



# Administrative procedural and litigation aspects of the review of governmental actions

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## Abstract

The main aim of this paper is to investigate the administrative procedural and litigation aspects of judicial review of governmental actions under the scope of the political question doctrine in Hungary. Governmental actions, due to their political nature, are usually excluded from judicial review, which means that an important safeguard of rule of law does not apply to them. As a result, serious constitutional concerns arise, especially when these decisions, in addition to their political nature, have a legal nature, too, or are administrative adjudicative ones. In these cases, procedural safeguards are even more important. The paper therefore examines such borderline cases in the practice of the Hungarian administrative courts and of the Constitutional Court regarding the existence of judicial review in these cases. The research has not comprehensively covered judicial practice, but focuses only on some characteristic decisions. In addition to examining court cases, the paper covers the statutory background and the theoretical foundations as well.

## Keywords

governmental actions, political question doctrine, judicial review, Hungary, discretionary power.

## 1 Introduction

Judicial review of governmental action is a particularly controversial, even conflicting topic in the science of public law. Namely, they are activities that, due to their primarily political nature, are exempted from judicial review; in other words, in their case, the most important safeguard of the rule of law does not apply. As a result, serious constitutional concerns arise, especially when these decisions, in addition to their political nature, have a legal nature, too, or are administrative adjudicative ones. In such cases, there is usually also a legal situation to be protected; in other words, the importance of procedural law and litigation guarantees increases. In my paper, I will examine how the borderline situation outlined above appears in the practice of Hungarian administrative courts and the Constitutional Court, and the extent to which judicial control can be interpreted in this context. The analysis does not cover the entire case law and Constitutional Court case law, but only a few decisions of a guiding nature. The research, as can be seen, essentially focused on the analysis of case law, but of course does not disregard the normative background and the theoretical foundations of governmental action and judicial control.

## 2 The concept of governmental action and its distinction from public administration

The concept of governmental action is addressed by both jurisprudence and political science, as it is a complex activity that is governed by law but is essentially political in its content and essence. From a public law point of view, our starting point is to distinguish between governmental and administrative acts or, more precisely, between its main control. Of these two, the basic purpose of the government is governmental action, which essentially involves setting strategic goals related to leading the country and providing the necessary resources and means to achieve them. Looking at the issue in the context of the system of separation of powers, it should be added that, although in parliamentary systems the government is the most active in governance, the head of state and the legislature are also involved (Fazekas, 2020, 89; Concha, 1905, 201).

Looking at governance in detail, in both the Hungarian and foreign literature, we find a variety of approaches to what exactly the government and the other state bodies in charge of governance do in implementing the above constitutional division of tasks. Thus, for example, in Lajos Lőrincz's not so much jurisprudential but rather administrative science approach, governance is an activity for defending the social and economic order of the country, increasing the welfare and wealth of the nation, developing the necessary strategy and tactics, and specifying the necessary tools. This requires the following tools: establishing and operating the system of governance, consolidating national unity, developing the economy, ensuring social welfare, protecting the quality of life, ensuring the country's external and internal peace, and representing and defending the country's interests at the international level (Lőrincz, 2005, 131). Another, more legalistic approach (Petrétei et al., 2007, 11–19), which can be associated with the trio of Petrétei, Tilk and Veress, regards governance as a basic state function, which can be perceived in functional, organisational and formal terms. In legal terms, it can be described in tasks and powers, and its system is defined by the constitution, mainly by laying down the framework. The primary purpose of constitutional regulation is to secure the maintenance of the most stable governmental relations possible. At the same time, this legalistic approach also emphasises the political nature of governance, i.e. that it means taking longer-term, strategic decisions through legislation and often through law enforcement, but it must be distinguished from these core functions of the state.

To this, we might add that governance as a political activity typically involves a choice between alternatives that express values (Marosi & Csink, 2009, 115), so governance is not neutral in an ideological sense. Its essence is political decision-making and action; that is, taking discretionary actions with political content. This is emphasised in the classical Hungarian public law literature, among others by István Ereky (Ereky, 1939, 180).

The Anglo-Saxon literature (see, for example, Hague & Harrop, 2004, 268) often words this in such a way that, at the top of the system of governmental system, stands the layer of political leaders, consisting of the head of state, the prime minister (if any) and the cabinet (in our concept, the government). The officials who comprise it are elected by popular vote, based on political criteria (typically this is also the way they lose it). Their role is to set priorities, make decisions and oversee their implementation. They are accountable to the sovereign people.

The concept of governance has, of course, undergone a number of changes over the past decades compared to these classical statements. Accordingly, governance is sometimes referred by either the term *government* or *governance* (Turpin & Tomkins, 2007, 391–400; Bennett, 1996). According to the authors Pollitt and Bouckaert, governance became a popular denomination in the late 1990s, thanks in part to the New Public Management movement. As opposed to traditional government-type approaches, this conception does not really emphasise the hi-

erarchical character of governance, but conceives it instead as a network (Pollitt & Bouckaert, 2011, 21–23).

This suggests that governance is a political activity, which means making the basic decisions necessary for the management of the common affairs of a political community (e.g. a country or a municipality). Its characteristic feature is that these decisions express the value choices of the political force that holds democratic legitimacy for governance. Therefore, the value choices of the sovereign people are reflected indirectly in governance. Since these values are often difficult to grasp from a legal point of view, the choice between them is typically made on the basis of a wide discretionary powers.

