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Siket, Judit¹

**How to Preserve Local Autonomy?
Special economic zones through the lens of constitutional requirements**

I. Introduction

Local self-governments have recently lost much of their functionality in Hungary, because of the systematic recentralization process effective since 2010. The handling of the pandemic crisis requires concentrated and coordinated actions from the Government and its measures necessarily affect the autonomy of local self-governments. There is a widespread consensus, that the state of emergency is not favourable for autonomous structures, nevertheless, the local self-governments should be important actors in the management of the pandemic. The handling of the crisis needs rapid, decisive and focused actions and harmonized operation between the Government and local self-governments.

It is thought-provoking, that more and more governmental measure emerged recently, which reinforced centralization rather than coordination. The question arises whether the governmental measures can lead to the emptying of the essential content of local self-governance in times of crisis.

The paper puts the focus on an outstanding decision of the Hungarian Constitutional Court, 8/2021 (III.2.) CC, which established *constitutional requirement* concerning functionality and competencies of local self-governments. According to this,

*'[...] it stipulated as a constitutional requirement that the National Assembly should provide local governments with budgetary or other material support commensurate with the performance of the obligatory tasks and powers performed by local governments. These subsidies may be reduced by the Parliament, or the Government in times of a state of danger, in the public interest, however, it should not make the operation of local governments impossible, nor could it empty out their constitutionally protected powers.'*²

The study attempts to demonstrate from a legal point of view the milestones in the process that led the Constitutional Court to define a constitutional requirement. It could be emphasised that the Constitutional Court considered the pandemic legislative decisions constitutional in several cases, they have stood the test of constitutionality. Nevertheless, the Constitutional Court eventually established the requirement of constitutionality. Beyond this, the study gives a short overview of the dogmatic, practical and legal approach of the content of constitutional requirement and analyses the decision from some aspects.

The paper concluding that the autonomy of local self-governments deeply involved in the analysed centralization process, which not in form but eventually resulted in a further loss of functionality for local autonomous communities. The abovementioned decision of the Constitutional Court fits into the framework, where the Constitutional Court instead of annullment the unconstitutional legal norm, opted for a milder instrument, laid down a constitutional requirement.

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² Constitutional Court Decision 8/2021. (III.2.) CC ABH 2021/10. pp. 689–729. Summary <http://public.mkab.hu/dev/dontesek.nsf/0/EE964910BAF66F71C125856E005C1D98?OpenDocument&english> (2021.05.19.)

II. A new-old legal instrument in the constitutional right protection: the constitutional requirement

The establishment of a constitutional requirement considered an important legal instrument of constitutional protection. Its dogmatic-based meaning related to the constructive dialogue and the constitutional-conforming interpretation principles. In addition, the Constitutional Court interpreted in its practice the constitutional requirement as a tool of protection of the constitution, although it has previously provoked disputes according to the interpretation of the Constitutional Court's powers. It should also be added, that the statutory law on the Constitutional Court of 2011 filled with normative content the constitutional requirement.³

Focusing on the dogmatic aspect, an opinion emerged, that the establishment of a constitutional requirement as an additional instrument used by the Constitutional Court. It can serve the *constructive dialogue* between the Constitutional Court and the legislator as to find the right way to interpret the regulation in conformity with the constitution.⁴ According to the other view, the establishment of a "proactive" constitutional requirement considered as a requirement of *constitutionally conforming interpretation*.⁵ The Constitutional Court may impose a constitutional requirement as a legal consequence as to cease the uncertainty of the interpretation of a legal norm and to give the range of constitutionally conforming interpretation. This latter interpretation gives guidance for the legal practitioners to define the right content of a norm.⁶ This interpretation emphasised that it would result in a substantive intervention into the competence of the Parliament, instead of the annulment of the norm.⁷ An opinion has also been formed to support this practice in crucial cases when there is no consensus on annulment, but obviously, unconstitutional practices would demand and action.⁸

Referring to the practice, the Constitutional Court also interpreted the constitutional requirement as an instrument of constitutional protection to mitigate the consequences of the abstract competencies. The Constitutional Court formulates a hypothetical case of application of the law constitutionally, in general.⁹ The Constitutional Court 'transforms' the law, the right to annul the law is the right to exclude certain unconstitutional applications, even so, the Constitutional Court remains in the framework of the *ex poste* norm control procedure.¹⁰

The practice of the Constitutional Court differentiated the forms according to as the constitutional requirement defined by the operative part or the justification of a decision. The Constitutional Court – since its establishment after the transition – a total of hundred thirteen times defined constitutional requirement in the operative part of its decisions.¹¹ It is worth for mention that the Constitutional Court gives guidance for the applicant of the law in the reason

³ Art. 46 Sec. (3) Act CLI of 2011 on the Constitutional Court.

⁴ Drinóczi Tímea: A többszintű alkotmányosság alkotmánytana és gyakorlata a 21. században. {Constitutional Theory and Practice of Multi-level Constitutionalism in the 21st Century} MTA TK JTI p. 169.

⁵ Based on the practice of '*verfassungskonforme Auslegung*' of Bundesverfassungsgericht. Sólyom László: Az Alkotmánybíraskodás kezdetei Magyarországon. I-II. Osiris Kiadó, Budapest, 2001. p. 52.

