

# SPECIFIC ISSUES OF THE ADMINISTRATIVE JUDICIAL REVIEW: RIGHT PROTECTION TOOLS AGAINST LOCAL SELF-GOVERNMENT'S REGULATION

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**Abstract:** *Local self-government regulation may affect the rights and legitimate interests of municipal citizens. This is particularly true for local self-government decrees, though normative decisions may also include provisions impacting the rights and legitimate interests of affected individuals. However, judicial review and effective legal remedy tools and procedures should be accessible when a local decree or normative decision is unlawful. Research based on the data of the Curia (Hungarian Supreme Court), analysis confirmed, that only indirect ways are available to citizens, and there is no effective, direct remedy against unlawful local regulation.*

**Keywords:** *effective legal remedy against local regulation, judicial review, legislative power of local self-governments*

## 1. Introduction

Under the current legal system in Hungary, two significant problems may be identified regarding the judicial review of local self-government's normative acts, including local regulation and normative decisions. On the one hand, the scope of entities and persons who may initiate the abstract and concrete judicial review procedures for local self-government decrees and normative decisions, the *locus standi* (standing) is restricted. On the other hand, issues arise concerning the judicial review forum for these normative decisions (Hoffman 2021, 323-325; Kárász, 2022, 2-5). This study focuses primarily on the first issue, examining the practice of Hungary's Supreme Court, the Curia.

The article aims to highlight the gaps in the judicial review process related to local self-government normative acts, particularly local regulations, which are considered legal regulations under the provision of the Hungarian Fundamental Law (FL Art. T). Judicial review of such legislation is closely connected to the government's legal supervision of decisions and the operations of local self-governments, as stipulated by FL Art. 34 Sec. (4), as well as to broader judicial review issues.

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The essential argument addressed is how comprehensive the available legal tools are and how the Administrative Litigation Code (ALC) manages the judicial review of these normative acts. The study also examines whether the principle of seamless legal protection and the effective legal remedy apply. In this context, the paper explores the issue of subjective legal protection against local self-government decrees and normative decisions.

The key focus is the issue of *locus standi*, specifically the position of petitioners. It is worth noting in advance that subjective legal protection is restricted under the current legal system. Individuals or entities with a right or legitimate interest in the matter lack access to a direct and effective legal remedy against the unlawful local self-government decrees. The situation differs if the regulation is unconstitutional, and contrary to the FL, because the constitutional complaint may be filed. However, when the local regulations violate lower-level legal norms rather than the FL, there is no available remedy for the affected person or entity (Kárász 2021 53-54).

The study is structured into three main parts, (1) the judicial review of administrative legal norms and the specific issues of local self-government normative acts. This section addresses the general framework of administrative litigation in Hungary. (2) Judicial review of local self-government regulation in practice, in Hungary. This part examines the application of ALC, and the Code in action, presents practical issues, and provides statistical data illustrating the practice of the Curia. (3) Identification of deficiencies affecting seamless and effective legal remedy. This section analyses shortcomings that adversely affect the application of legal remedies in the cases.

## **2. The Judicial Review in General and the Administrative Judicial Review System in Hungary**

### **2.1. Judicial review in a broad sense**

In a broad sense, judicial review refers to a review of acts issued by the legislature, including local government bodies or administrative authorities to ensure their consistency with a higher-level law. This competence is exercised by judicial bodies (Grote 2023 1.). The judicial review and the constitutional role of the courts are vital questions from the point of view of the tripartite approach to a separation of institutional powers (Poorter, Ballin, Lavrijssen, 2019, VI-VII). The institutions and procedures of administrative control vary significantly across European states (Buontempo 2010 1-20). According to the Council of Europe, all administrative acts should be the subject of judicial review, which should at least be available to individuals and legal entities whose rights and interests are directly affected by such acts (Rec(2004)20 B.1.a., 2.a.)

In a narrower sense, administrative judicial review pertains to the normative acts of administrative institutions. From this point of view, the focus shifts to bodies functioning as quasi-constitutional courts (Árva, 2020, 1-2; Szente, 2023, 7-11). This category also covers decrees issued by local governments regulating local social relations.

The German, French, and Anglo-Saxon types of norm control over local government decrees can be considered models. International standards emphasise that the control of local government regulations is an integral part of administrative litigation. In all three

models subjective legal protection is prioritized, granting affected individuals the right to directly initiate a review (Kárász, 2020, 72).

