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When social policy walks into the justice system...

ABSTRACT: *This paper aims to elaborate on the dilemmas Hungarian courts face when they appear in the forefront of policy implementation. Firstly, what kind of (legal) sources and documents should the court involve in in its legal interpretation? Secondly, what are the trade-offs between offering effective remedy sanctions and respecting the differences between branches of law and the division of power? For purpose of this analysis, we turn to the example of school segregation lawsuits between 2007 and 2022. In terms of equal and equitable education, the regulatory frameworks in the CEE Countries are harmonized to the EU standards and are strongly based on the anti-discrimination approach. In theory, policy programs and documents could be used as a source of facts, as well as a source of information regarding legislative goals and policy context. In theory, courts should aim to opt for sanctions with the most potential to achieve effective remedy. If this leads to specific policy-type sanctions, within the bounds of the parties' actions courts should be able to decide so. However, courts tend to refrain from such sources and decisions. In the context of democratic backsliding the possibilities of such activism are somewhat unclear. Issues around the independence of the judiciary, the attitude of the executive branch towards certain social policy issues, and the practice of overwriting by amendment on part of the National Assembly supermajority may discourage courts and judges from policy-sensitive or innovative adjudication of cases with social policy relevance.*

KEYWORDS: policymaking, education, public policy, courts, judgement analysis, Hungary

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INTRODUCTION AND RESEARCH QUESTIONS

What is the role of jurisprudence in deciding cases that are not strictly legal issues, rather revolve around social policy questions with far-reaching societal consequences? The present paper aims to explore the dilemmas arising from this question around policy implementation and enforcement by the court system. We present these dilemmas through example of Hungarian case law concerning school segregation and equal education, although this time the focus is on the nature of the dilemmas and not on the individual cases or the empirical findings.

School segregation is a serious social, legal, and political issue: on a societal level, school segregation is an obstacle to social mobility and cohesion (Gorard and See 2013). On a personal level, studying in a segregated environment is usually devastatingly ineffective, but even if the quality of the education is good, the separation itself harms the sense of self-worth and the potential relationship structure of the person experiencing it. School segregation is a special issue, as it is both an individual legal injury and a social problem. While justice systems are well equipped to deal with individual complaints, social problems are usually solved by policy measures usually associated with the executive branch of governance. Therefore, the dilemma arises: in a school segregation lawsuit, how should the court treat certain elements of the case, as a social problem in the background or as the central element of an individual injury just waiting to be sanctioned? In practice this leads to the two research questions explored in this paper:

(1) What kind of (legal) sources and documents should the court involve in in its legal interpretation?
(2) What are the trade-offs between offering (policy-type) effective remedy sanctions and respecting the differences between branches of law and the division of power?

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Similarly, it is an important question, which is the nature of the application of the policy programs and documents: are mainly used by courts only as a source in finding the facts and or as a supplementary resource in the interpretation of the law (Androniceanu and Tvaronavičiene 2019)?

While these dilemmas could occur in relation to most or all policy fields, in the case-law of Hungary, they are the most visible in the lawsuits concerning school segregation. More importantly, the school segregation lawsuits cited below show how the courts' stance on these issues can determine the outcome of individual cases.

As the empirical basis of the present paper comes from Hungarian case law, the questions are understood in the context of the continental legal system where the distinction between public and civil law rather defined (Zweigert and Kötz, 1998). While these dilemmas may as well apply to constitutional courts as well, the specific aim of this paper to show the balancing of the regular court system as they are the entities obligated to adjudicate and offer effective remedy in the cases brought in front of them – even if it leads to concepts outside of the black letter law.

CONTEXT IN LAW AND LITERATURE

The discussion of the presented dilemmas requires both the legal and the policy analysis angle. Public policy is a broad term describing the actions (or non-actions) of public actors (typically the government or executive) regarding a particular issue (or field) (Knill and Tosun 2012 and Vakulenko and Mattei 2023). Policymaking (and implementation) is generally dominated by the executive; however, other actors are also relevant: the legislature, the judiciary, the bureaucracy, political parties, and private actors such as interest groups, NGOs, and experts (Knill and Tosun 2012). The role of the courts in this context is multifold: they enforce policies by applying the law, set agenda or form policies (especially higher level or constitutional courts) (Knill and Tosun 2012) by their decisions, they provide forums and publicity to those who suffer from exclusion or injury (Carney 2019), and they serve as a line of feedback for the executive and legislative branch. The extent of courts' involvement in social policymaking and implementation likely differs depending on the country (or supra-national entity), the legal system. In the common law system of the United States the policy role of courts has been thematized ever since the school of legal realism (Mertz 2016), albeit the social policy involvement of the judiciary can be described as sequence of expansion and contraction (Horowitz 1977). In contrast, in European continental legal systems such as the Hungarian, this topic is far less discussed and mainly focuses on the European integration, for example on how the European Court of Justice admittedly became a major center of policymaking (Wasserfallen 2010 and Varju 2020).

