



Contributions to the interpretation of the concept of autonomy in the light of the model change in Hungary

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Abstract

The notion of university autonomy is a principle that is often invoked in higher education discourse, despite the fact that its precise content needs clarification. Although there is a rich domestic and international literature on the autonomy of higher education over the historical period, the principles set out therein cannot provide the necessary starting point, since the concept of autonomy varies from one historical period to another and cannot be regulated definitively. Due to the model changes in Hungary, the concept of autonomy has come to the fore again, so it is necessary to examine what is generally understood by the concept in the Hungarian literature and to what extent it is in line with international terminology. To this end, this study reviews the domestic constitutional court case law on the concept of autonomy and its changes, and then discusses the international standards of university autonomy, as defined by the European University Association, its components and the aspects of international comparative studies. It then discusses the position of Hungarian higher education institutions among European universities and, points to possible changes.

Keywords

freedom of teaching and learning, university autonomy, higher education institutional system, university model change, organisational autonomy

1. Introduction

The institutional reforms in Hungary in 2020 and 2021 and the debates around them have brought the concept of university autonomy back to the fore. Despite the many and frequent references to university autonomy in higher education discourses, its precise content needs to be examined. Although there is a rich literature on autonomy in higher education up to 1990, and especially in the historical period, we have to agree with Gábor Hamza that the concept of autonomy varies from one historical period to another; it cannot be regulated definitively and can be interpreted in several different ways (Hamza, 2013, 239–240). Thus, although the historical development of the concept of autonomy is an important issue, a different starting point should be chosen for examining the contemporary changes.

The concept of autonomy is inescapable in Hungarian public law literature and higher education discourse, and almost all works refer to it; however, there are very few works that clarify its content.

An important factor in this context, as Gábor Hamza points out, is that university autonomy should not be confused with the notion of academic freedom, which Hamza associates with the civil liberties of the individual, while autonomy is clearly a characteristic of the institution (Hamza, 2013, 230). However, it is precisely the undoubted connection with the concept of academic freedom that has also been the reason that the Hungarian literature has mostly invoked the issue of higher education autonomy as a principle closely connected to the legislative changes affecting higher education in Hungary, drawing on its historical traditions. As Miklós Kocsis has noted in several studies, autonomy in general is a misunderstood concept in the Hungarian higher education discourse (Kocsis, 2010, 132), which is certainly plausible insofar as the Hungarian concept of autonomy is not sufficiently clarified and is not always in line with international trends and interpretations.

Considering that recent legislative changes have brought the issue back to the fore, it is worth examining what is generally understood by the term in Hungarian literature, and to what extent this is in line with international terminology. Among the former, I will also examine separately the constitutional court decisions that have had a significant impact on Hungarian public law literature, which have strongly influenced the shaping of the concept, while, with regard to the international aspect, I will take the conceptual framework and terminology of recent comparative research as a basis, comparing it with the Hungarian discourse.

2. The Constitutional Court's attempts to interpret autonomy

2.1. Approaches to the concept of autonomy between 1993 and 2005

The first independent higher education act in Hungary was Act LXXX of 1993, which laid down the foundations of higher education until 2006. The legislation defined institutes of higher education as a professionally autonomous legal entity with self-government,¹ in relation to which the concept of autonomy is explicitly mentioned in the chapter title of Part Four (Self-government/[autonomy] and supervision of higher education institutions), without doubt identifying it with self-government at the level of legislation.

The informal reasoning attached to the proposed law also makes several references to autonomy, on the basis of which the following elements can be identified:

- The law considers the concepts of freedom of learning and teaching and university autonomy to be mutually dependent on each other.²

- Autonomy is a concept that needs to be protected, and the institution must also be protected from interference by state bodies.³

- "Institutional autonomy is based on the freedom of the staff and students of the institution", a freedom which, according to the context, applies in part to institutional norm-setting.⁴

¹ Act LXXX of 1993 on Higher Education, Article 2(1).

² "From the freedom of learning, teaching and academic research follows the autonomy (self-governance) of institutes of higher education."

³ One of the main objectives of the Proposal was to protect the autonomy of higher education, and therefore governance powers are usually conferred at the highest level of all legal sources, i.e. by law.