Compared to governance as a primarily political activity, public administration is the ‘engine room’ of the state (Hague & Harrop, 2004, 290), whose task is to implement efficiently the policies set by the political leaders. The characteristics of this bureaucratic administrative apparatus, separated from politics and operating according to special logic, were described in Max Weber’s theory of bureaucracy, now becoming a classic in the European social sciences (Weber, 2003, 45–84).

Despite the obvious differences, it is often difficult to distinguish between governance and public administration since, on the one hand, they are organisationally intertwined, for example, within the same ministry, political leaders work alongside professionally selected officials (Körösenyi, 1996, 35–62). On the other hand, although legal regulation often tries to separate the two spheres, they are intertwined also functionally, as it is not obvious where the boundaries are drawn between making political decisions and their preparation and implementation, since the two activities are partly performed by the same people (Varga, 2014, 547). Ereký offers a grip on this distinction when he writes, on the basis of contemporary French literature, that governance is basically about deciding more important policy issues, which largely serve to create political unity and to establish coherence between state bodies. The administration, on the other hand, deals with current affairs of minor importance (Ereký, 1939, 122).

Why does jurisprudence need to deal with the distinction between government and administration if, as we have seen, this is a political science issue in its important respects? The importance of the distinction, according to Ereký, lies in being able to decide which decisions can be challenged before a court (in the French system, the Council of State) and which cannot. If a decision concerns longer-term issues of political significance, then no, but if it concerns the management of daily business, then yes. It is up to the government, the political leaders, to decide into which category a particular matter falls, which Ereký sees as dangerous because, in this way, it is essentially possible to exempt any government decision from judicial review. A safeguard against this might be the exhaustive list of governmental actions that have immunity, which can be done on the basis of the practice of the court or the Council of State. Examples include the proclamation (convocation) of the National Assembly, ordering elections, adjourning and dissolving the Parliament, promulgating laws, ordering martial law, diplomatic activities declaring war and other acts of war, pardons and decrees regulating policing (Ereký, 1939, 120–123).

The main question is therefore who exercises control over governmental actions, what kind of control and, in particular, whether there is judicial control, and if so, what the extent of that control is. If there is none, then the control may be political; what is more, according to Ereký, only politicians can control governance, which is exempt from disciplinary and judicial control. This control, from a legal and political point of view, is carried out by parliament through parliamentary government or ‘constitutional law courts’. By contrast, the public administration and the judiciary can be controlled by those who themselves carry out this activity or are oth-

erwise professionally qualified to do so, namely the courts of law or the Court of Audit (Ereky, 1939, 180).

If we want to examine the control of governmental actions by means of jurisprudential tools, namely from a dogmatic point of view, we must start from the concept of governmental action. Two conceptual elements of governmental action can be discerned from the foregoing: its primarily political character on the one hand, and its broad discretionary powers (free deliberation) on the other. Thus, in what follows, I will deal with the basic theoretical features of these two main characteristics.

### **3 The political question doctrine**

In the era of globalisation, the resilience and flexibility of governmental and administrative systems are a common theme (Hoffman & Fazekas, 2019, 286–297). One of the obvious means of resilience is to provide agencies with broad deliberation, even discretionary powers, as the absence of detailed decision-making criteria and constraints laid down in legislation can enable governments to respond quickly and effectively to continuously changing challenges (Warren, 2003, 35–38). On the other hand, in order to maintain efficiency, government also needs to receive constant feedback on the quality of its work, both in legal and political terms, and to be subject to external scrutiny. This is what the science of public law calls democratic checks and balances. In fact, the Anglo-Saxon doctrine of political questions is nothing other than a theoretical framework for the resolution of the conflict between these two opposing demands, the conflict between broad political discretion and accountability (and, within this, legality) and its resolution.

Government decisions on political questions have a special relationship with the law, or rather with legislation. They are usually governed by constitutional law or administrative law, but sometimes there are essentially no clearly identifiable legal provisions; for example, no clear rule on competence that would reveal which body can make them and under what rules. By their very nature, they are adopted on political questions, and it is not unprecedented that they have no legal effect, and there is no interest protected by them that they would jeopardise or promote their being enforced (Barabás, 2018, 86–90). Consequently, governmental actions cannot be challenged in court, since judges can only adjudicate legal disputes but not political disputes, and cannot assume governmental responsibility, since they have not been empowered by the sovereign people to govern. On the other hand, they cannot violate the principle of the separation of powers (Fazekas, M., 2018, 212). In other words, the doctrine of political questions is a tool in the hands of the court to prevent itself from deciding on the merits of issues where it would be imprudent to do so (Tushnet, 2002, 1204).

The roots of the political question doctrine can be found in Anglo-Saxon, and more specifically American, public law. Following the Supreme Court's inconsistent jurisprudence on the criteria for political issues and thus governmental actions, the United States Supreme Court laid them down in *Baker v. Carr* [*Baker v. Carr* 369 U.S. 186, 217 (1962)], in which the Court was called upon to decide a case involving the boundaries of a constituency. In its decision, the Supreme Court set out the alternative criteria for a case to be considered a political question, which cannot be decided by the court: for example, the absence of identifiable and applicable benchmarks for the court to use, or the fact that the question can only be decided on the basis of a starting point that is essentially political in nature.

In European legal systems, the political question doctrine does not prevail either in theory or in judicial practice in the form in which it is found in the United States of America. If we look

at constitutional adjudication as the most ‘politicised’ area of adjudication, it can be seen that constitutional courts in Europe are generally not part of the ordinary court system and are much more likely to be regarded as political bodies than the Supreme Court in the US. In Europe, the separation between law and politics is not so rigid to begin with. Consequently, while in the USA the Supreme Court only rules on a specific dispute; that is, it only judges one specific aspect of a complex issue, a European constitutional court examines the whole issue, when, for example, it is engaged in abstract review of a norm (Paczolay, 1995, 22).

