fazekas, János*

The Regulation of Competence in the Act on Public Administrative Proceedings

Abstract

The paper examines regulation on competence in the Act on Public Administrative Proceedings (Ákr.) in Hungary. Regulation on competence is a basic guarantee of constitutionality and rule of law regarding administrative procedures, since public authority can only be carried out by bodies that have democratic legitimacy. However, the Ákr. does not cover several issues that are fundamentally relevant to this subject, e.g. delegation of competence and second instance authority. The hypothesis of the research is that the main reason for that is the intent of broadening the government's policy-making and organisational powers. In addition, the paper examines whether these intentions and the Ákr. are consistent with the above-mentioned constitutional requirements.

Keywords: administrative law, administrative procedural law, rule of law, competence, Act on Public Administrative Proceedings (Ákr.), Hungary

I. Introduction – the importance of regulation on competence in administrative procedural law

Regulation on competence is a key question in administrative proceedings' law. It has been regulated also in the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter: Ket., the former General Code) and Act CL of 2016 on General Public Administrative Proceedings (hereinafter: Ákr. which came into force on 1st January 2018). Regulation of competence is a basic guarantee of constitutionality and rule of law regarding administrative procedures, because public authority can only be carried out by bodies that have democratic legitimacy. It means delegation which comes from the sovereign people. This legitimacy provides transparency, accountability and predictability regarding individual cases of clients who are independent of public administration. It is therefore essential that a public statutory norm which is available to everyone shall regulate which body performs

* Fazekas, János PhD, Senior Lecturer, Department of Administrative Law, Eötvös Loránd University, Budapest.

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public authority in a concrete case (at first and second instance, if there is second instance) and how it shall do it.[1]

The main purpose of Ákr. is to provide a normative minimum standard through regulating only the questions which affect every type of individual cases; In other words, to strengthen the general nature of the Ákr.[2] This may also be related to the fact that, although the extent of the regulation of competence has not changed significantly, the Ákr. does not cover several issues that are fundamentally relevant to this subject. As such, it does not regulate jurisdiction, delegation of competence, primacy of court, authorities acting in local government affairs, possible types of quasi-authorities and second instance authority. In addition to considerations regarding the parsimony of regulation, another consideration may arise, namely the intent of broadening the government's policy-making and organisational powers.[3]

In my paper, I try to justify this hypothesis, basically relying on the normative text and its antecedents. In doing so, I also examine whether these intentions and the new Act are consistent with the above-mentioned constitutional requirements.

II. The lack of regulation of jurisdiction

Jurisdiction means the international division of labour between administrative authorities. In other words, in cases that contain international features, which state's authority shall act. The Ákr. does not regulate this question at all (it is not mentioned in the normative text), according to the Official Explanation, which explains that its practice has not developed and it does not arise in the overwhelming majority of cases and consequently cannot be regarded as a general rule.[4] However, this is a misunderstanding: the general nature of a rule is not a quantitative but a qualitative issue. It does not depend on whether the legal institution is often applied, but whether the necessity of its application in all types of cases may in principle be raised. An international element (for example, a resident or established resident of a foreign country) can in practice exist in all types of cases. From another point of view, it is also true that there are legal institutions (for instance, an interpreter) which are not so often

[1] Decision of the Constitutional Court No. 38/1993. (VI. 11.), ABH 1993, 256., 262., Rozsnyai K., A közigazgatás fogalma, in Fazekas M. (szerk.), *Közigazgatási jog.* Általános *rész I.,* (ELTE Eötvös Kiadó, Budapest, 2015[2]) 22–23.; J. H. Jans, R. de Lange, S. Prechal and R. J. G. M. Widdershoven, *Europeanisation of Public Law,* (Europa Law Publishing, Groningen, 2007) 23–29.

[2] Official Explanation of the Ákr. General Part.

[3] The Official Explanation of Section 9 of the Ákr. refers to 'possible further legal and organisational development' as the background to the general concept of administrative authority. See also: Hajas B., Az Ákr. hatálya, (2017) 19 (4) *Jegyző* és *Közigazgatás,* 7–12., https://jegyzo.hu/az-akr-hatalya/ (Last accessed: 31 December 2018).