⁴ The Proposal defines the limits of the self-government (autonomy) of institutes of higher education in line with the existing legislation, but in a clearer way. According to the Proposal, all matters which are not expressly referred to the competence of a state or local government body by law or other legislation issued on the basis of a statutory authorisation fall within the competence of the institution.

In the latter context, it is important to note that the creation of internal institutional norms is still an important factor in higher education.⁵

It can therefore be concluded that autonomy became a concept closely related to freedom of teaching and learning, and later rather confused with it, the main factor being freedom and protection against state interference, which the legislator did not define in more concrete terms. The same tendency can be seen in these processes as in the case of local governments, with the state granting extensive self-government to institutes of higher education as a counteraction to the previous period. This was also reflected in the fact that, strangely enough, it was possible for the institution to determine the level of training and the name of the course.⁶

Some Constitutional Court decisions in this period already touched on the concept of autonomy in higher education, although this was done without interpreting it. It can be outlined from the decisions that, based on the concept of autonomy at that time, the freedom of the institution could only be limited by law. Thus, Constitutional Court decision no. 35/1995 (VI. 2.) AB confirmed the right of the institution to decide on the admission procedure, the study and examination rules and the disciplinary proceedings.⁷ Then, in the same year, Constitutional Court decision no. 40/1995 (VI. 15.) AB, as part of the economic stabilisation package, ordered the annulment of the government decision-level rules on the number of the teaching staff, referring to the principle of autonomy, and stipulating that institutes of higher education are not under the control of the Government.

More significant findings are contained in a decision taken in 1999, which already foreshadowed the contours of subsequent decisions from 2005-2011. Decision no. 870/B/1997 considered the activities of institutes of higher education as an institutional form of freedom of teaching, for which the legislator granted the institution a high degree of autonomy, which the decision identified with the rights of self-government guaranteed by law. On this basis, the institution has the right to decide on all institutional matters that are not referred to the competence of the state or local government by law or other legislation based on the authorisation granted by law. However, the state may limit this right by law or by other legislation issued on the basis of a statutory authorisation, such as the unification of higher education, or the provision of basic requirements for the course on which a diploma is based.⁸

This decision thus defined, in a forward-looking way, the essential elements of autonomy, which is a right of self-government, the basis of which is laid down by law, but which can be limited both by law and by implementing government decrees.⁹

⁵ See Article 51(1) of Act LXXX of 1993 on Higher Education. At the same time, Article 11(1)(a) of the currently effective Act CCIV of 2011 on National Higher Education already stipulates that the regulations also contain provisions that are not excluded by other legislation.

⁶ The Supreme Court ruled in decision no. KGD2004. 60 that the determination of the level of the degree is also a matter of university autonomy, referring to Article 70/G (1) of the Constitution being in effect at that time. Thus, for the degree programmes issued until 2006, the degree catalogue did not even include the exact name of the qualification for some degrees (e.g. law), so, in the spirit of university autonomy, graduates with the same degree could obtain differently named qualifications in different institutions. At the same time, an important motivation for both the court decision and the legislation was the reference to Article 70/G (1) of the Fundamental Law, which defined the freedom of teaching and learning, i.e. the freedom of education, thus inextricably linking the concept of domestic autonomy to the freedom of education.

⁷ Constitutional Court decision no. 35/1995. AB, ABH 1995, 163, 166–167.

⁸ Constitutional Court decision no. 870/B/1997 AB, ABH 1999, 611, 613.

⁹ The question relating to the level of the legal source was raised in Constitutional Court decision no. 51/2004 (XII. 8.) AB, which classified the rules on the course structure as falling within the scope of the law. ABH 2004, 679.

2.2. A time of transition: 2005

The new law, passed in 2005, sought to contain the almost unlimited concept of autonomy or, in other words, attempted to limit it. The adopted legislation was subject to a prior norm control procedure, which resulted in Constitutional Court decision no. 41/2005 (X. 27.) AB. The decision considered the autonomy of higher education as a defining characteristic of institutes of higher education, under which the higher education institution operates autonomously and independently of the Government and the state administration.¹⁰

The core of her argument is that the existence of an institution does not in itself guarantee autonomy. At the heart of autonomy is the freedom of academic practitioners to engage in academic activity without interference. This should also be guaranteed by the organisational rules governing decisions on research and education, which also include independence from the executive branch. According to the petition, the main custodian of autonomy is the university community itself as a self-government. By contrast, the law actually passed gave certain powers to a governing body that is partly independent of academics, which powers would have enabled that body to influence the conduct of academic activity, whereas, according to the petition, “academic freedom, the freedom of teaching and learning are achieved through the autonomy of institutes of higher education”.¹¹

Since this argumentation therefore not only establishes a link but almost identifies freedom of teaching and learning with autonomy, the direct consequence is therefore that, according to the submission, any legal regulation that restricts autonomy is a violation of Article 70/G of the Constitution.