Nevertheless, the political question doctrine has its own antecedents and variants in European public law thinking and case law. It is true that here this issue generally arises in connection with governmental actions (*Regierungsakt, acte de gouvernement*). The first theoretical construct that can be associated with this issue is the theory of the reason of state (*raison d’etat*), the central idea of which is that the interest of the state is more important than the legality of the act (Miller, 1980, 587).

#### **4 Governmental actions from an administrative act theory point of view: the question of free deliberation**

Governmental action is very difficult to categorise in the system of administrative actions. This is due to the fact that, as Zoltán Magyary has put it, the significance of the administrative act theory, the genuine purpose of this categorisation, is to find out: “which of the acts of public administration have what legal significance” (Magyary, 1942, 587). Thus, the act theory categorizes the acts of public administration by means of the tools of black letter methodology, in terms of the legal effects on the recipients, i.e. the creation, termination and transformation of rights or obligations. However, governmental actions are not really issued by the administration, rather by the organs of government, even if these two organisational and personal circles are intertwined. On the other hand, it is precisely the legal effect, the change in the legal situation of the addressees, which is not necessarily given in the case of governmental actions; sometimes there is no legal interest to be protected or it is difficult to identify it, and therefore they cannot always be considered acts in the strict sense of the term.

Probably the existence of textbooks and summary works that do not even touch upon governmental actions in Hungary in their chapters on the theory of administrative acts, if they consider the administrative act theory a relevant matter at all – for example, Tamás (1997), does not consider it as such. There is a textbook that does discuss it; however, not in the context of administrative act theory, but in the context of administrative procedural law, in the scope of Act I of 2017 on Administrative Procedure (hereinafter: Kp. or Code), as an administrative activity that does not fall under the scope of the Act, and thus cannot be the subject of an administrative lawsuit (Pribula, 2017, 133).

The school of administrative jurisprudence, of which I am a member, in the textbook chapter written by Marianna Fazekas, classifies administrative acts basically from the point of view of whether they exert any legal effect. If they do, they are considered to be an act, if not, they are considered to be an actual activity. Within this classification, a governmental action belongs to the category of specific, administrative law unilateral acts (Fazekas, 2020, 88–89). However, this classification is problematic on several points. On the one hand, the textbook chapter itself admits that there are also governmental actions in the form of legislation or other normative acts (e.g. measures taken in the course of the extraordinary legal order). On the other hand, it is also questionable whether these acts fall under the regime of administrative law, if they exert any legal effect at all. It might be raised in several cases that their issuance is governed by

constitutional law or international law, again with examples in the area of extraordinary legal order, separation of powers issues (e.g. legislative initiatives) or in the area of defence and international relations.

Among the other types of theories of administrative acts, the classification of governmental actions by András Patyi is the most relevant. In terms of its content, it starts from the distinction between governmental actions and administrative acts and concludes, in the footsteps of Szontagh, that the former does not create any specific legal relationships, while the latter does. Otherwise, he examines governmental actions in the case law of the Constitutional Court; that is, he analyses the decisions of the Constitutional Court that review the constitutionality of certain acts classified as governmental actions or decisions (Patyi, 2017, 135–137).

Governmental actions are therefore difficult to classify from the theory of administrative acts point of view, both in terms of their subject and their object. They have a characteristic that makes them graspable, and that is the broad competence of deliberation or discretionary power with regard to the political content of the decision.

Discretionary power, also known as discretion, is one of the degrees of the legally bound nature of administrative acts. The issue of the legally bound nature of acts concerns the degree of discretion and the legal framework and the limits subject to which the administrative body, the law enforcement practitioner, operates and takes its decisions. Hence, the legally bound nature is as closely related as possible to the limited or unlimited nature of the power that administrative bodies can exercise. Thus, actually, the legal regulation of the issuance of acts, the delimitation of boundaries, is primarily a question of power, and as a result, a political question (Madarász, 1992, 326, 329). The authorisation by a source of law to issue an act must clarify the basic conditions for the issuance of an act. If these issues are not clarified by the legal norm, then in a strict sense we cannot even speak of law enforcement or of the act issued in the course of law enforcement: this is the field of legally unbound acts. It can be seen that legally bound nature means to be bound in a substantive law sense, since the above issues essentially belong in the field of substantive law (Madarász, 1992, 331–333).

Acts issued on the basis of discretionary powers, based on free deliberation, belong to the category of acts that are legally unbound or at least less bound. In the course of issuing such acts, public administration enjoys greater freedom than if it were simply exercising discretionary powers (F. Rozsnyai, 2017, 129–131).

Looking at free deliberation from another point of view, it is a mandate for the administration to act in a specific case in accordance with the objectives of the state, within the general framework of the law, on the basis of its discretion. Discretion in this context means that it is not clearly predictable from the legislation how the administrative body will decide; only that it will take a decision of some kind. The legislator leaves it to the agency to determine the content of that decision. However, with the rise of civil constitutionalism, the principle of the public administration being bound by law has become emphasised. This means that the administration cannot act in the absence of a legal mandate and that the law must also determine the content of the action. The development of administrative law therefore brought along a decline in free deliberation; the more legally bound discretionary powers came to the fore, and the category of less legally bound acts was created (F. Rozsnyai, 2017, 132).