Looking at our example specifically, the policy goal regarding school segregation is twofold: to provide vulnerable students with an integrated environment, and to close the academic achievement gap between students from different racial, ethnic, socio-economic or other backgrounds in order to create equal opportunity. In the Hungarian context both aspects are extremely relevant. In the years preceding the COVID-19 pandemic, roughly half of Roma pupils were studying in segregated classes, and this proportion was even higher in the Northern Hungary region (Ónodi-Molnár 2016). Year after year, vulnerable students, many of whom are of Roma origins perform worse than their peers in the National Competence Assessment. According to the data from the OECD PISA test, family background explained about 22% of the child's results, which puts the Hungarian education system last in the EU and the OECD in terms of compensating for differences in family background (OECD 2018). These data also show that a significant proportion of vulnerable children attend segregated schools, where the education provided by the institution fails to compensate for or even exacerbates the disadvantages of their situation (Kézdi and Kertesi 2009), thus violating their right to an adequate education and right to equal treatment (Dombrovszky 2019). This situation appears in the context of free school choice and its where the market-type behavior of actors the white flight phenomenon, where students from middleclass background leave schools with worse reputations causing these schools to become segregated (Kézdi and Kertesi 2014) as an (officially) unanticipated consequence (Urbanovič, de Vries and Stankevič 2021).

Courts interacting with social policy and serving different roles in terms of policymaking and implementation through enforcement is not unprecedented. In the United States where the segregation of Black and Latin students was challenged through a series of lawsuits (Powers 2014). Despite the many differences, such as legal systems, societal context, timeline of cases, social movements etc. the nature of the school segregation issue and the presence of related lawsuits make the lessons comparable (Greenberg

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2010). In the United States decisions such as Brown v. Board of Education of Topeka 347 U.S. 483 (1954), and the Brown II[3] decisions served as agenda setters dictating the goal of desegregation in American public education as a constitutional standard; together with later cases, court rulings "established national legal policy" (Giles and Walker 1975). Among the most significant decisions Green v. New Kent County School Board 391 U.S. 430 (1968) prescribed the standard to measure the compliance of school districts' desegregation policies: effectiveness in achieving proportionate student bodies (Allen, Daugherty and Trembanis 2004). In the Swann v. Charlotte-Mecklenburg Board of Education 402 U.S. 1 (1971) case the court issued a more specific ruling: the court ordered the implementation of a policy program, the so-called Finger Plan. According to the Finger Plan, the school district was divided into non-contiguous zones students were required to attend the school designated by their zone, with racial ratios that allow for no more than 15 percentage points of deviation between schools, while the school district provides the buses that transported students to their assigned schools. The Supreme Court upheld this decision, and the Charlotte-Mecklenburg School District became a positive example for creating diverse classrooms and decreasing the gap in academic achievement between students from different racial and socio-economic backgrounds (Jackson 2009, Mickelson 2001). While these court rulings were certainly catalysts of change, their effectiveness and relevance in terms of substantive results are debated (McNeal 2009). As for effectiveness, full desegregation never happened, while re-segregation appeared in the post-Brown era. (McNeal 2009, Jackson 2009) As for the relevance of United States court decisions, research suggested that the decrease in segregation in the following years can be more closely attributed to the legislative changes than judicial activism (Boozer, Krueger and Wolkon 1992), albeit courts still shape the school segregation landscape by deciding on cases that were filed to overturn previous desegregation policies (McNeal 2009, Jackson 2009, Mickelson 2001).