The Constitutional Court also highlighted the importance of the issue by pointing out that the freedom of academic activity is not only directly related to other fundamental rights (communication rights, etc.), but its restriction also has a social impact and, based on historical experience, freedom of academic activity is a fundamental guarantee of progress, which is also the basis of individual autonomy. “The free pursuit academic theories, statements and truths, and the free flow of academic ideas and opinions, are thus prerequisites for the development of society as a whole, of humanity, and a guarantee of the free development of the individual.”¹²

In the course of its interpretation, the panel noted that, in the practice of the Constitutional Court, the functioning and autonomy of institutes of higher education institutions was a rule related to Articles 70/F and 70/G of the Constitution in the period between 1990 and 2005. According to Article 70/G, academic freedom and freedom of teaching were considered a kind of right of communication, which is generally enjoyed by all, but whose main guardians are the practitioners of academia. The purpose of science is knowledge and, in this context, the neutrality of the state with regard to scientific truths is a constitutional requirement, while the freedom of academic research and the dissemination of scientific knowledge must be guaranteed to the practitioners of academia. According to the Constitutional Court’s interpretation, “in a broader sense, freedom of science also belongs to the freedom of expression in general”,¹³ which is therefore subject to the rules on restrictions of communication rights.

¹⁰ Marianna Fazekas argues that the 2005 legislation has resulted in an overall more confusing regulatory system by concretising certain elements of autonomy (Fazekas, 2008, 158).

¹¹ Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 460.

¹² 34/1994. (VI. 24.) ABH 1994, 177, 182.

¹³ Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 471.

The Constitutional Court, comparing the text of the Magna Charta Universitatum, the national legislation and the texts of the Ministerial reasoning attached to the legislation, found that the autonomy of higher education covers teaching, research, the internal organisation of the institution, its operation and the autonomy of financial management, and its subjects are the institution, the teacher, the researcher, the student and their community. The limit to the autonomous exercise of rights is a claim by other right holders.

Thus, in the interpretation, autonomy is inextricably intertwined with the freedom of science as a civil liberty, in connection with which the panel emphasised the now well-established principle in relation to economic, social and cultural rights that it is not sufficient for the state not to restrict the right, but it is also necessary to guarantee its institutional framework, where scientific, educational and research activities can freely take place, since the state has an obligation to protect institutions. On this basis, rules must be developed to guarantee the free exercise of scientific, educational and research activities. The essence of free academic activity is the free implementation of academic values, free from outside influence.¹⁴

Thus, the decision was in line with the petitioner's concept of autonomy, and at the same time it almost inextricably linked the concepts of freedom of teaching and learning and autonomy, on the basis of which we have to agree with the dissenting opinion of László Kiss, Judge of the Constitutional Court, according to which the mere existence of the governing (and as the dissenting opinion states: more correctly, leading) body, and even the "touching" of the higher education institution¹⁵ may be unconstitutional, since, according to the decision, the autonomy of higher education is a guarantee that the higher education institution is autonomous and independent from the Government and the state administration.

Following the majority decision, the elements of higher education's autonomy can be summarised as follows:

Autonomy in a narrow sense is academic freedom, which therefore applies to academic, research and educational matters, while, in a broader sense, it is organisational, operational and financial management autonomy, which includes self-governance. The safeguards are:

- The National Assembly determines the basic rules governing institutes of higher education, in particular the establishment, closure, central budgetary support, *et al*, of institutes of higher education.

- Ensuring internal norm-setting, whereby the internal life, organisation and functioning of the institute of higher education is determined by the institutional rules adopted by the institution itself.

- The creation of a representative body and a self-governing body of the institute of higher education itself, i.e. a community of teachers, researchers and students. These bodies can take both normative and individual decisions, and the right to submit appeals to the courts against the latter is guaranteed.