[4] Official Explanation of Section 17 of Ákr.

applied, but they are regulated in the Ákr. Moreover, the Official Explanation itself highlights the fact that an administrative appeal, which is a typical general institution of administrative procedural law, can be submitted in few cases so it is not a general type of remedy anymore.[5] However, this did not cause the legislator to leave the rules on appeal out of the Code, since it is rare, therefore, does not require general regulation, but has transformed the content of the regulation.[6]

Therefore, the fact that Ákr. does not regulate the issue of jurisdiction does not mean that there is no need for regulation, given the general nature of the legal institution. The change is 'just' that the general rules are neither in the Ákr. nor in other Code-like statute. Nonetheless, there are sources of law that can be called upon when an international element arises in an individual case. Thus, if the administrative case contains some civil law element (e.g. regarding guardianship, parental custody or international investment), then Act XXVIII of 2017 on Private International Law (hereinafter: Nmjtv.) shall be applied.[7] In other cases, sectoral legislation, international law or European Union law may be applicable.[8]

III. The definition of competence and the concept of authority

Regarding the principle of rule of law, the Ákr. sets the same requirements against sectoral regulation of competence as the Ket. used to: competence must be regulated by statutory law.[9] What is new is a distinction between authorisation and designation to exercise competence. The former may be made by a parliamentary act, a government decree or a local governmental decree, the latter by any statutory law.[10] Authorisation applies to – according to the Official Explanation of Section 9 – administrative bodies established specifically for the exercise of official authority. On the other hand, designation refers to quasi-authorities: organisations or persons other than public authorities, but may exceptionally provide administrative powers, e.g. to public corporations or individuals. Nevertheless, this distinction does not seem very well-grounded in the light of theory and sectoral regulations.

[5] Official Explanation of Ákr.
[6] Official Explanation of Ákr., Szalai É., Az Ákr. jogorvoslati rendszerének jellemzői, in Fazekas M. (szerk.), *Közigazgatási jog. Általános rész III.* (ELTE Eötvös Kiadó, Budapest, 2017[2]) 275–278.
[7] Nmjtv. 3. § *a)* pont.
[8] See e.g. Act XXXI of 1997 on the Protection of Children and Guardianship Administration (Gyvt.) Section 4 Pharagraph (3) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
[9] Ákr. Section 2 Paragraph (1). See also footnote 1.
[10] Ákr. Section 9.

Regarding the concept of the administrative authority[11] it is a conspicuous change that the Ákr. does not even outline the types of bodies authorised for the exercise of official authority (state administration bodies, local government bodies and quasi-authorities) in an exemplary manner. The reason for this is that – according to the Official Explanation – it is not a matter of procedural law, but a matter of substantive or organisational law, and the legislator wants to respect the subsequent development of the organisation and the organisational power of the Government.[12] This generic clause-type, much more flexible definition is in line with the principle of legal certainty, and who acts as an administrative authority in an individual case is indeed a matter of organisational law. The question may be whether this much more flexible regulatory technique means a change of attitude: is there a governmental intention to transfer more administrative authority powers to quasi authorities? This, in itself, would be not unconstitutional, but it can only be constitutional with the right guarantees.[13] Such a guarantee is primarily to ensure democratic legitimacy and adequate remedies. Moreover, such a guarantee was a provision of the Ket. which stated that if a public authority competence was transferred to a quasi-authority, the sectoral law had to define the cases in which the Ket. was to apply.[14] The Ákr. contains no such provision, so the system of guarantees is less stringent than the system of the Ket., although it contains the essential safeguards.

However, the Ákr. does not regulate generally which body is the second instance authority that has jurisdiction over appeals. According to the Official Explanation of the Ákr.[15] it is an organisational matter, not a procedural one, which is correct. Nevertheless, the Ket. itself did not confer competences to bodies but adjusted general principles regarding the regulation of competences. These principles were as follows: (1) the authority of first and second instance must be designated to a body by law, (2) the second instance authority is, in principle, the supervisory body of the first instance authority, (3) the first and the second instance authority cannot be the same body, (4) the second instance authority cannot give a direct order to the first instance authority regarding the individual case.[16]

These principles meant constraints on sectoral legislation and individual adjudication processes in order to enforce the constitutional right to legal remedy. Of course, they can be derived from rule of law and the right to legal remedy. Furthermore,

[11] See further: Á. Váradi, The Concept of "Authority" and Procedural Principles in the Administrative Procedural Law of the European Union, (2015) 56 (1) *Acta Juridica Hungarica,* 72–85. https://doi.org/10.1556/026.2015.56.1.7

[12] See footnote 3.