## 2.2. The judicial review forums

Hungary's judicial review system in legislative matters is centralized, with the Constitutional Court holding primary responsibility for assessing unconstitutionality. The Constitutional Court serves as the principal organ for protecting the FL, ensuring the rule of law principle, upholding constitutional order, safeguarding fundamental rights guaranteed by the FL, maintaining the coherence of the legal system, and fostering the principle of separation of powers (FL Art 24). Its functions include both preliminary and posterior norm control with competences extending to abstract and concrete norm control matters.

One of its key functions, relevant to this study, is the constitutional complaint procedure. Significant changes to the rules governing followed the entry into force of the FL. A constitutional complaint may be submitted to the Constitutional Court mainly when the petitioner's right guaranteed by the FL is violated by a judicial decision. Exceptionally, such complaints may also address instances where the application of a law contradicts the FL, or where the enforcement of a legal provision directly violates rights or legitimate interests without a judicial decision.

In 2012, with the enactment of the FL, the responsibility for norm control was divided, and the Curia was empowered with norm control competence over the reviews of local government regulations (Balogh, Marosi 2012 609, Tóth, Kovács 2018 21-23.). The Curia thus assumed some constitutional court-like functions, with its norm control competences laid down in the FL, Art. 25, Sec. (2) and further detailed in the ALC, and the Local Government Act of Hungary (LSG).

2016 was an outstanding year from the point of view of the development of administrative litigation. This year both the new General Administrative Procedural Code (GAPC) and the ALC were adopted, which came into effect on the 1st of January, 2018.

For the first time, an independent administrative court structure was established, comprising eight regional administrative courts, and an Administrative Supreme Court also, on the same level as the Curia. The new organization would have been operated from 1st January 2020 (Boros, Robotka, *year*, 29-38). However, serious concerns over judicial independence raised by international organizations (the First Vice-President of the European Commission, the CoE Commissioner for Human Rights, and the UN Special Rapporteur on the Independence of Judges and Lawyers), (Contribution, 2020, 17-18), especially the Venice Commission (CDL-AD(2019)004-e 61-65) led to the withdrawal of these reforms. Criticism focused particularly on the Minister of Justice's role in the appointment of administrative judges and the fast-tracking of civil servants into administrative judge positions.

In response to these concerns, the proposed administrative judicial system was abandoned. Instead, administrative litigation competence was reassigned from the 1st of April, 2020 to county courts with administrative judiciary boards, including eight regional courts and the Capital Regional Court. The Curia also maintains administrative judiciary boards.

### 2.3. The current administrative judicial review system

The Constitutional Court retains its general norm control function. Before 2010, the *actio popularis* system was applied, allowing anyone to petition the Constitutional Court for posterior norm control, without a direct interest and deadline. Under the FL, a citizen has the right to bring the case to the Constitutional Court only via constitutional complaints. Citizens can now initiate norm-control procedures only if their fundamental rights are directly affected. There are two forms of constitutional complaints, the normative one and the individual one. The subject of the normative complaint is the constitutionality of the norm, it might be direct or indirect, but it is available against the legislation. The individual complaint is available against the court decision, and the subject of the constitutional complaint is the constitutionality of the interpretation of the norm, the individual decision (CCA Art. 26-27) (Csatlós, *year*, 217-144).

The Curia has been granted norm control powers, especially over local government decrees. The Constitutional Court intervenes only in exceptional cases where such decrees solely violate the FL provisions. If a decree violates both the FL provisions and other laws, the Curia reviews its legality and may annul the provision of the decree or the whole decree. This shared competence system ensures that the Senate of the Curia handles local government decrees with broader legal implications (Hoffman, 2021b, 32-35).

Local government decrees are pivotal for safeguarding citizens' rights and legally protected interests. The examination focused on how they could enforce their rights and legitimate interests against an unlawful local self-government decree and explores available remedies under the current Hungarian law.

The right to regulate and administer the local public affairs is a core element of the local autonomy. The administrative acts that govern local public affairs shall be issued as a form of decree or decision, according to the Hungarian Fundamental Law (Art. 32. Sec (1), points a) and b). The local self-government decree is considered a legal regulation by the Legislation Act (LA). Due to the provisions of the Administrative Litigation Code, the court shall decide on proceedings to examine whether local self-government regulation conflicts with other legislation or whether the local self-government has failed to fulfill its legislative obligations.

### 2.3. Locus standi: Who may propose a review?

The crucial question is who may initiate the review of an unlawful local decree through abstract or concrete norm control procedures (Schwinn, 2023, 3-7). This paper aims to explore, whether the ALC provides effective legal protection for individuals and organizations against the local government decrees (Rozsnyai, 2019, 112.). The research premise is that subjective legal protection is incomplete, as illustrated by the Curia's practice.