- Financial management autonomy, with state support for higher education as a guarantee of academic freedom. In this context, the primary concern is to ensure that the performance criteria are in line with academic criteria, and that market utility and political expediency are in no way the sole considerations.

With regard to autonomy, the panel also referred to its practice in relation to local governments and, although it stated that the university as an autonomous public institution cannot be

¹⁴ Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 473–474.

¹⁵ Constitutional Court decision no. 41/2005. (X. 27.) AB, ABH 2005, 459, 489.

identified with local governments in organisational terms, the findings in relation to autonomy (self-governance) can be applied *mutatis mutandis*. In particular, such an element is the establishment of the organisational structure, with the possibility of restrictive rules to promote the economic efficiency and organisational rationality of the institute of higher education.¹⁶

The majority decision was accompanied by a dissenting opinion by Judge László Kiss, in which he also mentioned the possibilities of comparison with local governments, but he also established a rather precise and logically interrelated set of five criteria, as follows:

- Independent legal personality, which is a prerequisite for the independent establishment of legal relations. This element was not emphasised in the majority decision.

- Use and independent exercise of its own powers, prohibition of withdrawal of powers. However, the dissenting opinion also points out that, as in the case of local governments, it is desirable to subject the exercise of powers in this area to judicial control and it is necessary that the law guarantees the withdrawal of powers in both a positive and negative sense.

- The autonomous development of the organisational and operational structure – within the legal framework – and autonomous decision-making in personnel/staff matters. According to the dissenting opinion, the limitation to this statutory regulation is the Constitution itself: the law may also impose restrictive provisions, provided the Constitution is taken into account and it is possible that its detailed rules are already laid down by regulations.

- Economic autonomy, right of disposal over its own assets. In this context, the dissenting opinion also draws attention to the fact that if the institute of higher education does not manage its own funds from its own revenue, autonomy is only apparent, since the expectations of the funding body may prevail.

- The right of autonomous (internal) regulation, i.e. the possibility to establish internal norms within the framework of the law.

Thus, although the dissenting opinion recognises that institutes of higher education are the custodians of the freedom of teaching and learning, it does not derive the concept of higher education autonomy from it, but from the general content of self-governance. He also stresses that, on the one hand, state control can and should prevail alongside autonomy, since, just as with local governments, institutes of higher education cannot exist as a state within the state, and on the other hand, the possibility of laying down detailed rules through regulations in areas such as awarding qualifications and diplomas is not excluded.

A common element, however, is the possibility of norm-setting, which still has a significant impact today.

In summary, the 2005 decision linked autonomy to the freedom of teaching and learning in general, while the dissenting opinion linked it to the level and depth of the legal regulation, again stressing that the freedom of teaching and learning can be achieved if the law mainly provides guarantees, while the precise delimitation of powers may allow for different levels of regulation as compared to the law.

¹⁶ Thus, the panel did not consider as unconstitutional the control of the academic and educational activities of institutes of higher education on the basis of economic and organisational rationalisation criteria, the imposition of economic requirements by the maintainer, and the provision of budgetary means and allowances conditional on performance. Furthermore, the allocation of budgetary support exceeding the funds necessary for the operation of the institution and for the performance of its scientific, research and educational tasks according to performance criteria – precisely defined in advance and in accordance with academic criteria – was not considered unconstitutional either.

The clear implication of the norm control decision is thus the intertwining with the freedom of teaching and learning and the direct consequence that autonomy means the prohibition of state interference. The only “lost” area was that the institutions no longer had the right to appeal directly to the Constitutional Court.

2.3. Act CXXXIX of 2005 on Higher Education

The law promulgated in 2005 and the reasoning provided to it were drafted on the basis of the Constitutional Court’s above-mentioned opinion and transferred decision-making powers from the governing body to the Senate, emphasising the possibility of norm-setting and the possibility of deciding on academic, cultural and economic matters.

In several respects (establishment, operation, statutory detailed rules), the reasoning repeated the elements of the Constitutional Court decision and also referred to its interpretation of autonomy, conferring on the Hungarian Accreditation Committee and the Higher Education and Scientific Council independent legal personality, in connection with which the reasoning also refers to European Community practice.

