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Challenges for Hungarian Local Self-Governments Connected to the Use of Publics: To be Governed by Public or by Private Law?

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Abstract After the fall of the Wall in Hungary administrative law and legal thought was somewhat eclipsed. The article, focused on the concrete example of the usages of public space presents how the dominance of civil law and its concept of self-governments as the owners and not as the regulators of public land distorted the legal framework given for local self-governments to regulate the forms, as well as to manage the uses of public land themselves. The article will also trace back the developments of the last 25 years to show by which means in the case of some uses the governance of public law could be restored and how in other fields the entrepreneurial concept could be neutralised. From these developments, it will be evident that the governance (rule) of public law is vital to ensure equal access to these collective resources, safeguard the public interest and ensure effective legal protection.

Keywords: • use of public space • local self-government • municipal regulation • administrative law • effective judicial review

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https://doi.org/10.4335/2021.7.8 ISBN 978-961-7124-06-4 (PDF)
Available online at http://www.lex-localis.press.

1 Introduction

Whereas in socialist times it was clear that any private use of public space is principally forbidden and consequently only allowed if a legal norm or a single permit allows it, this concept was principally flawed during the transition to democracy and rule of law, causing inter alia major deficits in legal protection and corruption. The eclipse of administrative law had several grounds, but focus is now on the consequences for the regulation and management of the private use of public land. The article traces back the developments of the last 25 years to show on the one hand to what distortions this led and on the other hand means by which the governance of public law could be restored in particular relations as well as how the entrepreneurial concept could be neutralised. The aim of the article is to point out by this analysis that the governance (rule) of public law in relations connected to the private uses of public space is vital to ensure equal access to these collective resources, safeguard the public interest and ensure effective legal protection.

The article is primarily based on doctrinal legal research, analysing legal texts and the case law interpreting it. Flowing from the longer span of time of the developments analysed, the comparative method, as well as the qualitative empirical method was applied, too, to analyse the case law of the courts. As this type of cases rarely end up at the higher judicial fora, this method could be only used with constraints.

2 The concept of the notion of public space and its possible usages

2.1 The two types of notions of public space

There are two sorts of notions of public space in Hungarian law. The static notion was first defined in the Construction Act: "public space is land owned by the state or local government which is registered in the Land Register with this quality." (ConstrA s. 2 p. 13.) There is another, a dynamic notion, e.g. in the Act on the Surveillance of Public Space or in the Act on Petty Offences (s. 29) where public space is all ground in state or local government property intended for public use which can properly be used by anyone. The notion of public space is extended by these laws to the parts of public space which function as public roads and also the parts of private space which are opened and designed by its owner to the public, as well as to private space that can be used by anyone on equal terms. This latter definition is necessary for maintaining the order of public spaces, whereas the static definition of the Construction Act is better usable in relations with building / construction law and public planning.

Free public use and public ownership were elements of the notion of public space that were equally acknowledged by both kinds of definitions. In 2010 however, the legislator modified the definition of public space in the Construction Act and removed the element of free proper use of the definition ("which can properly be used by anyone") to connect

the proper use with the functions of public space stressing, that proper use is the use in line with the functions of public space. This was due to the developments of the uses of public space, namely the quest for the criminalization of homelessness (F. Rozsnyai, 2014). The legislator thus on the one hand explicitly stated, that local self-governments have a competence for regulating the use of public space according to local specialties. On the other hand, a distinct rule was created on the function of public space stating that the proper use is possible to everyone. These two regulations are preceded by the enumeration on the function of public space: it is to grant

- spatial connection and approach of lands
- traffic on roads and for pedestrians (road, catwalk, etc.),
- recreation, amusement, sport, leisure time activities,
- marching, assembling, collective action,
- place for statues, creation of memorial places, place for pieces of art,
- the placement of utilities,
- the creation of green spaces.

However, the clarification of the relation of these functions to the private types of use is missing from s. 54 of the Construction Act.