The relationship of free deliberation to legal regulation, to legality, is a fundamental issue in European and American approaches in the legal literature (McHarg, 2017). Many Hungarian scholars of public law have also visited this issue, following German and French examples: Here, Vilmos Szontagh, Móricz Tomcsányi, Győző Concha, János Martonyi, Tibor Madarász and Miklós Molnár are worth mentioning.

## 5 Lessons of procedural law and litigation from the case law of Hungarian administrative judges and the Constitutional Court

The concept of governmental actions appeared for the first time in Hungarian administrative law in the Kp. in the context of the fundamental provisions, in connection with the concept of administrative dispute. The Code states that

(4) Unless otherwise provided by an Act, no administrative dispute shall take place a) concerning government actions, in particular with respect to national defence, aliens policing and foreign affairs [Kp. Section 4 (4) paragraph a)]

This is apparently a rule of exception, which precludes claims relating to any governmental action from being brought before an administrative court. The rule of exception is necessary because of the concept of the Kp. and the rationale for its creation; namely, to ensure that judicial remedies are generally available against the various acts of the public administration, and thus to ensure that the Kp. provides for legal protection without a legal vacuum. In this context, the explicit aim of drafting the Kp. was also to ensure that administrative adjudication no longer provides legal protection only against the official acts of administrative authorities (F. Rozsnyai, 2016, 33–34). If, in principle, administrative adjudication provides legal protection against all acts of the executive branch, a special rule of exception must be made if the legislator does not intend to grant such protection for a particular type of act. On a theoretical level, it clearly follows from the previous chapters why a governmental action should be excluded from the scope of administrative review (separation of powers, political free deliberation, etc.). According to Marianna Fazekas, another important aspect from the point of view of Hungarian substantive public law is that the Government, as an administrative body, is also subject to the Kp., and although most of the governmental actions issued by it are normative acts (government decrees or normative government decisions), which are not subject to the Kp., there are also individual acts (individual government decisions), which are classified as governmental actions based on their content analysis. In principle, these may come within the scope of the Kp., and therefore require the exclusion rule (Fazekas, M., 2018, 212). Agreeing with this approach essentially, it needs to be seen that governmental actions cannot be exclusively performed by the Government, so the rule of exemption is not only needed because of certain acts of the Government.

It is also noteworthy that the quoted rule of the Kp. singles out, by way of example, three sectors, namely national defence, aliens policing and foreign affairs, which may be typical areas of governmental actions. The wording suggests that there is no place for the administrative judicial route in connection with any administrative act in these sectors, which cannot be a constitutional interpretation that allows the right to legal remedy to apply, since official administrative activity also takes place in these sectors, most visibly in the field of aliens policing. Thus, even in these sectors, it is not exclusively governmental actions that are adopted either. The question of whether an act falls within the concept of governmental actions is a matter for the courts to consider on a case-by-case basis (Barabás, 2018, 90).

That stated, the foreign affairs sector, for example, is of course a typical sector for governmental actions to be issued, as we have seen earlier in the context of conceptual clarification and international examples. This aspect, even if in a specific manner, is already reflected in the Hungarian literature: Zsolt Menyhárt, in his characterisation of the administration of foreign affairs, when interpreting the quoted rule of the Kp., writes that it is logical because “the resolution of a dispute between two or more states cannot fall within the competence of any national court;

the free deliberation is claimed by an international forum”. (Menyhárt, 2020, 197) It is remarkable that Menyhárt does not explain the rule of exception in the Kp. by the political nature of governmental actions in the foreign affairs sector, but interprets it in the field of law, conceiving the issue as a legal problem. In essence, it says that the rule is about resolving legal disputes rather than political conflicts, which should be settled according to the rules of international law rather than national law. This raises the question of whether all relevant governmental actions in the field of foreign affairs can be interpreted as disputes subject to the international law regime.

In line with the above, as we have seen at the beginning of the paper, in the context of conceptual clarification, Hungarian administrative law theory has also started to deal with governmental actions and their judicial review in the context of the Kp. (Barabás, 2018; Fazekas, M., 2018; Fazekas, 2020; Pribula, 2017). The concept became visible through the creation of the Kp., which can be interpreted as a specific manifestation of the law-developing function of administrative adjudication and the codification of administrative procedural law. Namely, if the concept of governmental actions is not included in the Code then theory is not necessarily forced to deal with this issue intensively (F. Rozsnyai, 2016, 6).

As we have seen, the adoption of the Kp. was a significant milestone in the process of the domestic emergence of the doctrine of political questions, as it gave the doctrine a clear formulation in legislation. Prior to the Kp., the doctrine appeared mostly in the practice of the Constitutional Court, as I have shown earlier, not without any controversy. Going further, since administrative adjudication at this time was primarily focused on the official decisions of administrative authorities, there was less chance of politically relevant cases being brought to administrative courts. Still, there were such cases. For this reason, I will now first examine these cases, and then those that arose under the regime of the Kp.

The first case that I will examine in this context is the order of the Curia No. Kvk. III.38.043/2019/2, which was issued in 2019 in a case related to a municipal election campaign. The applicant was Gergely Karácsony, candidate for the office of Lord Mayor of Budapest, who filed an objection with the Budapest Election Commission (FVB) because, in September 2019, Gergely Gulyás, Minister of the Prime Minister’s Office, made the following statement at a press conference called Kormányinfo (Government Info): “[w]hoever is suitable to be Lord Mayor seeks cooperation with the Government, while unsuitable ones, like Gergely Karácsony, reject the possibility of cooperation and consider the office of Lord Mayor as a war position”. According to Karácsony, this statement was unlawful as campaign activity, because it violated, among others, the fairness of the election and equal opportunities for candidates, as it clearly was favourable to the candidate for Lord Mayor of the governing party, István Tarlós, Karácsony’s rival.