⁶ Chronowski Nóra: Az alkotmánykonform értelmezés és az Alaptörvény. {Interpretation in accordance with the Constitution and the Hungarian Fundamental Law} p. 10., Közjogi Szemle, 2017/4. pp. 7-15.

⁷ Chronowski: supra p. 8.

⁸ Szakály Zsuzsa: Alkotmányos követelmények a magyar Alkotmánybíróság gyakorlatában 2012 után. {Constitutional Requirements in the Practice of Hungarian Constitutional Court after 2012} p. 167. Iustum Aequum Salutare CVI.2020. 4. pp. 163-179.

⁹ Sólyom: supra p. 218.

¹⁰ Sólyom: supra p. 243.

¹¹ Sólyom László: Alkotmányértelmezés az új alkotmánybíróságok gyakorlatában. {Interpretation of the Constitution in the Practice of New Constitutional Courts} p. 19. In Fundamentum 2002/2. pp. 18-28.; Constitutional requirements. Status at 31 March 2021. <https://www.alkotmanybirosag.hu/alkotmanyos-kovetelmenyek> (18/05/2021)

of the decision significantly more frequent. This latter form serves as a signal for the legislator, as a tool of the *signalling constitutional protection* in those cases where the constitutional requirement established not in decisive part but the in the reasoning of the decision. The constitutional requirement serves then as an element of this type of constitutional protection. The signalling constitutional protection is also an instrument for the Constitutional Court to sign the legislator to avoid the currently existing ‘constitutionality deficit’ in the Constitution, or imminent threat or danger.¹² The abstract *ex poste* control of the norms’ procedure is a regular one of the Constitutional Court’s procedures, to mitigate this device established the constitutional requirement. The Constitutional Court laid down, that the legal norm shall not be annulled, if its non-constitutional interpretation occurred. The Constitutional Court may, as a result of its examination of the constitutionality of a legal norm, establish the constitutional requirements that the interpretations of the norm must meet.¹³ The instrument of the definition of constitutional requirements has undergone a ‘metamorphosis’¹⁴ in the practice of the Constitutional Court and it was finally regulated at the statutory law of the Constitutional Court.

Pointing to the normative content, the statutory law on the Constitutional Court defined the necessity and the importance of finding the constitutional requirement. The Constitutional Court may determine the constitutional requirements in its decision, arising from the provisions of the Fundamental Law¹⁵ and give effect to the provisions of the Fundamental Law, with which the application of the law under review or applicable in the judicial proceedings, shall comply.¹⁶

The Constitutional Court, as a legal consequence of its proceedings, has declared a total of hundred-thirteen constitutional requirements in the context of the constitutionality, up to the present. The local self-governments were involved in 7 % of cases; eight such a decisions were taken. The Constitutional Court declared constitutional requirement in three cases according to the local government law, four times where examined local government decrees and once related to the legal status of the mayor. The table below presents those cases where the Constitutional Court related to the rights and competencies of local self-governments declared a constitutional requirement.

Constitutional requirements related to local self-governments

<i>year_number of the decision_subject</i>		
2021	8/2021 (III.2.) CC	Rights and competencies of local self-government
2016	3/2016 (II.22.) CC	Local Government Decree of Kaposvár on social co-existence rules
2010	19/2010 (II.18.) CC	Local Government Decree of Debrecen on the use of public open spaces
2004	21/2004 (VI.10.) CC	legal status of the mayor

¹² Parallel justification of Holló András. pp. 328–329. Constitutional Court Decision 61/2011. (VII. 13.) CC, ABH pp. 290–366.

¹³ Holló András: Néhány megjegyzés az „alapok” (húsz év) védelmében... {Some Remarks on the Protection of the Foundations (20 Years)} p. 2, <http://jesz.ajk.elte.hu/hollo50.pdf> pp. 1-10, (18/05/2021), Constitutional Court Decision 38/1993. (VI.11.) CC, ABH 1993, p. 267.

¹⁴ Súlyom: supra pp. 364-372.

¹⁵ Fundamental Law of Hungary (April 25 2011), hereinafter: Fundamental Law

¹⁶ Art. 46. sec. 3. Act CLI of 2011 on the Constitutional Court.

2000	27/2000 CC	(VII.6.)	Local Government Decree of Lipótváros on the settlement plan
1998	36/1998 CC	(IX.16.)	allocation of utility assets for local self-governments
1997	46/1997 CC	(IX.30.)	Local Government Decree of Igal on the use of public open spaces
1995	53/1995 CC	(IX.15.)	limitation of commitments

(ed. Author, source: *Constitutional requirements. Status at 31 March 2021.*
<https://www.alkotmanybirosag.hu/alkotmanyos-kovetelmenyek>)

III. The protection of local self-government functionality and competencies in the practice of the Constitutional Court 1990-2010.