Hungarian law creates a framework in line with the EU Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. On the constitutional level, Article B) paragraph (1) of Fundamental Law of Hungary (hereafter: Fundamental Law) states that Hungary shall be an independent, democratic rule-of-law State, while Article C) paragraph states that the functioning of the Hungarian State shall be based on the principle of the division of powers. According to Article XXVIII everyone shall have the right to have his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court, and to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests. Concerning legal interpretation Article 28 states that courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. It is stated by the article 28 of the Fundamental Law, that "[i]n the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good" (Szente 2022). In terms of school segregation, the Act V of 2013 on the Civil Code (hereafter: Civil Code) and the Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (hereafter: Equal Treatment Act) name the legal basis for a lawsuit. The Civil Code names the right to equal treatment as a personality right (Fuglinszky 2015). The Equal Treatment Act elaborates on the equal treatment requirement and declares that unlawful separation (the legal term for purposeful or neglectful segregation) is in breach of the requirement. Those who suffer segregation, can claim unlawful separation and file a civil lawsuit and action for damages or the no-fault sanctions (e.g., cease and desist) of the Civil Code. In this procedure the court and the parties should follow the Act CXXX of 2016 on the Code of Civil Procedure (hereafter: Code of Civil Procedure) which provides the principle of free disposition. Section 2 states the parties may freely dispose of the claims they raise in the proceedings, and unless otherwise provided by an Act, the court shall be bound by the requests and juridical acts submitted and made by the parties.

BACKGROUND AND METHODOLOGY

The present paper aims to highlight the above-mentioned dilemmas that were discovered as part of a research focusing on the "equality in education" case law of Hungary between 2007 and 2022. In the research a total of 224 decisions were gathered from the

3 Brown v. Board of Education of Topeka II 349 U.S. 294 (1955)

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publicly available database of the Hungarian court system. Judgements were accessed from the "Bírósági Határozatok Gyűjteménye" (Collection of Court Decisions) based on two search criteria: 1. Judgement contains reference to either the current or the previous Public Education Act 2. Judgement contains at least one mentioning of either the term "egyenlő bánásmód" (equal treatment) or the term "esélyegyenlőség" (equal opportunity). Judgements not fitting these criteria were included if they were issued in a lawsuit where the higher or lower instance decision did fit the criteria. It should be mentioned that the majority of the cases are available at CCD. According to the Act CLXI of 2011 on the organization and administration of the courts the CCD contains all judgements of the Curia, the Supreme Court of Hungary, the final judgements of the five Courts of Appeals, the final judgement of the county courts in cases on the judicial review of administrative decisions and the 1st and 2nd instance cases on which the Curia and Court of Appeal cases are based. Because the cases on privacy and the judicial review of administrative bodies belong to the competences of the county courts, therefore, the majority of these cases are accessible at the CCD. Cases concerning elections or referenda were excluded by default. The methodology of this research draws on lessons learned from the research design of a previous research about guardianship cases in Hungary (Kiss et al 2021). The selected and analyzed judgements are available at the following repository: https://docs.google.com/spreadsheets/d/16fKzuk5__3L5Q-PmnEBqGD9wldrdUw_odZhgp8YFU78/edit?usp=sharing.

224 judgements were sorted based on their contents. Cases that revolved around an equal treatment dispute within the educational system and cases that revolved around education policy but raised the issue of equality were subjected to the analysis. Out of the 224 judgements the research examined 110 decisions from 53 cases – the ones that focused on the questions of equality in the context of education policy – to see how courts use policy and social science in their decisions and whether courts used specific sanctions to enforce policy. Among these cases there were the 18 school segregation lawsuits. This group emerges as a special subset due to the societal relevance of the issue at hand, the concentration of cases, the presence of strategic litigation, but also the extent to which the parties and the court engaged with the underlying social and education policy aspects of these cases.

Tab. 1: Significant cases by issue, legal branch, and contents of verdicts 2007-2022

	Civil lawsuit			Administrative lawsuit			Labor and employment lawsuit		
	P&S elements[4]	Programs & documents[5]	Number of cases	P&S elements	Programs & documents	Number of cases	P&S elements	Programs & documents	Number of cases
School segregation	**89%**	**31%**	**15**	**100%**	**0%**	**3**	-	-	0
Employment	0%	0%	1	0%	0%	2	41%	13%	14
School provision	-	-	0	40%	6%	10	-	-	0
Special needs children	100%	50%	2	50%	33%	4	-	-	0
Other	0%	0%	1	0%	0%	1	-	-	0

As it is visible from the table, compared with other cases, the school segregation judgements cited policy programs and documents to a greater extent, considered education, special education, sociology, and social policy angles more often. In these cases, courts also exhibited slightly more activism in terms of effective sanctions (Farkas and Körtvélyesi 2022). However, looking at the policy-relevant elements more closely, two peculiar tendencies occur. One, the policy programs and documents are almost exclusively referenced by plaintiffs, and not offered by the defendant, or used ex officio by the court – even if the policy material in question is a document (e.g., strategy, directive, development plan etc.) adopted or issued by lawmaker such as the Parliament or a representative body of a local government. Furthermore, these materials are mostly used only as a source in finding the facts and not as a supplementary resource in the interpretation of the law. Two, despite declaring the breach of the equal treatment requirement in most cases, the courts (with only

4 The percentage of court decisions where the verdict contained statements with social policy, education policy, social science, or education science content.