The National Electoral Commission (hereinafter: NVB) that acted as a result of case transfer, had rejected the objection as, according to its position, Gergely Gulyás participated in the press conference as a minister, and during it he made a statement in the course of his statutory duties as the member of the Government in charge of the development of Budapest and the agglomeration. The minister carries out these tasks in cooperation with the Lord Mayor of Budapest, which is why his statements regarding the agreement previously reached between the Government and Lord Mayor Tarlós and the urban development of Budapest can be evaluated as governmental actions, since he expressed his professional position on a candidate he considered unfit. Moreover, under Section 142 of Act XXXVI of 2013 on the election procedure (hereinafter: Ve.), a governmental action is not part of the election campaign, which is why the basic principles of Ve. are not applicable to it either.

Gergely Karácsony filed a petition for review against the NVB’s decision to the Curia as, in his view, the minister’s statement had nothing to do with his duties, it could not be considered



as of a professional nature, but was politically motivated, and therefore does not fall under the rule of exception in the Ve. and should be assessed as campaign activity.

The Curia upheld the decision of the NVB. Although it did not dispute that the Minister's statement was unfavourable to Karácsony, it did not classify it as campaign activity but as governmental action, which is covered by Section 4(4)(a) of the Kp. as the underlying rule. Acts falling within the scope of governmental actions are based on free deliberation and discretionary powers, and are mainly of a political nature. They are very slightly or not at all legally bounded and therefore cannot be the subject of an administrative lawsuit. Moreover, their legality cannot be reviewed under the Ve. Furthermore, the Curia agreed with the NVB that the Minister had not exceeded his statutory mandate in making the statement and had not otherwise violated the law. The Curia pointed out that "[t]he fact that the applicant considers that it was not necessary for the Minister to classify a candidate for Lord Mayor unfit to perform his duties does not mean that he did not do so in the course of his duties as defined by legislation, which is not, by law, part of the electoral campaign".

Because it concerned a municipal election campaign, the case received considerable media coverage. Among the articles published, one highlighted the decision of the Curia for stating that "the stance of the Curia on the neutrality required from the state in the fight of political parties cannot be maintained in the future" (Herczeg, 2019). There was an article published that clearly took over the minister's claim of Karácsony's incompetence (Origo, 2019). It is obvious, therefore, that the case was clearly political, which in itself may be a kind of explanation for the decision of the Curia, i.e. that it did not qualify the minister's statement on the merits, in terms of its content, using an argumentation that classically belongs to the doctrine of political questions. In doing so, it acknowledged that, in a ministerial statement as a governmental action, political and non-political (e.g. professional) elements are necessarily intertwined, and in many cases cannot be separated. And this circumstance renders the case essentially unsuitable for the court to decide on the merit in this regard. However, from a procedural law point of view, the question may arise as to why, if this is the case, the Curia did not reject the application as inadmissible, without examining the merits. At the same time, Section 231(1) of the Ve. does not refer to any grounds which would have been applicable in this case, and the Curia therefore upheld the decision of the NVB on the basis of Section 231(5)(a).

In addition to the above, the significance of this decision lies in the fact that the Curia clearly refers to Section 4(4)(a) of the Kp. As an underlying mandatory rule, applicable to the possibility for a governmental action to be reviewed by a court.

In May 2021, the Curia passed the next decision, order No. Kpkf. 40.129/2021/2, in the so-called SZFE case (EduLine, 2020). The background of this case was one of the most serious "culture war" conflicts in recent Hungarian political history, the change in the maintenance of the University of Theatre and Film Arts (hereinafter: SZFE). The first step in this process was taken in 2020, when government actors suggested that the Hungarian state should pass the maintenance of the SZFE into the hands of a foundation. The legislative background for this was Act LXXII of 2020 on the Foundation for Theatre and Film Arts, and grant to the Foundation for Theatre and Film Arts and the University of Theatre and Film Arts (hereinafter: SZFA tv.). The transfer of the maintainer's right was subject to numerous conflicts. On the one hand, the Senate and the Student Self-Government of the SZFE repeatedly expressed their strong disagreement, and the students of the university joined them. On the other hand, the issue, similarly to the media war in the 1990s, appeared from the outset as a kind of ideological confrontation in the context of the so-called culture war. In this context, two opposing positions emerged.

**1** The Government decided to transfer the maintainer's right on the basis of ideological considerations, because it wanted to shape Hungarian theatre and film education according to its own political interests, while at the same time it was promoting its own cadres.

**2** In contrast, the government's interpretation is that the restructuring is necessary partly for professional reasons, because of the shortcomings in the theatre and film training in Hungary, and partly because of the left-liberal ideological predominance in training that has developed in recent decades.

One of the administrative steps in this sequence of events was when the Ministry for Innovation and Technology (hereinafter: ITM), which exercised the maintainer's rights on behalf of the state, and the new maintainer, the Foundation for Theatre and Film Arts, submitted a joint application to the Education Office (hereinafter: OH) in August 2020, requesting the transfer of the maintainer's rights to be entered in a public register. The application was in the form of the so-called FRKP-1110 form, against which, as act ordering the transfer of the maintainer's rights, a student of the SZFE (also a member of the Presidency of the Hungarian Students Council (HÖK) and a member of the Senate) brought an action before the Budapest District Court in November 2020. In the action, he requested, inter alia, the annulment of the form as act, the ordering of the defendant to issue a new act and to provide detailed guidelines for ensuring the guarantees of university autonomy in order to implement the transfer of the maintainer's rights as an administrative act.