A crucial element of local autonomy is the scope of local public services delivered by the local self-government system. The functional autonomy is closely linked with the tasks performed by the local self-governments since these functions are the subject of constitutionally protected autonomy. As regards functionality, the general authorization principle is dominant in the Hungarian local self-government system. The provisions of the former Constitution related to the fundamental rights of local self-government entitled with such powers and responsibilities the local body of representatives. It constituted the basis of the constitutional guarantee to ensure the autonomy of the local governments' activities.¹⁷

The concept of local self-government, provided by the European Charter of Local Self-Government, requires the ability to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.¹⁸ The *ability for local self-government* presupposes having adequate financial resources. These resources shall be commensurate with the responsibilities provided by the law.¹⁹

The minority opinion related to a Constitutional Court Decision from the early 1990s emphasised the violation of the *ability for local self-government* where the legislator imposed a new mandatory task for local self-governments but did not ensure the adequate financial resources for the implementation.²⁰ The Constitutional Court interpreted the term of *adequate financial resource* in a subsequent decision, as a guarantee to exercise the fundamental rights of local self-government. Due to the decision, the Parliament was obliged to ensure resources needed to the performance of the mandatory tasks, under the provision laid down in the Constitution.²¹ However, the Parliament can decide on a discretionary basis how to ensure these assets, through a complex system of own resources and central budget contributions.²² Subsequently, the Constitutional Court further interpreted this fundamental right and delimited the duty of the legislature. In its decision stated, this fundamental right does not necessarily imply the obligation of the legislator that any additional expenditure of the local self-governments resulted from the legislation must compensate, by means of earmarked for a

¹⁷ Art. 44/A. Act XX of 1949 on the Constitution of Hungarian Republic, Csink, Lóránt – Patyi, András – Varga Zs. András: *The Basic Law of Hungary. The first commentary.* NIPA 2012. pp. 385-390.
<https://www.eui.eu/Documents/General/DebatingtheHungarianConstitution/TheBasicLawofHungary.pdf>
 (2021.05.21.)

¹⁸ European Charter of Local Self-Government Strasbourg 15.X.1985, ETS No. 122. (hereinafter: Charter) Article 3 1.

¹⁹ Charter Article 9 1-2.

²⁰ Constitutional Court Decision 41/B/1993. CC, ABH 1992. pp. 1019-1073, minority opinion of Kiss László.

²¹ Act XX of 1949 on the Constitution of Hungarian Republic Art. 44/A sec (1).

²² Constitutional Court Decision 56/1996. (XII. 12.) CC, ABH 1996. pp. 204-213.

specific purpose from the state budget.²³ A few years later, the Constitutional Court explained the obligation of the legislator related to the own resources of local self-government. The legislator must guarantee own resources for local self-governments with those adequate revenues for the implementation of mandatory functions can be provided. The regulation on the financing system of local self-governments may cause constitutional trouble if the system violates a specific constitutional provision or results in a lack of compliance with the autonomy of local self-governments directly or indirectly depriving them of the possibility to exercise a fundamental right to local self-government. The declaration of unconstitutionality may be asserted only if the legislator fails to provide the possibility of own revenues and state funding to perform the tasks defined by law for local the self-governments. In another case, if the legislator fulfils its constitutional obligation to ensure the economic conditions for local self-governments to perform their tasks in such a way that the exercise of a fundamental right of local self-government, the performance of mandatory tasks or the ability of local self-governments to function becomes impossible, as a result.²⁴

The examination of the above-mentioned cases pointed out the significance of the state funding and the regulative framework of own revenues established by the Parliament for the functioning of local self-governments. This financing system must ensure the performance of local self-governments responsibilities, but the legislator is free in the shaping of the sources and revenues and the financial conditions. Unconstitutionality of the regulation emerges only in those cases where the legislator fails to provide adequate resources or the functions of local self-governments becomes impossible as a consequence of the legislative acts, as mentioned before.

It is also worth mentioning that the Constitutional Court did not establish a constitutional requirement in these mentioned cases, in terms of requirement in decisive part of a decision, but frequently gave guidance for the legislator and the legal practitioners in the interpretation of economic autonomy. These elements of guidance may be considered as the tools of signalling constitutional protection.

IV. The special economic zone: case of Göd in the centre of attention²⁵

This case is a particular sample of that tendency, how an exceptional government decree becomes a universal ruling on the economics of local self-governments. In the context of the state of danger, the Governmental Decree (GD 1)²⁶ authorized the Government to declare a territory or a part of the territory of the municipality as a so-called ‘special economic zone’.²⁷ Taking into account the most important conditions of such qualification, (1) the Government shall declare the investment of major importance from the national economic aspect, (2) the cost of the investment may exceed 100 billion HUF and (3) the investment affects the significant part of the county. The link between the declaration and the state of

²³ Constitutional Court Decision 2/1997. (I. 22.) CC, ABH 1997. pp. 27-32.

²⁴ Constitutional Court Decision 47/2001. (XI. 22.) CC ABH 2001, pp. 308, 320.

²⁵ See also in details: Siket, Judit: Veszélyben a helyi önkormányzatok funkcionalitása? A pandémia hatása a helyi demokráciára. {Is the functionality of local government at risk? The impact of the pandemic on local democracy.} In: Rixer, Ádám (ed.): A járvány hosszútávú hatása a Magyar közigazgatásra. Károli Gáspár Református Egyetem Állam-és Jogtudományi Kar, Budapest, 2021. pp. 203–222.