5 The percentage of court decisions where the verdict referenced a social policy or education policy program or document.

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two exceptions) resort to issuing sanctions only using the general terms of no-fault sanctions instead of issuing the specific remedies pleaded by the plaintiffs, citing the differences between legal branches (and the division of powers principle).

The following chapters look through the context and explore the two dilemmas that arise from the mentioned contradictions. The analysis of the examples (court rulings on individual and normative administrative decisions on public education conflicts and policies) shows the tools of enforcement of the legal regulations in Hungary. It should be emphasized that the Hungarian framework of the legal regulation on education policies are based on strict anti-discrimination regulation (Menyhárd 2020), however it is one of the characteristics of the countries of the global semi-periphery, that the law enforcement is not very effective, therefore, the strict regulations remain as 'law in books' (Guibentif 2020). Similarly, it should be noted, that the transformation of public services and transfers (Szikra 2018), such as public education, (especially, the change of the access to the high-quality services) is an attribute to populist democratic backsliding (Moynihan 2021, Babšek et al 2020, Barwicka-Tylek & Ceglarska 2022 and Biernat 2020).

Dilemma (research question) 1 – What kind of sources should the court involve?

First of all, we would like to examine the status of policy programs and documents mentioned or referenced in a lawsuit. As mentioned before, in the Hungarian school segregation lawsuit policy programs and documents were only present in two contexts: as a source of information for the facts of the case, or simply listed that the plaintiffs action contained references for such element (Árva 2020). The position of this paper is that if policy programs and documents were to be sought out by courts more actively or be used more extensively in cases that revolve around social policy questions with far-reaching societal consequences, it could help them to issue judgements more suitable to the individual case and more in line with the social policy goals.

The main barrier to further application is the legal nature of policy programs and documents. Policy programs and documents are usually not adopted in the form of law, even if some are adopted as such. They can be calls for application, strategies, reports, recommendations, circulars, etc. They can be adopted by a legislative body, such as the Parliament, representative body of a local government, or by the Government itself in form of a resolution or similar measure. For example, Hungary's most comprehensive medium-term strategy that aims for the fight against poverty and inclusion of the Roma population, the National Social Inclusion Strategy 2020 (then the Hungarian National Social Inclusion Strategy 2030) was approved by Government Resolution no. 1430/2011. (XII. 13.), while local governments are required by the Equal Treatment Act to create local equal opportunity programs that are also typically adopted by resolution of the representative body. If such contents are adopted according to Chapter IV of Act no. CXXX of 2010 on law-making as a "normative decision", they fall under the category of public law regulatory instrument and enjoy a quasi-law status in the context of public organs, in contrast to resolutions issued as individual decisions (Gárdos-Orosz 2021). However, the empirical research only found policy programs and decisions that were issued or approved in individual decisions. Whereas recommendations, circulars and similar documents (usually) coming from members of the executive branch outside of the scope of the public law regulatory instruments are considered to be "pseudo-norms"[6], hence cannot be enforced as a universal norm. Reports are clearly not legal norms, even if they were created within the public administration, but typically these documents are written by experts or expert-activist on request of either a public actor or an interest group (Wilkins et al. 2017) based on the previous empirical research.