In its defence, the defendant ITM also referred, inter alia, to the classification of the form under the theory of administrative acts. It explained that the applicant's rights and obligations were not directly affected by the form, inter alia because it was "an application based on governmental action that cannot be subject of an administrative lawsuit under Section 4 (4) (a) of the Kp. (governmental action), that aimed at conducting the registration procedure related to the transfer of the maintainer's rights pursuant to Section 16 of Government Decree No. 87/2015 (IV. 9.) on the implementation of certain provisions of Act CCIV of 2011 on National Higher Education (hereinafter: Nftv.). The FRKP-1110 form only results in the registration in the public register kept by the OH. The FRKP-1110 form is a pre-established form, which does not qualify as an administrative act within the meaning of Article 4(3) of the Kp."

The court of first instance dismissed the application for lack of jurisdiction and, in its order, referred to Section 4 (4) (a) of the Kp.: it agreed with the reasoning set out in the defendant's defence as regards the nature of the form as a governmental action. It further explained that the form, as an application, cannot be considered as an individual decision because it does not contain an expression of will with a content of a decision and does not settle any matter brought before the administration. The transfer of maintainer's rights, which does not necessarily have to take the form of any formal decision, does not qualify as an act of a law enforcement authority, and does not fall under Act CL of 2016 on the general administrative procedure (hereinafter: Ákr.).

The plaintiff student filed an appeal against the order of the first-instance court, relying on, among other things, Section 4 (4) (a) of the Kp., which he claimed was violated by the order, because the objectives of the Kp.'s creation, such as broadening the means of judicial review and ensuring legal protection without any legal vacuum, must be interpreted strictly. Therefore, the form qualifies as administrative act subject to Section 4(1) and (3)(a) of the Kp., against which creating an independent judicial control is necessary and which may therefore be subject of an administrative dispute. A broad interpretation of the concept of governmental actions would constitute a restriction of the right to turn to the courts, and indeed the whole of paragraph 4 as

a rule of exception is in itself a restriction of that right. Tertiary education is a public task, which is regulated in detail by public law, and being regulated by administrative law is the central element of the concept of administrative dispute in the Kp. [Article 4 (1)]. The purpose of the application is to trigger administrative legal effects through the OH's proceedings.

Subsequently, in its appeal, the applicant submitted that the designation of the university's maintainer falls within the competence of the National Assembly and therefore cannot be considered as a governmental action. When the ITM applied to the OH for the registration of the change of the university's maintainer, it was acting independently in the performance of a public task and not on the basis of an instruction or authorisation from the Government, and therefore that act could not be classified as governmental action. It has legal effect and may be the subject of administrative dispute.

The Curia ruled that the appeal was unfounded and upheld the decision of the court of first instance. It agreed with the court of first instance that the form does not constitute an individual decision under the Kp., has no legal effect and is only intended to register the change of maintainer. Therefore, it does not qualify as an administrative act subject to an administrative action: at most, such action can be brought against the decision closing the OH's procedure. Consequently, the fundamental rights violations alleged in the appeal could not arise in relation to that form.

It also follows from this, and this is the most important element in the reasoning of the decision of the Curia, that "[s]ince the application/form challenged in the action does not qualify an administrative act, it is irrelevant that the court of first instance had not applied the provisions of the Kp. 4(4)(a), because the basis for the refusal was not Section 4(3)(a) of the Kp. but Section 48(1)(b) of the Kp. Consequently, the arguments of the appeal relating to governmental action were irrelevant". In other words, the court of first instance acted lawfully in dismissing the application on the ground that it lacked jurisdiction.

As an assessment of the court's decision(s), it can be concluded that the key element of the case for our purposes is the application for registration of the transfer of the maintainer's rights and, more specifically, the form used for this purpose, which was submitted jointly by the ITM and the Foundation. The Curia, as we have seen, did not consider whether the submission of the form was within the scope of governmental actions to be a relevant question, because it deduced otherwise, that it did not fall within the scope of the Kp. The court of the first instance considered that the submission of the form was a governmental action, which – from a theoretical point of view – can be considered to be disputable. The part with the applicant's argument that this is an administrative act, which is regulated in detail by public law, may be agreed upon. It can be considered as correct, but it does not follow that it is an individual decision under the Kp., which can be challenged in administrative action. The form is an application for registration in the public register kept by the OH of the maintainer's right, pursuant to Articles 35-38 of the Ákr. A client application cannot be challenged in an administrative lawsuit, even if one of the applicants is an administrative body (the ITM), since it indeed does not contain a decision that would exert legal effects on an external entity. However, it is also not a governmental action, as its filing and content are subject to detailed legal rules; it is not submitted under political free deliberation.

A governmental decision issued on the basis of political free deliberation is the act by which the Government decided to transfer the SZFE's maintainer's rights to the Foundation. This decision was Government Decision No. 1380/2020 (VII. 10.) on the establishment of the Foundation for Theatre and Film Arts and on the provision of conditions and resources necessary for the operation of the Foundation and the University of Theatre and Film Arts. The Government

decided to establish the Foundation in this decision, appointed the Minister of Innovation and Technology to exercise the founder's rights and transferred the rights of the University's maintainer to the Foundation. The form, as an application, only served the purposes of implementing this decision.