Later, in the course of the amendment of the Act, Constitutional Court decision no. 39/2006 (IX. 27.) AB was adopted within the framework of prior norm control, which declared certain decision-making powers related to the Economic Council and the Rector unconstitutional, regardless of their connection with the freedom of teaching and learning. Already at that time, the Constitutional Court judge László Kiss had drawn attention to an extremely important aspect: the decision distinguished between state and non-state institutes of higher education in relation to the rights of the maintainer, while Miklós Kocsis assessed this as a decision that made the institution independent of the founder and, through the rights of the maintainer, independent of the state (Kocsis, 2010, 78).

Constitutional Court decision no. 62/2009. (VI. 16.) AB was also adopted in relation to the rights of the Economic Council and summarised the decisions taken so far concerning autonomy. According to the panel’s interpretation, three – already well known – elements of autonomy were distinguished:

- the autonomy of academia as a right to make decisions on academic matters,
- organisational autonomy as the organisational and operational autonomy of the higher education institution,
- financial management autonomy as the free use of funds.

The 2009 decision focused on independence from the Government and the state administration, and, according to the decision, autonomy is primarily derived from Articles 70/F and 70/G of the Constitution, and from which specific fundamental rights such as freedom of teaching, which also extends to the regulation of admissions, can be derived. At the same time, it also acknowledged that the Government also has duties and powers in relation to education policy, pursuant to Article 35(1)(f) of the Constitution. On the basis of a comparison of the two provisions, the decision concluded that the autonomy of institutes of higher education does not preclude the Government from imposing constraints, but the regulation must be based on objective criteria that exclude arbitrary interference by the Government and/or the state administration, and the basis for the regulation must be defined at the level of the law, in relation to which the Government may adopt implementing rules.

These starting points were used for the assessment of the Economic Council as well.¹⁷ The decision also stated that the economic autonomy of institutes of higher education is not an end in itself, but a guarantee of academic freedom. Thus, the level of protection depends mainly on the relationship between the academic and business activities. If the economic activity is only tangentially related to academic freedom and the freedom of teaching, this protection is also lower. In the latter cases, too, it is a requirement – stemming from Article 70/G of the Constitution – that the actual decision is made by a body with higher education autonomy, but the legislator has greater freedom in determining the limits of the decision.

2.4. The Higher Education Act and the model change (2011 to date)

Act CCIV of 2011 on National Higher Education (hereinafter: the Higher Education Act) defines institutes of higher education as organisations established for the purpose of education, scientific research and artistic creation as their core activities, which operate as institutions funded from the central budget and have legal personality. Thus, unlike the Act adopted in 1993, which included self-governance, and also contrary to the 2005 Act,¹⁸ the legislation now only refers to legal personality and operation as a budgetary institution (Fazekas, 2008, 157). At the same time, in the field of internal norm-setting, which many studies consider to be the essence of self-governance, there is a much broader provision than before in Article 11 of the Higher Education Act, according to which any rules may be made which are not excluded by other legislation.¹⁹

In 2019 and 2020, and – following the ninth amendment to the Fundamental Law – also in 2021, there were several significant legislative changes related to higher education autonomy, the essence of which was that, in the case of state-maintained institutions, the state has established maintenance foundations with special rules for the board of trustees and provided assets to these foundations.

Under the ninth amendment to the Fundamental Law, public interest trust foundations performing public functions have been given constitutional status. The legal institution of trust foundations, which can be regarded as a predecessor, was created and regulated by Act XIII of 2019 as a *lex specialis* compared to the Civil Code. Then, Act CXLVIII of 2020 on the regulation of higher education and the amendment of certain related acts established the concept of a public interest trust foundation performing public functions as of 1 January 2021. Under the law, the public interest objectives included, among others, higher education and research. Annex 1 of Act XIII of 2019 already named 13 such institutions, with one more to join from 1 February 2021. Following the amendment of the Fundamental Law, a cardinal act establishes the rules applicable to these foundations as *lex specialis*.

The scheme also differs from private law foundations in that the board of trustees of the foundation is appointed by the state only at the time of its establishment, and the board of trustees itself subsequently has the right to appoint the trustees to fill any vacancies, so the state is effectively relinquishing its founder's rights in favour of the board of trustees. As a result of the legislation, several public universities in Hungary have changed their model, ceasing

¹⁷ Constitutional Court decision no. 62/2009. (VI. 16.) AB, ABH 2009, 553, 577–581. See also Constitutional Court decision no. 41/2005 (X. 27.) AB, ABH 2005, 459, 476.