Despite their mostly non-legal nature, policy programs and documents can still become a part of the judicial process, albeit only in very limited ways. If either of the parties references such programs or documents in a lawsuit only as a source of information they will likely be considered by the court. For example, in a diagnosis-based school segregation lawsuit from Heves County,[7] Hungary the NGOs conducting the public interest litigation brought in a report made on the request of the Heves County Municipality detailing the state of diagnosis-based segregation in the county and the program aiming to mitigate it; and the court relied heavily on the findings of this report. The non-legal nature of public policy programs and documents becomes a problem in two settings: one, if such source could provide important information but neither parties motion for their inclusion. Two, if such source could offer guidelines or assistance to the court in its legal interpretation for the specific case. These barriers are especially pronounced in civil lawsuits,

6 Hungarian Constitutional Court Ruling no. 60/1992. (XI. 17.), ABH 1992, 275.

7 Eger Regional Court ruling no. P.20166/2014/92.

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and school segregation cases were mostly filed as such.[8] In Hungarian law in general, courts and judges shall make their decisions in accordance with the law based on their own personal judgment according to Section 3 to Act CLXI of 2011 on the organization and administration of the courts. As for civil lawsuits, the Code of Civil Procedure declares the principle of free disposition and the non-ultra-petita principle. In practice, when deciding in a lawsuit the Hungarian courts look at the relevant legislation ex officio, but in terms of aspects of a case, evidence, sanctions etc. the exploration and the decision of the courts strictly remain in bounds of the parties claims and actions (Varga 2018).

As mentioned before, procedural guarantees such as free disposition or the non-ultra-petita principle do not block the use ofpolicy programs and documents in general, they are sometimes included as a source of information regarding the facts of the case. If a plaintiff looking for legal remedy references a policy program or document as a source of information about the facts of the case it will likely be used in the court's assessment, as it happened in multiple school segregation lawsuits between 2007 and 2022. However, in all these cases either the plaintiff or the legal representative of the plaintiff was an NGO specializing in educational justice and advocacy for Roma and low-income children. Knowing about policy programs and documents, properly referencing and using them in a civil action presupposes certain resources on the plaintiff's part: mostly the means to access well-prepared legal representation with a certain level of expertise in the given social policy field (Plaček et al. 2023). While a dedicated NGO or interest group can make up for these resources even for the most at-risk social groups, a private individual seeking remedy for an injury with social policy relevance would likely lack the monetary and other means to bring in the policy programs and documents in any form.

As for those contents of policy programs and documents that could supplement the application of a legal norm, courts seemingly refrain from including and interpreting them. In the 18 school segregation cases in Hungary between 2007 and 2022 no judgement referenced any statements, principles, targets or other elements when applying the law, despite the fact that there were cases where the court elaborated on the responsibilities and positive obligation of the state and its actors, while simultaneously the plaintiff specifically mentioned the National Social Inclusion Strategy, or other programs and documents that contain policy goals and principles regarding school segregation, the inclusion of the Roma population, and the fight against poverty. Furthermore, side-effects of the procedural guarantees mentioned earlier apply here as well (Farkas and Körtvélyesi 2022).

This paper argues that the more active inclusion of policy programs and documents is already rather feasible in the current legal context. In terms of them being a source of information, Section 266 of the Code of Civil Procedure opens up the possibility for courts to take evidence from policy programs and document, as facts that are considered by the court to be commonly known, or of which the court has official knowledge, shall be taken into account by the court even if they are not invoked by any of the parties. Policy programs and documents can fall within the scope of "commonly known" if they have national or local relevance to the legal issue at hand, especially if the given source was adopted, approved, or previously heard by a lawmaker entity, or published regularly to the general audience. The extensive interpretation of the "commonly known" would not be unprecedented, as courts had already used extensive interpretation of this legal instrument to help plaintiffs secure appropriate legal consequences in personality rights lawsuits in the context the previous Civil Code (Lábady 2016). Using this instrument to involve the relevant policy content ex officio may help the cases of those plaintiffs who do not have sufficient resources to provide the information or social policy context themselves. As for policy, the interpretation rule of Article 28 of the Fundamental Law can allow courts to consider programs and documents to guide or assist legal interpretation. As mentioned before, Article 28 declares that courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good. Policy programs and documents that are adopted, approved, or were previously heard by a law-making entity can provide information to the court about the purpose of the law, similar to the preamble and the justification, but probably in more detail. These sources can also offer vital information in reconstructing the concept of "moral", "economic", and "public good" in relation to the given legal issue or its social policy context (Bouma et al. 2018).

8 In contrast, in administrative court procedure, there are exceptions for the free disposition principle in terms of taking evidence.

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Dilemma (research question) 2 – What are the trade-offs in sanctioning?