²⁶ Governmental Decree 135/2020. (IV.17.) on necessary measures for the stability of national economic in the context of state of danger.

²⁷ Balázs István – Hoffman István: Közigazgatás koronavírus idején – a közigazgatási jog rezilienciája? {Public Administration in the Time of Pandemic – Resilience of Public Administrative Law?} p. 15. MTA Law Working Papers 2020/21. pp. 1-17., Hoffman István – Balázs István: Administrative Law in the Time of Corona(virus). p. 115. *Studia Iuridica Lubliensia* vol XXX, 1,2021 pp. 103-119.

danger was that this measure (4) shall be suitable to avoid mass loss of jobs and (5) established a new investment or expansion. The first zone, according to the Governmental Decree (GD 2)²⁸ was the city of Göd. Under the regulation, Governmental Decree aimed to defend more than 1.500 jobs threatened by the state of danger and to establish more than 2.500 new jobs.

What may be the consequences of the abovementioned Government Decrees on the competencies of the local self-government involved? The ownership of assets (public open spaces, public parks and public roads are non-marketable), belonging to the common property located on the territory of the special economic zone, is acquired by the county government, Pest. The decision making and regulatory competencies related to the special economic zone shall belong to the county government in the following areas, (1) urban planning and building rules, (2) requirements of forming plots, (3) requirements of the settlement image, (4) heritage protection rules, (5) using and maintaining the public open spaces, regulation of traffic law, (6) fundamental rules of self-support, the fulfilment of public duties and community living.

The tasks and competencies of the local self-government, specified by the law, shall be performed by the county government. The state administrative functions of the mayor and the notary shall comply with the president of the county assembly and the notary of the county. Why it is a huge loss for the municipality from an economic point of view? Every local tax imposed by the county government decree, and the income belongs to the county government as well. The most important local tax from this aspect is the local tax on operation on economic activity. The tasks of tax authorities belong to the state tax authorities. This type of revenue is not entirely a freely disposable source for the county government, because it shall be used for the support of developments of the settlements. Only 5 % may be the source of operation of the county government.

The general reasons given for the proposal by the Government pointed out that the designation of special economic zones contributes to restarting the economy. Besides, the effects of these special economic zones are wider than the local self-governments located in the territory, allowed proportionate distribution of the sources within the county. The county self-government supports the development and operation of the local self-governments, based on the knowledge of the economic and employment position of the county.

The Hungarian Parliament adopted the proposal and enacted the Act LIX of 2020 on special economic zones. The special economic zones law entered into force on 18 June 2020. The Act altered related acts on local taxes in two main ways, on one hand, the local government decree of the county self-government shall be sent to the Government, and on the other hand, the tax authority who is responsible for the collection of the business tax is the state tax authority.

This ruling poses also legal problems. According to the Fundamental Law,²⁹ the Government shall supervise the legality of municipal governments through the Budapest and county government offices. The Government's task in connection with this decree does not reveal from the text of the Act, however, the relevant provision of Local Government Law³⁰ on regulatory supervision has not been modified. The empowerment with the local tax collection function the state tax authority makes clear, that the territorial, county self-government unable to perform tax administration tasks. The Local Government Law is conferring only four, defined function to county self-government; territorial development,

²⁸ Governmental Decree 136/2020. (IV.17.) on designation a special economic zone in the administrative territory of the town of Göd. Göd is a town in Pest county, located in the agglomeration of the Capital of Hungary, Budapest. The population is approximately 18,000.

²⁹ Art. 34. sec (4) Fundamental Law.

³⁰ Art. 132. Act CLXXXIX of 2011 on Local Self-Governments of Hungary (hereinafter: Local Government Law).

rural development, territorial planning and coordination tasks. The competencies and functionality of county self-governments located at the territorial level of public administration have not been satisfactorily arranged, especially since 2012.

The Hungarian Constitutional Court has already examined the case of special economic zones. First, fifty-nine MPs submitted a constitutional complaint to the Constitutional Court to establish the infringement of Fundamental Law and to annul the Governmental Decree. The *ex-poste* norm control aimed at establishing the lack of conformity with Fundamental Law, principles of rule of law, prohibition of retroactive legislation, right to legal remedy, breach of the principle of hierarchy of norms and the conflict with the international treaty, the Charter. The Constitutional Court examined only the Governmental Decree on special economic zones. Given the fact that this governmental decree has been expired, the motion was rejected for reasons of mere formalism.³¹ As a result of the second constitutional complaint, the procedure has established the decision the Constitutional Court, which is the focus of the study.

V. The legal consequence of Constitutional Court Decision: establishing of a constitutional requirement

The Constitutional Court on a consequent constitutional complaint submitted by the local self-government of Göd concerned, examined the Act LIX of 2020 on the designation of special economic zones. This time, the CC has the chance to sit the case for a second time however, rejected it again, nevertheless, a constitutional requirement was established *ex officio*. According to the constitutional requirement established by the Constitutional Court, the Parliament must ensure budgetary and financial support proportionally for local self-governments to mandatory tasks performed by them. During a state of danger, Parliament has the power to reduce these resources if public interest demands so, but it must not render to exercise their function impossible and must not deprive them of their constitutionally protected powers.