[13] See e.g. Decision of the Constitutional Court No. 478/B/1996. See detailed: Hajas, Az Ákr. hatálya; Barabás G. and Kovács A. Gy., A törvény hatálya, in Barabás G., Baranyi B. and Kovács A. Gy. (szerk.), *Nagykommentár a közigazgatási eljárási törvényhez,* (CompLex Kiadó, Budapest, 2013) 70–74.

[14] Ket. Section 12. Pharagraph (4). The Official Explanation of the Ket. mentioned legal certainty as a justification to this provision.

[15] Official Explanation of Section 9 of Ákr.

[16] Ket. Section 106.

in the remedy system of the Ákr., appeal is a secondary remedy, as opposed to judicial review, and therefore the absence of such rules cannot cause such a problem. However, it must be borne in mind that a considerable part of the adjudicative competences has been transferred to district and Budapest district offices in recent years and there are still appeals in these cases.[17] On the other hand, if we examine the Ákr. alone, it must be stated that the level of the safeguards has weakened due to the disappearance of these fundamental principles from the Code.[18] This can be of particular importance when an administrative authority or court or the legislator needs a guideline. So far Ket. showed a relatively straightforward course in these constitutionally sensitive issues, even if sectoral laws could differ from it, e.g. from the abovementioned principle no 2.; see the so-called horizontal remedy.[19]

IV. General principles of regulation on competence

A ban on the abolition of powers is a classic principle, which is an important aspect of rule of law: the client has the right to have an authority designated by law in his/her individual case. This principle has been stipulated by both Ket. and the Ákr.[20]

There is, however, no rule for the delegation of powers, contrary to Ket.[21] According to the Official Explanation of the Ákr., there is no need to explicitly prohibit it, as the exercise of the powers designated by the law is not an option but an obligation for the authority, derived from the principle of rule of law. I can agree with that but the concern is the same: in such a regulatory environment, the outcome of a controversial situation depends solely on sectoral regulation or the authority or court acting in the concrete case. The outcome has been up to these factors so far, but it is a fact that the guarantee level of general regulation has become lower.

The primacy of the court is also a classic principle, which can be traced back to the principle of the separation of powers. This principle means that if the administrative court decides on the essence of the case or identifies its lack of competence, this decision

[17] Ákr. Section 116. Pharagraph (2). See also: Horváth M. T. and Józsa Z., Az államigazgatás helyi és területi szervei: koncentráció és koncentrátum, in *A magyar jogrendszer állapota,* (MTA Társadalomtudományi Kutatóközpont Jogtudományi Intézet, Budapest, 2016) 564–582.

[18] Szalai, Az Ákr. jogorvoslati rendszerének jellemzői.

[19] See e.g. Government Decree No 410/2007. (XII. 29.) on traffic violations, which states that the Head of Police of Vas County or Szabolcs-Szatmár-Bereg County acts on first instance in these cases, while the Head of Police in Budapest Capital acts on second instance, which is a body at the same level of organisation as the first instance authority. See further: Barabás G., Fazekas J. and Kovács A. Gy., Joghatóság, hatáskör, illetékesség, in Barabás G., Baranyi B. and Kovács A. Gy. (szerk.), *Nagykommentár a közigazgatási eljárási törvényhez,* (CompLex Kiadó, Budapest, 2013) 134.

[20] Ákr. 9. §. See also: Barabás, Fazekas and Kovács, Joghatóság, hatáskör, illetékesség. 138–139.

[21] Ket. Section 19. Paragraph (3). See further: Barabás, Fazekas and Kovács, Joghatóság, hatáskör, illetékesség. 135–138.

is binding on everyone *(res iudicata)*.[22] The Ákr. – contrary to Ket. – does not expressly state this, which is well-founded, because it can be deduced from the principle of legality and separation of powers. Nonetheless, there are legal provisions from which the primacy of the court can be derived.[23]

V. Other regulatory issues

Hereinafter, I refer to legal institutions that do not directly relate to the concepts and principles discussed previously, but are act as a guarantee.