What kind of sanctions can be imposed by the court in a case that revolves around social policy questions with far-reaching societal consequences? Is it possible for a civil court to give any specific mandate to the executive branch or public organs (and if yes, what can that specific mandate be)? In Hungarian school segregation cases the courts answered no to this question with only two exceptions. As mentioned before, most school segregation lawsuits were filed as civil lawsuits. In most of them the courts found that the right to equal treatment was breached, students were subjected to unlawful separation and/or (direct or indirect) discrimination. While the violations were established by the court more-or less according to the plaintiff's claims, courts refrained from issuing the specific consequences the plaintiffs actioned for (e.g.: mandating the defendant to adopt a desegregation plan or to redraw the compulsory catchment areas of the schools) under the no-fault sanction rules. In these cases, the courts issued only general no-fault sanctions, often simply repeating verbatim the phrases of the Civil Code, for example, only ordering the defendant school provider to "end injurious situation" without giving the specific instructions the plaintiffs actioned for (see above). The difference between civil law and public law, practical implications such as the impact on the free school choice system, and enforceability were cited as reasons for refraining from more specific sanctions.

In the case of a segregated elementary school located on the outskirts of Kaposvár (a city of approx. 60 000 residents in Southwestern Hungary), the in first instance court ruled that the institution unlawfully separated Roma students and ordered the provider to cease the violation, but did not specify the method of doing so because (as later the Supreme Court approved) "segregation in the school in question was not established in a civil law relationship, but in a public law relationship, and therefore civil law with its regulatory system is not suitable to provide for the manner of desegregation and desegregation. The determination of these measures falls within the scope of public law, i.e., the violation of rights that has occurred can only be remedied by means of public law."[9] This argument and the ruling of the Supreme Court (now Curia) occurred in multiple cases after this lawsuit.

This position was contradicted in the later stages of the same case when (due to the unlawful situation persisting despite the previous ruling) the plaintiff brought the case before the court for the second time. The second instance ruling of the second lawsuit ordered the closure of the segregated school and mandated the provider to adopt desegregation measures as no-fault sanctions. The plaintiff specifically requested the closure of the school, arguing that the location of the school and the characteristics of the local educational structure made it impossible to keep the school open and make it integrated. The judgment accepted this argument and ordered the school to close gradually in the following years. "The unlawful separation established by a final judgment in the case of the school can therefore only be eliminated by implementing a desegregation program based on the closure of the school. According to the attached desegregation plan, the closure of the school can be implemented either by a one-off measure, as a result of which all pupils attending the school will be transferred to another school within a relatively short period of time, or by a gradual, ascending desegregation system, by prohibiting opening new first grades."[10] The court argued that "the nature of the sanction to be imposed in a particular case depends primarily on the nature of the harm and the complexity of the remedy, so a relatively long obiter dictu part should not be an obstacle to an injunction. Nor can concerns about enforcement be derived from the existing law, since the action has specified when, by whom and what must be done. The sanction is an order for ending the injurious situation, the elements of which are clearly and comprehensibly set out in the action. And it is manifestly contrary to the rule of law for the court to make it dependent on the political will of the defendants whether desegregation can be ordered. The political position of the defendants on the subject-matter of the action is irrelevant, since the court must decide on a question of law, regardless of its possible political consequences."[11]

In a case where the action was brought against the (former) Ministry of Human Capacities as the governing body of public education, the court prescribed in exceptional length and detail the specific technical measures to be implemented by the Ministry in order to put an end to the infringement: to clarify its professional guidelines on school segregation, as specified in the judgment, and to oblige the Government Offices to conduct investigations in accordance with the amended criteria, as well as to declare the reasons for the situation detected and to decide on the steps to be taken to eliminate the segregation detected, and to make all of

9 Supreme Court of Hungary (now Curia) decision published as Ruling no. BDT. 2010. 2309.

10 Pécs Regional Court of Appeal ruling no. Pf.20004/2013/4.

11 Ibid.

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these public.[12] It also ordered the Ministry to instruct the maintainers of 13 schools to stop starting first grade classes, to instruct the authority to modify the district boundaries in certain municipalities, and to pay a public interest fine of HUF 50 000 000 (approx. 150 000 EUR at the time), which "shall be used for monitoring the implementation of desegregation programs by NGOs for five years after the launch of the programs."[13] The operative part also contains a summary table to be used in the investigation of the state of school segregation. In the explanatory memorandum, the court goes on to state that the measures requested by the applicant in its application are included in the operative part as a remedy for the cessation of the infringement.