The analysis of the latter decision – may be considered of great importance, the Constitutional Court established a paramount constitutional requirement – forms the basis for further negotiations.³²

V.1. The main arguments of the proposal and the opinion of the Prime Minister's Office

The local self-government of Göd proposed the annulment of the *Governmental Decree 135/2020. (IV.17.) on necessary measures for the stability of the national economy in the context of the state of danger* (hereinafter: GD 1) and the *Governmental Decree 136/2020. (IV.17.) on the designation of a special economic zone in the administrative territory of the town of Göd* (hereinafter: GD 2) in its first, received at the Constitutional Court on 15 May 2020,³³ constitutional complaint. The proposer intended to annul further legislative actions, because of the changing legal landscape in a supplementary submission. It concerned the Act LIX of 2020 on the designation of special economic zones, the certain provisions of Act C of 1990 on local taxes and the *Governmental Decree 294/2020 (VI.18.) on the designation of a*

³¹ Constitutional Court Decision 3388/2020. (X. 22.) CC, ABH 2020/25. pp. 2229-2233.

³² Constitutional Court Decision 8/2021 (III.2.) CC, ABH 2021/10. pp. 689-729.

³³ Proposal of Local Self-Government of Göd
[http://public.mkab.hu/dev/dontesek.nsf/0/ee964910baf66f71c125856e005c1d98/\\$FILE/IV_839_0_2020_inditva_ny_anonim.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/ee964910baf66f71c125856e005c1d98/$FILE/IV_839_0_2020_inditva_ny_anonim.pdf) (12/05/2021)

special economic zone in the administrative territory of the town of Göd (hereinafter: GD 3). The amended proposal received on 15 October 2020.³⁴

In the view of the proposer, the abovementioned statutory law provisions and the Governmental Decrees, subject of the proposal, unnecessarily and disproportionately restrict his property rights; infringe the prohibition of discrimination under the Article XV of Fundamental Law. Furthermore, these legal provisions by failing to provide sufficient time for preparation and by infringing the prohibition of retroactive legislation are contrary to Article B (1) of the Fundamental Law.

The proposer invoked the right to exercise public powers as local self-government under Article 32 (1) (e) of the Fundamental Law and the fact that the contested legislation, which is an individual decision in terms of its content, deprived him of the right to a legal remedy. In that connection, the proposer also referred to the lack of a legitimate aim is based on the fact that the government regulations exceed the authorisation to limit fundamental rights conferred by the Fundamental Law, applicable during the special legal order.

The minister of the Prime Minister's Office filed an *amicus curiae* paper³⁵ to present his opinion concerning the proposal of the local self-government of Göd. First, the admissibility of the proposal was contested by the position. It highlighted, that the statutory requirements of the admissibility were not met, the local self-government was not individually, directly concerned in the context of the GD 1. The proposal could not be considered definitive; furthermore, the right to submit a constitutional complaint of the local self-government the Prime Minister's Office also questioned, about the legal nature of the constitutional complaint.³⁶ This constitutional protection tool serves to redress individual harm, but not to decide the competence dispute between local self-governments and the state organs. Because of the local tax law also is concerned, the competence of the Constitutional Court is restricted, at least in its opinion.

The opinion covered the legal policy objectives also, according to the governmental decrees. The regulation on one hand aimed to promote the economic development of the regions of Hungary, having economic priority, on the other hand, to mitigate negative economic effects of the pandemic, to keep the jobs and to create new ones. The economic results that emerged from this activity will improve the quality of life of the population living in these regions largely than before. Under the regulation, GD 2 aimed to keep more than 1,500 jobs threatened by the state of danger and to establish more than 2,500 new jobs.

The position of the minister of Prime Minister's Office argued in detail that the contested provisions met the requirements of constitutionality. In the context of the legitimate aim of the governmental measures, the paper stressed that the interests of the wider community shall be given precedence over the smaller, local communities if the aim is to ensure social justice and solidarity. The infringement of principles of local self-government and popular sovereignty no infringement was committed, because the only changes concerned the organ is responsible for the implementation of public tasks and the owner of the assets assigned to that public task, to ensure the more effective performance of the public tasks.

³⁴ Amended proposal
[http://public.mkab.hu/dev/dontesek.nsf/0/ee964910baf66f71c125856e005c1d98/\\$FILE/IV_839_8_2020_indkieg_anonim.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/ee964910baf66f71c125856e005c1d98/$FILE/IV_839_8_2020_indkieg_anonim.pdf) (12/05/2021)

³⁵ The opinion of the minister of Prime Minister's Office related to the proposal of Local Self-Government of Göd, dated 9 June 2020
[http://public.mkab.hu/dev/dontesek.nsf/0/ee964910baf66f71c125856e005c1d98/\\$FILE/IV_839_4_2020_Miniszt_ereIn%C3%B6k_%C3%A1ll%C3%A1sfog_anonim.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/ee964910baf66f71c125856e005c1d98/$FILE/IV_839_4_2020_Miniszt_ereIn%C3%B6k_%C3%A1ll%C3%A1sfog_anonim.pdf) (12/05/2021)

³⁶ It should be noted that the subject matter of a constitutional complaint is the same as that of the ex-post control procedure. Szalbot Balázs: Az alkotmányjogi panasz legújabb kérdései – A közvetlen alkotmányjogi panasz. {Recent Issues of Constitutional Complaint – The Direct Constitutional Complaint} p.4. In *De iurisprudentia et iure publico VII.* évf. 2013/2. pp. 1-31.