2.2 Ways of using public space

There are basically three legitimate uses pointe out in the notions of public space: common or public (proper) use, and special or private use (improper use) – typically indirectly enhancing the public use, like do food trucks or mobile shops. Between these two forms of use we can identify a third form, the usage by residents, mostly connected to traffic regulations (driveways, resident parking zones, etc.) While in the case of public use, in fact, anyone is free to use the public space, in the case of a private use, concurrent use is not possible. This is usually the case with illegal behaviors as well.

Perhaps the most important characteristic of public space is the designation that it is intended for public use. Public use is always collective: either it is a use of space by a larger, not defined group of persons, or it is a use which serves a larger, not defined group of persons, i.e. collective interests. Thus, the uses which serve dominantly private interests are not proper utilizations. These forms of use are restricted, mostly regulated by the local self-governments, empowered by the Construction Act as we have seen above and the Act on Local Self-Governments. If we look on the regulations of the use of public space by the local self-governments, we see that these are utilisations which serve particular – mostly economic – interests. The restrictions to the use of public land are primarily categorised by its duration and the nature of these interests. The longer it shall prevail and the more it serves economic interest, the greater is the possibility that besides a permission of the local government, also the payment of a fee is necessary for the exercise of such a use. For example, the decree on the use of public space of the Local Government of Budapest categorises uses which are not allowed, uses which are

temporally allowed on notification and those which are only allowed with permission. These latter uses are mostly of commercial or cultural nature, like the selling and the promotion of goods, festivals, fairs, filming, advertising devices, terraces of restaurants and cafés, but also phone-boxes, mailboxes and vending machines. The uses connected to construction and reconstruction works, including the protection of trees and other plants on public land also need a permit.

We find a different intensity and different types of regulation for different types of public space usages. This also flows from the fact that there are different types of use within each type. Some require very detailed central regulation, such as road transport, while for others we hardly find any. It also varies depending on the possible public service nature of the use of a given public space (such as public parks or playgrounds) and the potential risks associated with its use.

Thus, most of the rules are necessarily found in the municipal norms, so the order of the use of public space is decided by the local governments within the legal framework. This includes on the one hand deciding what activities are principally prohibited and which are those from this category, which are nevertheless possible upon a permit. On the other hand the fees to be paid for the use of public land upon permit have to be determined, as well as the sanctions of the violations of the prohibitions. There are however some forms of use of certain special public spaces where we find a statutory law framework in the sectoral rules. This is the case with road traffic or passenger transport services, as well as the main rules for trade on public space. Of course, the legal framework also stems from the laws regulating the general part of administrative law, such as the Act on Local Self-governments or the Act on Administrative Offences. The general framework of the public authority's activities, legislation and application of law is determined by law. Theoretically, the Administrative Procedure Act should be part from this framework, too, when local governments issue permits for the special use of public space, but this was not evident for almost three decades in Hungary. It is worth shedding some light on the reasons and consequences of this "disturbance" which could have been easily dissolved through the central legislator or the case law of the higher courts, but nevertheless was present for more than 25 years.

3 Is public space merely a piece of national property or a public good?

3.1 The permission for private (improper) use to be governed by civil law or public law?

A heavily discussed question of the last decade is the legal nature of the decision of the local government which permits the improper use of public space. The Constitutional Court had several occasions to decide on this and developed a legal reasoning that was not free of contradictions. This was also due to the fact, that the concept of law

enforcement was severely touched by the transition and there were a lot of uncertainties (Nagy 2007).