In this case the second instance ruling essentially left only a skeleton of the very detailed sanctions imposed in the first instance judgment: the establishment of unlawful separation, the obligation to prepare desegregation plans and the public interest fine. This "withdrawal" is in line with the previous idea promoted in the decisions of the first Kaposvár lawsuit. The court explained that it was not legally possible to comply with the individual requests for measures in relation to the Ministry, since "the elimination of the segregation that has been established and maintained is possible within the framework of a public law relationship"[14] and "only by implementing a complex program based on aspects that go beyond the subject of the present personal action, is it possible to effectively eliminate the harmful situation".[15] It is important to note that the defendant's appeal also raised concerns about the division of powers. The defendant claimed that "the first instance ruling violated the constitutional requirement of the division of powers, as declared in Article C) and Article 25 of the Fundamental law. The infringement occurs by not requiring the public administration bodies with direct powers and responsibilities to exercise their statutory powers to remedy the unlawful situation, but by imposing an obligation (and penalty) on the governing body to give instructions on the basis of its management power. Therefore, the ruling prescribes the execution of certain acts in within administrative bodies who belong to the executive branch."[16] It can be inferred from the wording of this ruling that the second instance court broadly agreed with the defendant's concerns about the division of powers as regards the sanctions not imposed.

As the present examples show the courts view of policy type sanctions are not homogenous, even after the latter Kaposvár ruling in 2016. In that case the second instance court established the framework of the application of policy-like mandates: nature of the specific no-fault sanction should depend primarily on the nature of the harm and the complexity of the remedy; a long operative part is no obstacle; the plaintiff's action should specified when, by whom and what must be done; the court should not leave decisions about remedies to the political will of the defendants, hence the civil court can issue specific (policy-type) mandates as a no-fault sanctions to public law organs in relation to public law relationships. The Curia later approved this approach and maintained the ruling in effect.[17] However, the case of the Ministry of Human Capacities demonstrates that the idea how the civil court shall not issue specific (policy-type) mandates to public organs in relation to public law relationship still prevailed.

This paper argues that in lawsuits where the actions of the parties and the legal issue at hand fit the criteria based on the latter Kaposvár ruling, there shall be no obstacle in ordering policy-type specific sanction regardless the public or executive branch affiliations of the defendant. Firstly, in terms of regulation, Section 4 of the Equal Treatment Act declares that the equal treatment requirement applies to public organs, while neither this Act nor the Civil Code offer any sector-specific exemption. Therefore, the rights under the Equal Treatment Act should be enforced against public organs, even if they belong to another branch of governance. Secondly, ordering the application specific measures that are scientifically founded and are in line with declared social policy goals (e.g., the execution of a desegregation plan that was approved by experts) provide real effective remedy for the persons affected by the school segregation in the individual case. As a welcome side-effect such rulings promote social equality, cohesion, and highlight good practices on a more general level.

In cases similar to the Ministry of Human Capacities lawsuit the assessment of policy-type specific sanctions is less clear. On one hand, one can argue that civil courts should be able to aim for effective legal remedy if a personality right violation occurs, regardless

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12 Capital City Regional Court ruling no. P.20351/2011/47.

13 Ibid.

14 Capital City Regional Court of Appeal ruling no. Pf.21145/2018/6.

15 Ibid.

16 Ibid.

17 Curia ruling no. Pfv.20085/2017/9.

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of the legal or political status of the defendant public organ or its legal relationship with the plaintiff. On the other hand, the concerns explored in Chapter 2 of this paper should not be ignored. Unfortunately, there is no Constitutional Court decision on the Ministry of Human Capacities case or a similar lawsuit to settle or elaborate on the issues regarding the competence of civil courts and the division of power.

Finally, it is important to add that if a plaintiff wishes to avoid the potential pitfalls of civil procedure described above, there is one other option. Outside of civil procedure, there is the "action for failure to act" based on Section 8 point h) of Act I of 2017 on the Code of Administrative Court Procedure (hereafter: Code of Administrative Court Procedure). The legal instrument of "action for failure to act" can make omissions of public service providers and other public organs actionable. The strategy to file a lawsuit for "failure to act" can be utilized either in itself or in combination with a civil lawsuit (more specifically, in the event of non-enforcement of a previous civil court decision). The basic idea behind an action for failure to act is that the rule of law principle and the aim of ensuring the legality of public administration require public authorities to act in matters within their competence even where no meaningful procedural rule exist (for the particular activity) (Rozsnyai 2022). In order to bring a "failure to act" action, the following conditions must be fulfilled according to Section 4 paragraph (3), Section 127, and Section 127 point a) of the Code of Administrative Court Procedure: the defendant must be an administrative body, the administrative body must be under a statutory obligation to perform an administrative act (individual decision, provision of general application applicable to an individual case), the defendant administrative body must have failed to perform the act, and the failure directly affects the plaintiff's rights.