Under current Hungarian law, the scope of petitioners is restricted. County and capital government offices supervise the local government's legality and the Ombudsman may initiate an abstract norm control. While judges are entitled to initiate a concrete review of the law in pending cases. If a judge identifies an unlawful rule during the judicial reviews, they may express concerns about the applicable rule in the judicial review

petition, while the Curia decides on the unlawfulness of the rule and the exclusion of its application in a specific case.

The territorial government office exercises the legal supervision competence according to the decisions and operations of local self-government. When the government office notices a violation of legal regulations, within the framework of its legal supervision competence, they request the representative body of the local government to put a stop to it. The representative body is obliged to examine the terms set out in the request and inform the government office about the measures taken or disagreements. In the latter case, if the legal request brings no result, the government office shall decide on the application of other tools, within discretionary jurisdiction (LSG Art. 134). It is important to underline that the decision on the application of other tools is at the discretionary competence of the government office. The Commissioner for Fundamental Rights (ombudsman) may also appeal to the Curia if a local decree infringes upon fundamental rights (CFR Art. 34-34/A).

It is worth highlighting the posterior concrete constitutional complaint, from the point of view of the judiciary system. Two criteria determine which judiciary body the judge may bring the case. On the one hand the type of the act issued by the legislator and on the other hand the type of act against which the judge wishes to compare the act to be reviewed. When the local decree is applicable, if the case is contrary to the FL, the judge can initiate the procedure of the Constitutional Court, but when it is contrary to lower-level legislation, the judge can initiate the concrete posterior norm control procedure of the Curia. The judge might declare his or her concerns about the unlawfulness of the applicable norm through a judicial review motion, and the Curia decides on the unlawfulness of the norm and the exclusion of its application in the specific case. The responsibility of the judge to initiate the necessary procedures is paramount from the perspective of the effective legal remedy for the citizen (Bodnár, Szalbot, 2018, 12-13).

### **3. The practice of the Curia<sup>2</sup>**

To demonstrate the implementation of local decree norm control, the practice of the Curia, was examined for the period 2012-2023. The President of the Curia is obliged to report annually on the operation of the Curia. The report of the Local Governments Senate is a separate section of the annual report, the following trends emerge from the reports on the practice of the Senate.

The number of cases filed annually varies between 27 and 86. The highest number was recorded in 2012, largely due to cases transferred from the Constitutional Court following the separation of judicial review competences. In contrast, the lowest number occurred in 2022. The number of cases completed each year ranges from 29 to 68, with the highest number in 2014 and the lowest both in 2020 and 2022, of 29 cases.

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<sup>2</sup> The Chapter based on the Reports of the President of the Curia to the Hungarian Parliament. A Kúria elnökének beszámolója [Report of the President of the Curia], <https://kuria-birosag.hu/hu/a-kuria-elnokenek-beszamoloi>