The Constitutional Court – except the issue of the admissibility – mainly accepted the opinion of the Prime Minister’s Office and this opinion reflected in the justification part of the Decision of Constitutional Court, sometimes verbatim.

V.2. The cardinal subject matter of the Constitutional Court Decision 8/2021 (III.2.) CC

The Constitutional Court rejected the proposal, the constitutional complaint of local self-government of Göd, aimed to declare the unconstitutionality and to annul the regulation on the designation of the special economic zone. Nevertheless, it also provided that the Parliament must ensure budgetary and financial support proportionally for local self-governments to perform mandatory tasks. During a state of danger, the Parliament may reduce these resources from public interest, but it must not render to exercise their function impossible and must not deprive them of their constitutionally protected powers.

The Constitutional Court underlined in its decision, that the property results social responsibility, thus the local self-government must also bear this responsibility exercising the right to ownership. However, the local self-government shall bear in mind that the ownerships’ rights of public property is limited by law to serve social commitments. Such commitment may be changed when the execution of public tasks requires so. The transfer of property may happen be without any compensation, free of charge, thus in the form of socialization, expropriation. Meantime, property rights shall be subject of limitation, but the limitation of property rights shall pass the necessity and proportionality test to maintain its conformity with constitutionality. Therefore, the intervention of state organs is not excluded if the constitutional guarantees are respected.³⁷ The sudden and unpredictable nature of a state of danger always require immediate responses, and cannot be prepared for that in advance. The pandemic caused state of danger, the economic and social effects of the defence against the pandemic goes beyond the duration of the state of danger.³⁸ The Constitutional Court emphasised, that the contested regulation results in no distinction between legal entities concerned, moreover, no prohibited retroactive legislation can be found in the case under examination.³⁹

However, the Constitutional Court pointed out in its decision, that if the state transfers the public tasks from one to another local self-government, in terms of local public affairs, such as local taxation, in the territory of the special economic zone and the transfer results in a deficit in the current year budget of the local self-government, it must not be of such extent that makes impossible to perform tasks of local self-government.

The parallel reason and two minority opinions are remarkable. The main findings of them are as follows. The parallel reason, stated, that related to the case the unconstitutionality in failing legal norms emerged. This may be traced on one hand, that the legislator did not adopt ruling on the compensation of property transferred from the local self-government to county self-government. On the other hand, there is a failing of regulation concerning the proportional allocation and use of the business tax formed revenue of the local self-government transferred to the county self-government. The unconstitutionality may appear if the assets have market value. The proportional distribution of business tax collected by the county self-government requires regulation, because the norms under examination does not cover this issue. The regulation is a guarantee from the aspect of equal rights of local self-governments.⁴⁰

³⁷ Constitutional Court Decision 8/2021 (III.2.) CC [127]-[133]. pp. 718-719.

³⁸ Constitutional Court Decision 8/2021 (III.2.) CC [101]-[105]. pp. 714-715.

³⁹ Constitutional Court Decision 8/2021 (III.2.) CC [106]-[107]. p. 715.

⁴⁰ Constitutional Court Decision 8/2021 (III.2.) CC Parallel reasoning of Salamon László [176]-[184] pp. 726-

A minority opinion⁴¹ declared that the state must ensure proportional financial resources for local self-governments to perform their local public affairs and public services provided at local level. The state may reduce financial resources for the reasons of public interests but does not make the operation of local self-governments impossible and discharge the competencies protected constitutionally. Basically, in this case the Constitutional Court defined guarantees as a form of constitutional requirement, which are missing from the regulation. It does not seem evident, that how the local self-governments concerned can enforce these constitutional guarantees. The mere constitutional requirement as a legal standard does not sufficiently protect the autonomy of local self-governments. It is necessary to adopt an individual normative rule that serves as a tool to fulfil this purpose. Namely, it shall guarantee that the reduction of financial resources only takes place where it does not jeopardize the performance of local public affairs and if it is still needed, the legislation shall also provide compensation. Therefore, instead of the decision rendered, the unconstitutionality caused by the malpractice of the legislator should have been declared.

According to another minority opinion,⁴² the damage to the property of Local self-governments as the constitutional question was in the focus of the case. The Constitutional Court did not check in any way the damage or the lack of compensation in connection with the expropriation. On the other hand, the Constitutional Court did not make clear the relationship between the state and the local self-government system based on the Fundamental Law provisions. The minority opinion emphasised, that there are two different entities; it is not acceptable, that the local self-government is a 'figure of speech' in terms of Fundamental Law and actually, it should be understood as the local state organ.