Equal treatment is one of the basic principles of Act CXC of 2011 on the national public education (hereafter: National Public Education Act). Both the National Public Education Act and the Government Decree 229/2012 (VIII. 28.) on the implementation of the national public education act name the duties and obligations of public authorities, primarily the Government Offices and their divisions that serve as the public education authority. One of their duties is to take measures to enforce the requirement of equal treatment according to Section 38/A paragraph (1) of the aforementioned Government Decree. It can be argued that if the actors in the public education system fail to act in a certain way and this failure unlawfully affects the rights of individuals, there is ground for bringing an action for failure to act under the Code of Administrative Court Procedure (at least against the Government Office) (Barabás et al. 2018). In cases where there is a civil court ruling establishing that unlawful separation happened, but the defendant has not been ordered to take specific action, the action for failure to act may also be able to resolve the problem of the civil court's reluctance to interfere in public law relationships. Following a civil court decision declaring that there should be no interference with public law and/or only generally citing no-fault sanctions, if the unlawful separation has not been resolved, an order for more effective, specific policy-type actions can be supplemented by the administrative court. The administrative court can specify which exact administrative measure of desegregation has been omitted and the defendant is already obliged to implement. Administrative courts were designed to intervene in public law relations, their knowledge of the administrative system, their mandate to interpret principles and specific provisions of the sectoral legislation makes the administrative court procedure a good option for legal remedy in school segregation cases (Rozsnyai 2020).

There is one caveat. No such lawsuit has ever been filed in Hungary regarding public education or a similar human service system. Furthermore, the action for failure to act has only limited case law at this point. Therefore, a failure to act lawsuit in relation to school segregation would certainly count as an innovation and a new precedent. As Hungary has the limited precedent system, where the unity of Curia case-law is protected (Pozsár-Szentmiklósy 2022), filing such lawsuit could generate precedent case. Depending on the content of the precedent ruling, seeking effective remedy for school segregation or similar social policy problems could become either easier and more straight forward or exponentially harder in the future.

CONCLUSION

When faced with the dilemmas explained above, courts can take up an active role in the implementation of policies through issuing specific, enforceable decisions, even if the defendant is a public actor. However, previous research showed that Hungarian courts tend to err on the side of caution and the black letter law. In this paper we find that most policy programs and documents are of non-legal nature and the presence of procedural guarantees indeed puts a limit on the use of such sources. Furthermore, the application of specific policy-type no-fault sanctions can also be limited by the procedural guarantees, but the most relevant barrier is how the distinction between public and private law is understood by most civil courts.

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We argue that it is legally possible for courts to issue judgements where social policy programs and documents are used (ex officio if needed and applicable) either as a source of facts, information on the policy background of an individual case, or as tool for legal interpretation. The inclusion of policy programs and documents can provide information about the social policy context of the cases and insights into the considerations of the lawmaker. This enables courts issue judgements that are more in line with the policy goals set and approved by the executive and legislative branches, and more importantly more in line with the social context and the needs of the individuals seeking the protection of the law.

We argue that if the legal interpretation is sufficiently well-founded, civil courts should aim to opt for sanctions with the most potential to achieve effective remedy. If this leads to specific policy-type sanctions, courts should be able to decide so – within the bounds of the parties' actions. The examples of the Kaposvár ruling, and (the first instance ruling on) the Ministry of Human Capacities show that such decisions had already been issued under Hungarian jurisdiction. These examples, however, also demonstrate that currently such decisions only have the chance to happen if the plaintiffs are able to bring the right case with the right framing to court. In both cases the plaintiff was an NGO specializing in advocacy and legal representation of Roma and low-income children. With their expertise in both de-segregation and anti-discrimination law the NGO in question was in the right position to convince the court – in a far better position than the average law-seeking individual.

Despite the existing possibility for policy-sensitive jurisprudence, most courts do not exhaust the limits of the Hungarian legal framework. In the context of democratic backsliding the possibilities of such activism are somewhat unclear. Issues around the independence of the judiciary, the attitude of the executive branch towards certain social policy issues, and the practice of overwriting by amendment on part of the National Assembly supermajority may discourage courts and judges from policy-sensitive or innovative adjudication of cases with social policy relevance.

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