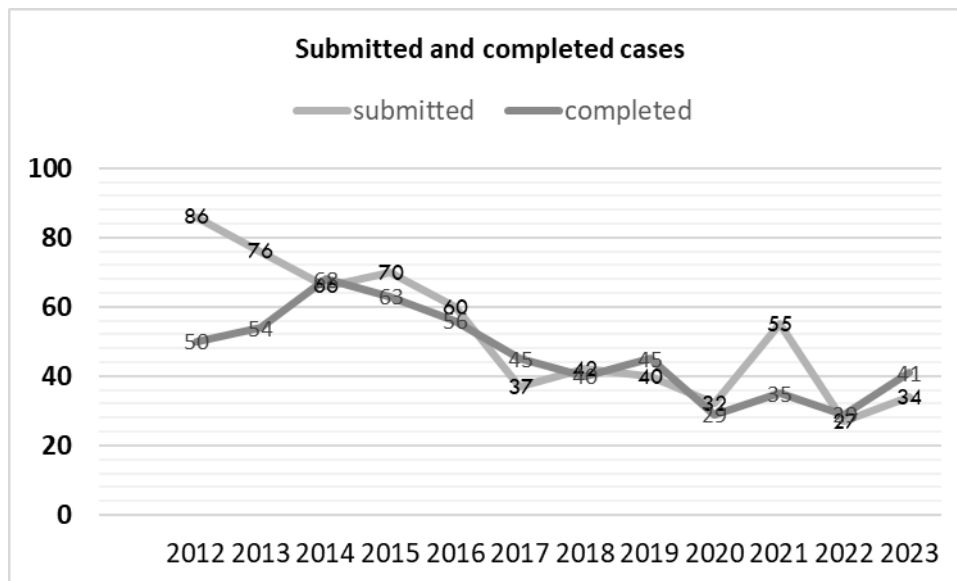


Fig.1. *Submitted and completed cases (own editing)*

The Curia's decisions typically fall into one of the following categories, (1) decides on the merits of the case, (2) can annul the local government decree, or its provision when the local self-government decree is against the law, (3) rejects the file on the merits, or (4) decides on the failure of the local self-government if it does not fulfill the legislative obligation. The Curia (5) rejects the file on formal reasons when the claimant does not have the right to file the case (ALC Art. 146). Decisions declaring annulment, or total or partial unlawfulness exceeds the 2/3 majority of all completed cases.

The number of merit-based rejections was the highest between 2017 and 2019, ranging from 15 to 18 annually. Meanwhile, formal rejections peaked between 2014 and 2016, reaching approximately 20 cases. This category highlights the need to reconsider the scope of the petitioners to initiate proceedings. The number of termination decisions reached its peak in 2013, with 12 cases.

An analysis of standing (petitioner's position) during the examined period reveals noteworthy patterns. County and capital government offices, as well as the ombudsman, may initiate abstract reviews of the local government decrees, while judges may initiate concrete reviews in pending cases. Notably, the activity of government offices was highest between 2012 and 2014, with 39, 34, and 31 petitions filed in these years, respectively. In 2021 government offices submitted 37 petitions. The ombudsman's activity was concentrated in 2015 and 2016, during which 9 and 7 petitions were submitted. However, in the past four years, the ombudsman has not initiated any reviews. This deliberate activity likely reflects a selective focus on cases where local decrees or their applications result in unconstitutional or unlawful outcomes.

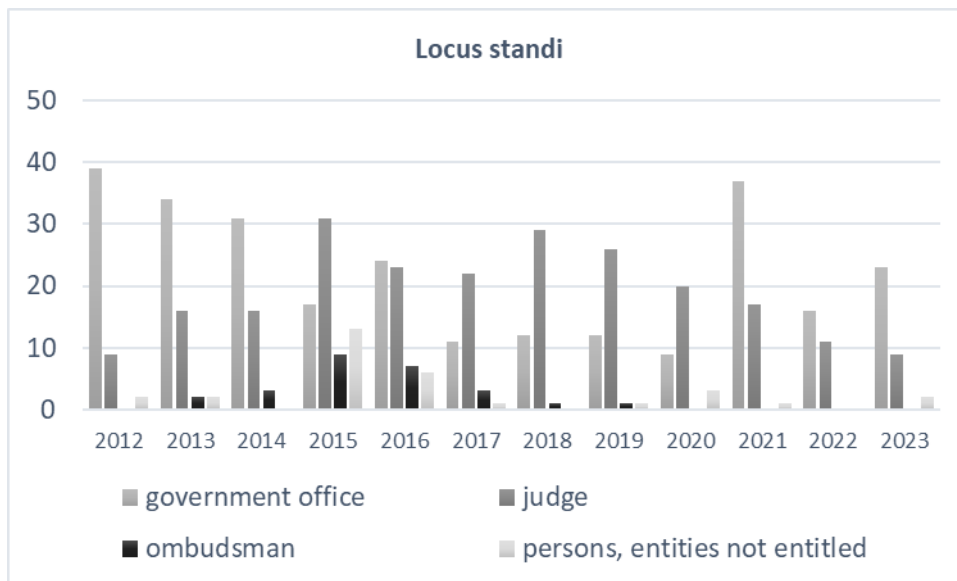


Fig.2. *The allocation of petitioners (own editing)*

The number of concrete norm control petitions submitted by the judge also varied over the years, with relatively high numbers in 2015 (31 petitions), 2018 (29), and 2019 (26). The fewest were submitted in 2012 and 2023, with 9 petitions in each year.

It is important to highlight that individuals and entities directly concerned by a case lack the legal standing to file petitions directly. They cannot bring actions before the Curia to defend their rights, nor can they initiate abstract or concrete norm control procedures. Nevertheless, statistics show that such attempts occur regularly. For instance, in 2015, 13 petitions of this kind were submitted, and 6 in 2016. The Curia was compelled to refuse these cases without examining their merits due to the petitioners' lack of standing. This trend indicates that those affected by local government decrees are often unaware of their inability to file petitions.