When the Constitutional Court had to decide from the angle whether the local government has a right to regulate the use of public space, it stressed that it is its constitutional competence to address the needs of the inhabitants by imposing administrative rules and saw no problem in the fact that the local self-government used the institution of civil law contracts instead of an authoritative permission. It stated, that this does not prevent the local self-government from fixing the fees to be payed upon the contracts in its municipal decree on Public Space Protection Order (CC Decision 46/B/1996). When it had to decide on the legality of applying wheel-locks because of the non-payment of the parking fee, it accepted the underlying concept of the municipal decree, that the obligation to pay the parking fee flows from a civil law relationship, and annulled the Public Space Protection Order, municipal decree of the council of Budapest Capital because of the illegality of sanctioning this civil law obligation with an administrative sanction (CC Decision No. 31/1996.). The new municipal decree already stated that the wheel-lock is applied out of reasons of the order of traffic which was accepted consecutively as conform with the constitution and statutory law by the Constitutional Court (CC Decision No. 1256/H/1996.). It stressed out that the local government acted not as owner, but as an authority when it had to decide on the application of wheel-locks as a sanction for wrongful parking. The concept of the civil law obligation flowing from using a parking slot was not questioned at all. Some years later, when the municipal decree of Budapest Capitol on the use of public space again was questioned before the Constitutional Court, the concept of permitting the private use of public space through civil law contracts was again accepted. Albeit the concept that the issuing of permits should be governed by public law was declared by the Constitutional Court to be the optimal, it did not regard this to be the unique way of regulation constitutionally possible. The Constitutional Court stressed that the main point is the possibility of legal remedy against the decision – if it is given, the form of the decision brought by the local government itself will not be a question of constitutional nature (CC Decision No. 41/2000.). The Constitutional Court did not tackle the questions arising from the principle of contractual freedom in view of the effectivity of legal remedy, although it was clear that the turning down of an application for a contract could not be sued effectively before civil courts. So, there was a somewhat inconsistent approach where the private law perspective was overruling the public law perspective.

This was even more striking in the case where the Constitutional Court stressed out the quality of ownership in connection with public space when deciding on whether the electricity supply companies had to pay a fee for the line poles placed on public land like they had to when placing the poles on private land. At this moment, the definition of the Construction Act did not incorporate the providing for the installation of public utilities as a function of public space, so the Constitutional Court decided that as the property of local self-governments and private property have equal protection according to the

Constitution, the companies have to pay a fee to the local self-governments for placing the poles on public land (CC Decision No. 3/2000.).

The main problem was that the civil law perspective applied focused on public space as a piece of local government property and not on the quality of public good of public space, resulting in a blurred concept where the local government was not only acting as the regulator of the use of public space but dominantly as the owner of public space. This two-fold concept allowed for regulating the use of public space through civil law instruments, which led to unequal possibilities of use thus a distortion of competition in this sphere, as well as discrimination and severe deficiencies in legal protection. The collisions emerging in the different relations of public space (public vs private use, public vs public use, public vs resident use and private vs private use) could not be settled with this approach. That is only possible through a public policy concept in which public space is a public good that must be regulated through public law means. To underline this statement, it is worth exploring a specific improper use of public space, which is quite important in daily life of many: parking on public space.

3.2 A special solution: parking as a public service

The introduction of paying parking zones citywide in Budapest and other cities made the question of improper use of public space emerge again in another legal context. Drivers who did not pay the fee for parking were imposed an additional charge, and those who still did not pay were sued before courts partly in civil procedures, partly in administrative court procedures. This led to a divergent practice as the civil and the administrative courts both saw the matter falling into their respective competence. Finally, the Supreme Court issued a decision for the uniformity of case-law (No. 5/2005 KPJE) which opted for private law. This was coded into the decision as the proceeding bench was set up with a majority of civil law judges. The starting point of the Supreme Court was the classification of the road as property of the municipality, and from this fundamental right to property it classified that relationship as a private law contract.