In order to interpret this, it is worth relying on the concept of *acte détachable* (detachable act), developed in the French practice of the Council of State and already mentioned in the context of the French approach to governmental action, according to which it is necessary to detach from governmental actions those public law acts which can be qualified as such from the legal point of view and which can be reviewed by an administrative court. This review can, of course, only be limited to the lawfulness of the act, not to its political content. The SZFE case was also clearly brought before the court with the aim of enabling the plaintiff to remedy the violations of constitution it alleges, in particular the violation of the autonomy of tertiary education. However, the violation of rights, if any, did not arise from the submission of the form, but from the government decision, the SZFA tv. and Section 94 (6) of Nftv., which grants the maintainer broad powers, for example, in the adoption of the university's budget and organisational and operational rules. However, in the absence of an *actio popularis*, the applicant was unable to challenge these before the Constitutional Court, which is presumably why it asked the court to initiate a specific *ex post* norm review.

It is a different question whether this governmental decision can be reviewed from a legal, constitutional point of view; in other words, whether it should indeed be considered as a governmental action. If the case is brought before the Constitutional Court, it will have to examine whether the transfer of the SZFE to maintenance by a foundation (especially in the light of other similar reorganisations) and the regulation of the rights of the maintainers, including the aforementioned legal provisions, actually violate the constitutional rights and principles mentioned in the complaint, including the autonomy of tertiary education.

The Constitutional Court's Resolution 16/2020. (VII. 8.) AB was passed in the context of one of the most controversial media political events in Hungarian internal politics in recent years, in the so-called KESMA case. The background to the case is the creation of the Central European Press and Media Foundation (hereinafter: KESMA). Established in 2018, KESMA has become the owner of a number of media businesses and is thus, according to some evaluations, currently the main tool for the concentration of pro-government press and media businesses (Kósa & Zoltai, 2018). As one of the elements in this process, the Government has classified, in Government Decree 229/2018 (XII.5.) on the acquisition of ECHO HUNGÁRIA TV Televíziós, Kommunikációs és Szolgáltató zártkörű Részvénytársaság, Magyar Idők Kiadó Korlátolt Felelősségű Társaság, New Wave Media Group Kommunikációs és Szolgáltató Korlátolt Felelősségű Társaság, and OPUS PRESS Zártkörűen Működő Részvénytársaság by Közép-Európai Sajtó és Média Alapítvány, the acquisition of four media businesses, on the basis of the authorisation granted in Section 24/A of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Practices (hereinafter: Tpv.) As a result, the concentration did not have to be notified to the Hungarian Competition Authority (hereinafter "GVH"), as it was outside the scope of the Tpv., and the National Media and Infocommunications Authority (hereinafter: NMHH) did not have to be involved in the procedure as a specialist authority either.

The MPs who submitted the petition objected to this very thing, saying that, in this way, it cannot be assessed whether the level of independent opinion sources after the merger ensures the enforcement of the right to diverse information in the relevant market of media content services (see Section 171 (2) of Act CLXXXV of 2010 on media services and mass communication). In addition to media pluralism, the petition also claimed the violation of discrimination, as the

Government Decree exempts entities involved in a specific concentration from the procedure of the specialist authority, thus putting other entities in a similar situation at a disadvantage. This results in discrimination in relation to a fundamental right (freedom of the press). In addition, the petitioners also pointed out that Section 24/A of the Tptvt. allows for the classification as being of national strategic importance in the public interest only, and that the Government Decree itself did not in any way make any reference to the public interest served by the merger, and the related official communications only referred to them tangentially, which, in their opinion, were not correct statements in any case. Consequently, in their view, in the absence of a public interest, the merger could not have been declared to be of national strategic importance, and the Government Decree therefore violated Article 15(4) of the Fundamental Law, which provides that a Government Decree may not be contrary to an Act of Parliament.

At this point, it is worth quoting the challenged Section 1 of the Government Decree verbatim:

The Government, pursuant to Section 24/A of Act LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition, hereby classifies the merger implemented by the acquisition of control of ECHO HUNGÁRIA TV Televíziózási, Kommunikációs és Szolgáltató Zártkörű Részvénytársaság (registered address: 1149 Budapest, Angol utca 65-69., company registration number: 01-10-045204), Magyar Idők Kiadó Korlátolt Felelősségű Társaság (registered address: 1097 Budapest, Könyves Kálmán körút 12-14., company registration number: 01-09-168017), New Wave Media Group Kommunikációs és Szolgáltató Korlátolt Felelősségű Társaság (registered address: 1072 Budapest, Klauzál utca 30., company registration number: 01-09-189828), and OPUS PRESS Zártkörűen Működő Részvénytársaság (registered address: 1062 Budapest, Andrássy út 59., company registration number: 01-10-048787) by Közép-Európai Sajtó és Média Alapítvány (registered office: 8623 Balatonföldvár, Bethlen Gábor utca 9., registration number: 14-01-0003400) as a concentration of national strategic importance in the public interest.