In sum, application of a legal consequence, the declaration of unconstitutionality in the form of the failure of the legislator could have been inferred from the both the parallel and minority opinions could have been a greater guarantee for the protection of local government rights.

V. 3. Some comments on the decision

The starting point of this part the provisions of Fundamental Law related to local self-governments' competencies. Although these competencies are not classified as fundamental rights, the 'essential fields of self-governmental autonomy' are declared.⁴³ The Fundamental Law determines also the main elements of local autonomy.⁴⁴

The contested legal acts ensure possibility for the Government to designate special economic zones in context with the handling of effects of human pandemic, which concerned the administrative territory and property of local self-governments not temporally but for evermore. The authorization of the Government, the possibility executed in an individual governmental decision concerned the Local Self-Government of Göd. The local self-government submitted a constitutional complaint to the Constitutional Court demanding the protection of its constitutional rights and competencies.

The unconditional removal of the local self-government property without any compensation on the reason of public interests forms the core of the case. The local self-

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⁴¹ Constitutional Court Decision 8/2021 (III.2.) CC Minority opinion of Czine Ágnes [185]-[194] pp. 727-728.

⁴² Constitutional Court Decision 8/2021 (III.2.) CC Minority opinion of Pokol Béla [195]-[198] pp. 728-729.

⁴³ Article 36 sec (1) Fundamental Law.

⁴⁴ Csink, Lóránt – Patyi, András – Varga Zs., András: The Basic Law of Hungary. The first commentary. NIPA 2012. pp. 385-390.

<https://www.eui.eu/Documents/General/DebatingtheHungarianConstitution/TheBasicLawofHungary.pdf> (2021.05.21.)

governments' assets are the part of national assets and serves the performance of public tasks. The transfer of local self-governments' property located in the territory of special economic zone from the local self-government to the country self-government resulted not only the reduction of assets, but also the cut of revenues from local taxes. The latter loss of income has a substantial negative impact on the providing of local public services, ultimately to the supply of services available for the citizen of a settlement.

The Constitutional Court analysed accurately the argumentation system of the constitutional complaint of the proposer and concluded, that the contested regulation related to the designation of special economic zone did not violate the provisions of the Fundamental Law but considered necessary to declare the constitutional requirement as a legal consequence. It follows, that the subjective purpose of the legislator was at the forefront of the Constitutional Court's reasoning; mostly subjective teleological arguments were used, though the substantive, economic and moral arguments were also applied.⁴⁵

The argument of the Constitutional Court in context with the lack of constitutionality contentious on several points, this part of the study attempts to deal only with some respected elements, like (1) the lack of appropriate time to prepare for the implementation, (2) the violation of the right to property, (3) the autonomy of local self-government.

ad 1. The lack of appropriate time to prepare for the implementation

The Constitutional Court in its decision strengthened the earlier established opinion, that the lack of appropriate time to prepare for the implementation causes unconstitutionality only in that case, where the conformity to the new regulation involves extreme difficulty, impossible or there is no time for preparation.⁴⁶ The contested legal acts covered by the constitutional complaint entered into force during the implementation of local self-government budgets. In the planning process of the annual budgets and when the budgetary local decrees were adopted, the local self-governments could not have been aware of the plans for the special economic zone, nor could it have planned for the economic impact of the designation.⁴⁷ Incomes from local taxes serves the implementation of local public affairs, contributes as an additional resource for the performance of mandatory tasks and are the sole source of the voluntary tasks.⁴⁸ The loss of revenue sources obviously has a negative impact on the performance of tasks, following for the above-mentioned facts; there was no time at all to prepare the changes in the task structure of local self-government.

Ad 2. The violation of the right to property

Related to the issue of protection of right to property the Constitutional Court recalled the elements of its earlier established argument, developed in the previous practice. Nonetheless, the former decisions connected with the extent of protection of right to property were established on the protection of individual's right and the property of legal entities. The analogy is controversial, because the Constitutional Court did not take into account, that the local self-government exercises public powers and provides local public services, its rights and competencies are constitutionally protected, including the exercise of right to property.⁴⁹ In the case, where the unconditional removal of the local self-government property, as a part of national assets, serves the performance of public tasks, without any compensation, on the reason of public interests occurred, the reference on the 'social responsibility of having property' may not be relevant. It should be noted that the lack of differentiation between

⁴⁵ Jakab András: Az alkotmányértelmezés módszerei. {Methods of Constitutional Interpretation} pp. 24-26. In Századvég 2008. 1. szám Új Folyam 47. szám pp. 3-36.

⁴⁶ Constitutional Court Decision 8/2021 (III.2.) CC [104].

⁴⁷ See detailed rules Act CXCV of 2011 on Public Finances and the enacting regulation, Government Decree 368/2011 (XII.31).

⁴⁸ Art. 10 sec (2) of Local Government Law.

⁴⁹ Constitutional Court Decision 8/2021 (III.2.) CC [124]-[126] pp. 717-718.

different types of national assets, the unique treatment of state and local self-government's assets is unconstitutional.

The designation of special economic zone results the change of administrative burdens of local self-government. The European Charter ensures the protection the limits of local self-government, thus the regulation on special economic zone may require the preliminary consultation with communities concerned, or local referenda.