Of course, the question of the legal quality of parking fees was also brought before the Constitutional Court. The applicants questioning the constitutionality of the parking decree of the Local Self-government of Budapest argued, that the additional fee was extremely high in comparison to the parking fee, the possibilities of wheel-lockers and the towing off all were characteristics of a public law relationship, and not those of a civil law one. The Constitutional Court, although it did not completely abandon his former views of preferring the public law solution, deemed the solution of the contract in principle as constitutional. The difference in the evaluation of the relationships stemmed previously from the various starting positions. While the Constitutional Court started its considerations earlier from the fundamental right of freedom of movement, which is limited here through an authority (the municipality) by legally binding unilateral means, later the starting point shifted to a more civil law based concept: the municipality was

primarily regarded as an entity which is using its property to provide public services. The decision introduced the perspective of overuse of public space, which also made it necessary to create frames and limits to this kind of use of public space (Horváth 2010, 51.). The shift in perspective was certainly partly due to the development of administrative law, mostly the New Public Management. In the outcome, the Constitutional Court annulled some regulations of the Road Traffic Act as well as the municipal decree on parking of Budapest Capital because of the missing guarantees, for example in the question of fixing the sum of fees and fines. The analysis of its arguments makes it evident – although the Constitutional Court did not explore this question and made no explicit statement to it – that the Constitutional Court theoretically classed this contract as an administrative contract. These implications do however not alter the explicit, official classification as civil law contract, which was ruled to be constitutional by the Constitutional Court.

This concept of the Constitutional Court was then codified into the Road Traffic Act, which is a tripartite legal relationship: the local self-government regulates the use of the public space in its decrees by his public powers and creates obligations for the citizens (in this case car holders). The outsourcing of the provision of this public service is an administrative law contract, but the use of the public service (i.e. when a car holder is using a parking lot) creates a contract between the car holder and the service provider to whom the municipality outsourced the provision of this public service. This solution was further developed by the Local Self-government Act, which defined the provision of parking lots and other parking possibilities on public space as the provision of a public service and created rules for the outsourcing of it. As the outsourcing led to heavy corruption, since 2013, the provision of the public service of parking can only be effectuated by companies owned totally by the state or a local government, by the Public Space Protection Office (Officers) of the local self-government or the association of local self-governments.

Classification as a public service in the case of parking is unfortunate in terms of the coherence of the legal system, as the different improper usages should be handled to the same patterns. The special scheme might be explained by the fact that opposed to most private usages, it is a non-permanent and non-individualized use.

To conclude this circuit, we can see that up until the beginning of the 2010s, the contract has become and remained the dominant form of permitting the improper use of public space. The law enforcement of parking fees via civil procedural means has certainly become easier for the municipalities, as there are fewer possibilities of recourse against it and their procedure underlies now lesser – but still sufficient – guarantees. There was nevertheless a reminiscence of public law as the process of contracting is designed like the procedure for issuing authoritative permits. It is not easy to choose the time of the verbs as at present a slow return to public law takes place.

4 A slow return to public law institutions

The reminiscence started to turn to statutory law again after 2011. A very important step in this direction was the new Basic Law which broke with the concept of basic rights of local self-governments and introduced the German concept (which was already present in the case law of the Constitutional Court principally from the beginnings) of municipal tasks and competences (Nagy, 2017: 24.). The right to property of the local self-governments, moreover its protection ceased, the Basic Law declared their unity in the notion of national asset, containing both state property and municipal property. This made the way free not only for taking away assets together with the tasks from local self-governments (Hoffman et al., 2016: 460), but also to other – mainly politically driven – interferences regarding municipal property, like public space. However, this also had positive side effects as the returning to public law institutions. A first step in this direction. In 2013 in contrast to the civil-law-based solution, the statutory legislator introduced again the classic public law authorization of the use of public land as a for certain special forms of use of public space. Taking the authorisation out of the hand of the property owner's municipality, but typically a state administration body that decides on the usability of the public space, so these rules also mean the limitations of the municipality's regulation of public space. Such an institution is the permit for the use of public space for filming, the regulation of which was necessary because there were some Budapest district municipalities, that required excessive fees for filming before. Amendments to the Motion Picture Act announced in 2013 "to rationalise and develop administrative authority procedures, to establish the public credibility of official registers and to expand the public service", established an interesting repartition of competences. The county (capital) government office concludes an authoritative contract with the applicant after the approval of the local government for filming on public space. The government also fixed the tariffs for filming in a government decree, based on which the fee payable to the municipality is calculated. Similarly, the Act on the Protection of Townscape also uses such a division of competences between local government administrative bodies and state administrative bodies in relation to the placement of advertisements and advertising media on public space and in areas to be seen from public space.