Regarding the subject matter of local government decrees under review, a diverse picture emerges. Decrees concerning local taxes consistently represent the highest number of cases before the Curia, followed by decrees regulating the organization and operation of local government representative bodies. Recurring topics include local regulation on local community coexistence, budget and final account decrees, and the use of local public spaces. The reduction of local government competences in recent years has led to a decline in the number of proposals addressing social issues. Finally, petitions submitted by capital and county government offices often reflect the thematic focus of their legal supervision monitoring plans for the given years.

#### 4. The Relevance of the 'Legality Complaint'

When the norm control competencies of the Constitutional Court and the Curia were separated in 2012, it was proposed that a type of "legality complaint" should be created for citizens. This legal mechanism would ensure the right of petitioners to initiate a

specific review of norms, functioning similarly to the constitutional complaint. Under this procedure, the individuals and entities whose rights or legitimate interests were violated would be able to initiate proceedings before the Curia (Balogh, Marosi 2012 610). It is difficult to assess the potential burden such a mechanism might place on the Curia. However, data from the past 12 years shows that only 31 cases were initiated by non-entitled citizens and entities seeking judicial review of local decrees, none of which led to substantive outcomes.

The introduction of a new legal instrument, such as a legality complaint, is justified by two key considerations. First, there is a need to ensure consistent enforcement of the principle of effective and seamless legal protection, strengthening subjective legal protection, and safeguarding the rights of the individuals and entities concerned. Second, further development of administrative adjudication could be advanced through this mechanism. If the current system remains unchanged and individuals are not granted the right to petition, there is a risk that the rights or legitimate interests could be violated without any means of rectifying such breaches. At least three arguments can be made for introducing a legality complaint.

(a) The county and capital of government offices, in exercising their legal supervisory powers may issue a notice of lawfulness if they detect a breach of the law. However, under the current framework, the LSG does not impose any obligation on these offices to take action when a local government's decree or decision is in breach of the law. Whether to initiate legal action is left to their discretion. The responsibility placed on the heads of government offices is substantial in deciding whether to pursue legal action. These offices serve as territorial state administration bodies under the FL. However, the heads of government offices are classified as political leaders under the Government Administration Act (GA). They are not required to possess specific qualifications but must be eligible to stand as a candidate in parliamentary elections. Their term of office ends concurrently with the Government's term. Consequently, the use of legal tools by these offices can become politicized, leaving citizens vulnerable.

(b) Judges presiding over cases involving potentially unlawful local government decrees have the authority to initiate proceedings before the Curia. However, this is also discretionary. If the judge does not initiate such proceedings, the affected party is left without recourse to challenge the unlawful decree. According to the established practice of the Curia, it is the judge's conviction regarding the illegality of the decree – not the party's motion to initiate proceedings – that determines whether a petition is filed. Judges are required to reason when alleging that a local government's decree is unlawful. The party's statement of position does not suffice to meet this requirement, which has resulted in the rejection of judicial petitions in several cases.

The Ombudsman, who also has the authority to bring the cases before the Curia, is not legally obligated to do so. The decision to initiate proceedings is entirely at the Ombudsman's discretion.

In summary, the lack of a consistent legal mechanism allowing individuals and entities to challenge unlawful local decrees directly creates gaps in legal protection. The introduction of a legality complaint could address these shortcomings by providing an additional layer of accountability and reinforcing the rule of law.



## 5. Concluding remarks

The exploration of the legal framework for judicial review has revealed that individuals and entities have recourse to a constitutional complaint if a local government decree conflicts with the FL. However, there is no directly applicable legal remedy available when the local government decree conflicts with statutory or lower-level regulations. This limitation highlights a gap in the legal protection framework. The discussion also examined the practice of the Senate of the Curia in this regard.

The Curia has the authority to assess the unlawfulness of local government decrees upon the petition of government offices, judges, or the ombudsman. Consequently, the role and activity of these petitioners are critical in ensuring legal compliance. Due to the restricted scope of petitioners, individuals and entities remain dependent on state organs such as the ombudsman, judges, and government offices to initiate judicial review. This dependency exposes individuals and entities to potential vulnerability, as their legal protection hinges on the discretionary actions of these state actors.

The Hungarian system of judicial review does not fully align with the Council of Europe's Recommendation on Judicial Review of Administrative Acts (Rec(2004)20). This discrepancy underscores the need for a more comprehensive approach to judicial review, ensuring that effective legal protection is accessible to individuals and entities when local government decrees violate statutory or subordinate regulations.

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