The rules of the Ákr. on illegal silence of the authority[24] are considerably shorter than those in Ket.[25] For example, such powers as the initiation of disciplinary proceedings or the special provisions on local authority cases have been omitted. In essence, the Ákr. only states that the supervisory body or the administrative court is authorised to act in the case of the illegals silence. In my view, this does not necessarily imply any safeguard problems.

Regarding the situation of regulation on conflict of competence: the Ákr. transfers the competence of making a decision on that matter to the administrative court. Ket. consisted of the same regulation[26] with an exception. While Ket. expressly transferred the competence to the Municipal Administrative and Labour Court, the Ákr. only generally refers to the administrative court, so it is clear from the Kp. that the Municipal Court of Budapest will act in that case.[27]

The regulation of provisional measures is more problematic. This dogmatic category covers a constitutionally sensitive phenomenon, when an administrative authority in a case of emergency (e.g. a life-threatening situation or severe risk of injury) acts without competence or jurisdiction. Doing so, it essentially violates one of the basic principle of rule of law and prohibition of abolition of powers. However, administrative law acknowledges the justification of provisional measure and tries to adjust its constraints by regulating it. The regulation in the Ákr. does not, in substance, differ from the provisions in Ket.,[28] however, its taxonomic location is problematic. In the Ákr. these provisions are in Chapter VIII 'Specific Rules in Relation to Certain Regulatory Actions' together with protective measures, sequestration and seizure.

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[22] Barabás, Fazekas and Kovács, Joghatóság, hatáskör, illetékesség. 139.
[23] Act CLXI of 2011 on the Organization and Administration of the Courts Section 2. Pharagraph (1), Act I of 2017 on the Code of Administrative Litigation (hereinafter: Kp.) Section 96–97.
[24] Ákr. Section 15. Paragraph (2).
[25] Ket. Section 20.
[26] Ket. Section 24. Paragraph (1), Ákr. Section 18. Paragraph (3).
[27] Kp. Section 12. Paragraph (3) and Section 13. Paragraph (11).
[28] Ket. Section 22. Paragraph (3)–(5) and Ákr. Section 106.

The Ákr. handles the concept of authority measure in a dogmatically erroneous way, since the legal institutions mentioned in Chapter VIII may be formal decisions; nevertheless, an authority measure is a non-formal decision of the authorities, but is usually an oral, unformed act.[29] The provisional measure may also be a formal decision, since the authority may adopt it on the essence of a case.[30]

VI. Conclusions

In sum, it can be stated that the Ákr. provides a much wider administrative policy gap and organisational power for the government and the legislator than before. This is the most striking in its designation of the second instance authority, considering also the fact that the weight of the appeal has probably not diminished to such an extent in the new regulatory environment as intended by the original government motivations. Anyway, loosening the boundaries of the forum system is definitely a step towards increasing organisational power.

Another direction of change is the rules of the Ákr. on weakening guarantees of predictability, accountability and thus the rule of law, but they can also be used to increase public policy manoeuvre, namely the rules on quasi authorities, delegation of jurisdiction and primacy of the court. It should be emphasised again that this does not mean that these rules have disappeared from Hungarian administrative procedural law; as I have referred to, they can be deduced from general principles or from specific provisions in other laws. Regarding guarantees, a more abstract, shorter regulation can be a problem if a civil servant or judge does not or does not want to derive the safeguards of rule of law and constitutional rights from these rules and from other available sources such as sectoral regulation, EU and international law, judicial practice or professional competence. This kind of more abstract regulation is therefore more appropriate in hierarchical matters (e.g. in head of authority – civil servant relationships), where there is much less need for fundamental rights protection, because client, for example, is more vulnerable than a civil servant. On the other hand, in administrative proceedings where the opposite is true, it is less reassuring, since we need to protect clients who lack public authority and state resources from the possible arbitrariness of state.

[29] See Official Explanation on Chapter VIII and Fazekas M., A hatósági aktusok, in Fazekas M. (szerk.), *Közigazgatási jog. Általános rész III.* (ELTE Eötvös Kiadó, Budapest, 2017[2]) 99–100.

[30] According to some opinions, provisional measures can be both formal and oral acts, see: Barabás, Fazekas and Kovács, Joghatóság, hatáskör, illetékesség, in Barabás G., Baranyi B. and Kovács A. Gy. (szerk.), *Nagykommentár a közigazgatási eljárási törvényhez*, (CompLex Kiadó, Budapest, 2013) 178–179.