Beyond the public law regulation of these special uses some lucky processes have begun in judicial case law. These are partly connected to the gradual emerging and strengthening of the administrative law branch of the judicial system. The reclassification of the public land use legal relationship as a public law -administrative legal relationship in individual cases became dominant in judicial practice. The other very important factor was that the judicial review of municipal decrees was transferred from the Constitutional Court to the Curia, the supreme judicial forum in Hungary. The Municipal Senate, instituted by the Act on Court Organisation, adheres to the administrative branch of the Curia and developed over the somewhat more than nine years a case law deeply rooted in public law. These two tendencies develop synergies due to which the proceeding administrative judges are more and more using the possibility of turning to the Municipal Senate if they

have to apply illegal municipal decrees (Hoffman and F. Rozsnyai 2015). So did it come, that the Senate annulled some rules of the Public Space Protection Order of Budapest Capitol and stated that the use of public space must be decided on in an administrative legal relationship, by authoritative means (Curia Köf.5010/2020/6.). Since then, other municipal decrees on Public Space Protection have also been annulled on similar grounds (e.g. lately Curia Köf.5010/2020/6.). In the absence of central regulation, the results of these decisions are only particular now, but the direction to be followed is clear (not to say: binding) for all local self-governments – and of course also for the county (capital) government offices as legal supervisory organs.

The central legislator is however still far from being able to sit back as the case law of the Curia has done the work. Although it may be argued that the central legislator was not negligent, as it should for the municipalities and the Constitutional Court always have been clear that administrative procedural law has always provided a sufficient framework, this line of argumentation is very weak from the perspective of the case law of the Constitutional Court and the legislative reactions given to it. And our actual administrative procedural law does not give sufficient answers to the new challenges emerging in connection with some private uses which are endangered by overuse. It becomes increasingly important to create a legal framework for the allocation of scarce resources, public goods as public space. These types of problems emerge more and more as cities get more and more urbanised and congested: who can operate sightseeing electric trains, how many lots should there be at taxi ranks, how many cafés and bistros can operate in a public park, and for how many years, and so on. There are many such challenges local self-governments have to face in connection to the use of public spaces actually without a statutory legal framework. Allocation in view of scarcity amidst a competitive environment is of course not only an increasingly pressing issue in relation to the use of public space, but the lack of answers also causing significant damage to many.

5 Conclusions

As this time travel clearly shows, the civil law perspective applied focused on public space as a piece of municipal property and not on the quality of public good of public space resulted in a blurred concept where the local government was not only acting as the regulator of the use of public space but dominantly as the owner of public space. This two-fold concept allowed for regulating the use of public space through civil law instruments, which led to unequal possibilities of use thus a distortion of competition in this sphere, as well as discrimination and severe deficiencies in legal protection. The collisions emerging in the different relations of public space (public vs private use, public vs public use, public vs resident use and private vs private use) could not be settled with this approach. That is only possible through a public policy concept in which public space is a public good that must be regulated through public law means.

Even given this framework, the balancing of the rights of individuals or groups of individuals and the proper use of public space encounters many problems. Local self-governments face challenges they are not able to supersede without a firm public law framework. The effects of the COVID-19 pandemic on the regulation of the use of public space also showed that the central legislator must not leave local self-governments alone with these issues. Albeit in Hungary these questions were partly handled on a political level, causing a lot of tension and hindering effective municipal action, vice versa it also made clear that local governments can have a strong influence on central action when they act promptly, according to the principles of public law. Several solutions developed by local mayors were taken over by the government and showed the resilience of Hungarian municipalities in these hard times (Balázs & Hoffman 2021 and Cseh et al. 2021).

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