According to the opinion of Constitutional Court, the restriction of the right to property did not rise to the level of expropriation and therefore, the 'public interest – proportionality' test should be applied. The majority of the Constitutional Court had no momentary doubts about the public interest and proportionality of the contested measures. The elimination of the role of local self-government, entrusted with the exercise of local public powers related to a part of the administrative territory of its whole territory and the curtailment of the right to local self-government of residents, while, at the same time they are bearing the consequences of the investment, meets the requirement of proportionality and it serves the public interests, at least in the view of the Constitutional Court.

Due to the specific nature of the protection of right to property as a fundamental right, the focus of the assessment of the constitutionality of state restriction intervention is the proportionality and the reason of public interests. In any case, the social and economic role of property, and in particular the way in which certain regulatory measures fit into specific economic policy tasks, makes it much more difficult to determine whether they are necessary or inevitable.⁵⁰ In this case, the Constitutional Court should examine the reason of public interest and whether the public interest is justified, the public interest solution does not infringe another constitutional right. The fact is that the Constitutional Court in this case examined only from a mere formal point of view the consistency between the public interest and the exercise of the constitutional rights and competencies of local self-governments.

The Constitutional Court examined the local self-governments right to property several cases in 1990s, only two decisions and declarations are worth to highlight from this period. The minority opinion emphasised, that 'the right to property, to which neither the right to property nor the guarantee of expropriation applies, that is may be the subject of distraction without any compensation, in the absence of a public interest, is no longer a right to property.'⁵¹ The Constitutional Court declared in principle, that the state can limit the property of local self-governments only by the regulation on constitutional limitation of fundamental rights and can distract it only on the basis of the constitutional provisions on expropriation.⁵² The interpretation framework of the extent of protection of right to property have changed since then, but the basic principles and values remained the same.

Ad 3. The autonomy of local self-government

The Constitutional Court stated the limitation of local self-government autonomy consequently, but it was caused by the Parliament, not by the Government.⁵³ Therefore, the local self-governments exercise their competencies within the limit of the law, thus, from this point of view, the legislator is not capable to harm the autonomy of local self-governments. In the context of the constitutionally protected functions and powers, the limit is the so-called 'discharge standard', the Constitutional Court has not yet interpreted deeper, in details, in this decision remained in silence.

It should be added that the protection of local self-governments right not a fiction and should not be interpreted as being available only in the event of damage to the entire local government system. According to the Article 11 of the Charter, 'local authorities shall have

⁵⁰ Sólyom: supra p. 140.

⁵¹ Minority opinion of Vörös Imre, Constitution Court Decision 64/1993. (XII.22.) CC, pp. 373-380.

⁵² Constitutional Court Decision 37/1994. (VI. 24.) CC, ABH 1994. pp. 238-250.

⁵³ Constitutional Court Decision 8/2021 (III.2.) CC [164] p. 723.

the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation'. The Local Government Law provides that 'legal exercise of the functions and spheres of authority set forth in Paragraph (1) of Article 32 of the Fundamental Law is protected by the Constitutional Court and other courts. Consequently, the rights of the individual local self-government must be investigated and protected. The exercise of a constitutional complaint is based on the violation of a right guaranteed by the Fundamental Law. In addition, a constitutional complaint serves as a tool in a case of violation of competence, in this latter case the Constitutional Court must examine whether the local self-governments' competencies are ensured by law or whether the violation of competencies causes serious disruption to its functioning. The Constitutional Court must investigate the individual case and not on the basis of the whole local self-government system, without distinguishing between levels of local self-governments, precisely because of the function of the constitutional complaint.

VI. Closing remarks

The outlining the dogmatic background and practice formulated on the application of constitutional requirements stand as a magnifying glass to understand the nature of constitutional requirement in the case of Göd special economic zone. On the other hand, a short review from the interpretation of financial, economic and functional autonomy of local self-governments in the practice of Constitutional Court enhances the evaluation of the so-called discharge test in the case, where local self-governments' functionality has injured.

What happened in Göd highlights an extreme Governmental measure under the coat of state of danger battling measures. The Government does nothing of the kind of autonomous structures, does not seek any cooperation even in the state of danger with local self-governments, and hits by measures the local democracy. According to the designation of special economic zones the main deficiencies of the proposal can be detected that the proposal of the Government did not contain any impact assessment on fulfilment of the mandatory and voluntary tasks, providing of public services of concerned local self-governments. The insufficiency and inconsistency of the proposal could be recognized in the infringement of subsidiarity and decentralization and result in further centralization as well. The decision-making competency on the designation of special economic zones, on their territory, concerned local self-governments, and competent county governments belongs to the Government, which decides on investments eventually. The government has no obligation to consult on this issue with the involved local self-governments. The lack of normativity and predictability may cause the serious breach of autonomy of the local self-governments. If the Government's efforts aimed the balancing of revenue inequalities, it is necessary to find the proper tools. Reduction of residents' influence on local public affairs is not an appropriate instrument.

Although the CC declared constitutional requirements about the functionality and financial resources of local self-governments, confined its examination to scratching of surface in case of special economic zones.