The statement of reasons of the Constitutional Court resolution focuses on the concepts of national strategy and public interest. The Minister of Justice, who was consulted in the case, gave the Constitutional Court some guidance in this respect, explaining that “the concept of public interest is not static but is constantly changing as a result of value choices, and its definition is therefore a matter for the legislator at any time”. In the same way, it is for the Government to decide what it considers to be of national strategic importance, and this is the Government’s responsibility, which it cannot share with others. The Constitutional Court essentially accepted and reiterated this reasoning, stating that it cannot itself determine the public interest underlying the regulation: this is a matter for the Government, as it is the general body of the executive branch (Article 15(1) of the Fundamental Law). Similarly, it cannot adjudicate on the correctness of a national strategy. At the same time, it acknowledged that the lack of notification to the GVH and the subsequent competition procedure, as well as the lack of a contribution from the NMHH as specialised authority, does indeed mean that a system of guarantees is abolished, which could lead to a “reduction” in the state’s duty to protect the diversity of the press. The panel has therefore set itself the task of examining the public interest behind the classification of the concentration concerned as being of national strategic importance and weighing this against the constitutional requirement of diversity of the press.

The decision stated that the petitions were wrong, that the Government Decree does identify the public interest underlying the national strategic character of the merger of the media

businesses concerned. The Court supports this by its grammatical interpretation of Section 1 of the Government Decree. This public interest, however, “can be overruled only in extreme cases, and this case cannot be considered as such. In the case under scrutiny, there may be a reasonable justification, arising from the specific characteristics of the media market, for more concentrated media activity in a given market segment. In other words, it is clearly not possible to conclude that the merger is in fact not in the public interest. This is sufficient for the Constitutional Court’s assessment of the public interest in this respect”. It follows from this that the Government Decree is not contrary to the TpvT, since “the classification as being of national strategic importance took place in the public interest as defined by an act”. On this basis, the Constitutional Court dismissed the petition.

Once again, we see the Constitutional Court relying on the doctrine of political questions in a politically sensitive case, even if it does not name that basis of principle. However, it is obvious that it does not do so coherently. It fails to carry out the balancing exercise that it has set for itself, and fails to weigh up the public interest, as defined by Government Decree, against the constitutional requirement of press pluralism. This would be a political balancing exercise, as it would require it to interpret the concept of public interest in the context of the case in question, but it must refrain from doing so. However, it cannot justify its statement that there is no extreme case where the public interest can be overruled in favor of press pluralism. This is based on a grammatically manifestly incorrect interpretation of the law, that the merger of companies is the public interest itself. This interpretation is not even supported by the text of the norm, which states that the Government “hereby classifies the merger ... as a concentration of national strategic importance in the public interest”. Concentration cannot, by definition, be equated with public interest, since the former is an act and the latter an abstract concept. The public interest must be a reason, a value, or a principle that justifies the concentration as an act.

Why is this incoherent reasoning necessary? In politically sensitive cases, a situation seems to be emerging that is different from foreign examples as if the panel is not trying to push the case aside but, on the contrary, it wants to decide it, as it did, by stating that there is a public interest and dismissing the petition. However, it is trying to do this by keeping up the pretense that its decision is not political but determined on a professional basis.

## 6 Conclusions

It can be seen that the relationship between the doctrine of political questions and the rule of law is a key issue. Exempting governmental actions with political content from judicial review is a clear challenge to the rule of law since, as a result, the independent judiciary will not be able to exercise control over the legality of a part of the executive branch’s activities. The classic justification for this is that, in many cases, such acts have no legal effect to begin with; they do not create any legal interest to be protected, and thus judicial control is functionless. We have, however, seen examples of governmental actions exerting legal effect, which may raise the question of the legal position to be protected and thus the question of legal remedy.

The theoretical critiques of the political question theory also focus on this point. There are authors who speak of a trend for the political question doctrine to decline, it can only be applied in a narrow context, even in rule of law, since there is a need for some legal regulation of the merits of the cases and the content of the decisions to be taken in all governmental relations. Consequently, it is also necessary that there should be a judicial remedy against the decision and that the court must be in a position to judge the legality of the decision. This is the so-called process of judicialisation, which Ernő Várnay translated as ‘bírósodás’ (Várnay, 2017, 13–14).

In this conception, the principle of separation of powers supports judicial review in all cases, even of a governmental action with political content, as it ensures that each branch operates lawfully in its own domain. In other words, in a democracy, no one can justify their own decisions against the constitution and substantive law (Beširević, 2021, 95–96.)

Furthermore, in the case-law of the Hungarian Constitutional Court, the decision in the KESMA case was an example of a body explicitly ruling on an actual policy matter in a way that favoured the Government's side, on the basis of arguable grounds. Moreover, it did not refrain from ruling on the case, but decided on the merits.

If the aim is (and what else could be in a constitutional state it is) to have meaningful and effective judicial control over a governmental action, then it would be appropriate to follow the prudential theory of political questions, as known from American public law jurisprudence, as developed in the Pocket Veto case. The essence of this is that the court (or the Constitutional Court) carefully considers whether politically sensitive cases brought before it are suitable for judicial review and review those that can be reviewed under the constitution. Namely, it draws as narrowly as possible the boundaries of the doctrine of political questions and seeks to ensure that as many acts of the executive as possible are subject to review, provided, of course, that the constitutional conditions for doing so are met (Marosi & Csink, 2009, 116). This is very much needed in the current centralised Hungarian system of governance (Fazekas, J., 2018, 380–387).

However, the above conclusions can be drawn from the work of the Constitutional Court. It is not yet possible to deduce trends and regularities from the case-law of ordinary court, as the Kp. entered into force on 1 January 2018, and therefore the extensive case-law related to governmental action that can be comprehensively examined has not yet been developed. However, this also sets the path in the direction of further research. Furthermore, if we take into account that, as we have seen, there is still plenty of “reserve” for governmental action in the field of specific legislation, it is obvious that the topic will not remain unexploited in the future.

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