¹⁸ Article 1(1) and Article 10(1) of Act CXXXIX of 2005 on Higher Education.

¹⁹ Article 11(1) (a) of the Higher Education Act.

to be state-maintained and becoming state-recognised universities maintained by foundations. Foundations are subject to a minimum capital requirement of HUF 600 million, which does not include assets held by the foundation in fiduciary asset management. Autonomy was introduced as a specific element in the regulation, emphasising the cooperation between the Senate and the board of trustees of the foundation, and explicitly stating that the regulation preserves higher education autonomy with regard to the content and methods of research and education.

Thus, while, in administrative terms, the classical dual nature of the governance of higher education institutions, i.e. the separation of organisational and professional governance, can be observed, the new legislation has now also linked autonomy with the concept of the freedom of teaching and learning, instead of emphasising self-governance. In the case of the University of Theatre and Film Arts, one of the first institutions to be affected by the model change, the Constitutional Court also had to take a position in connection with the impact of the change on the autonomy of higher education.

Constitutional Court decision no. 21/2021. (VI. 22.) examined the issue of the rights of founders and maintainers and the issue of autonomy at the same time. The petition submitted by the judges repeats the elements that appeared in the previous decisions concerning the 1993 and 2005 Acts. These include independence from the executive branch in matters directly related to academic activity, and the organisational and economic rules that go with it. The petitioner, however, complained about the influence of the maintainer, which, in his view, would void the right of self-government.

In general, the decision stressed the importance of the guarantee system in the context of the legal rules. This is in line with the trend towards which the Constitutional Court's rulings have been moving since 2006. Thus, while in the initial period the elements of a quasi state-within-the-state autonomy were outlined, from 2009-2010, they shifted towards the idea that autonomy is not an interest in itself, but that organisational rules must be interpreted in their context, so that several solutions can be envisaged to meet the requirements. The resolution defined the concept of maintainer control in a manner similar to the one used in public administration, which, in conjunction with the "autonomy guaranteed by the Fundamental Law", declared that maintainer control cannot include exclusive decision-making in areas where the higher education institution has autonomy. This is also in line with the concept of the Higher Education Act, which stipulates that the autonomy of higher education institutions with regard to the academic subject and content of education and research must not be infringed by the control exercised by the maintainer. The custodian of the autonomy of the higher education institution is the Senate, which still has the right to legal remedies (litigation) if the autonomy of the higher education institution granted by the Higher Education Act is infringed by the actions of the maintainer.²⁰

Nor has it changed the fact that, in the context of autonomy, the starting point was the provisions of the Fundamental Law relating to the right to education, which can thus be a benchmark for the individual rights and their holders and from which several types of institutional solutions can be derived from Article X (3) of the Fundamental Law.²¹ Thus, the principle that the framework of organisational rules must be defined by law and must ensure the research and teaching autonomy of the higher education institution remains valid. The basic requirement in this context is Article 1(1) of the Higher Education Act, which applies equally to all higher education institutions, regardless of the maintainer. In contrast, there is a substantial difference

²⁰ Article 75(1) of the Higher Education Act.

²¹ Constitutional Court decision no. 21/2021 (VI. 22.) AB, Statement of Reasons, para. [42].

between state and non-state higher education institutions in terms of financial management, since the rules of financial management of state-maintained institutions are determined by the Government and their financial management is supervised by the Government.

The decision thus went back to the initial foundations, again considering the organisational system as the central element of autonomy, which can, however, be defined by law and, in this respect, several solutions are possible, provided that an appropriate guarantee system is developed. At the same time, in full agreement with his earlier dissenting opinion, László Kiss also states that the powers exercised by the organisation, in particular the Senate, should not be examined in general, but element by element, as they may affect the autonomy of higher education in different ways. Thus, overall, in connection with the decision, which caused a feeling of loss among many, it can also be stated that the starting point of the petition determined the framework nature of the decision, since the panel was not required to make a general interpretation of the Constitution on the basis of the petition.²² At the same time, Balázs Schanda pointed out that, although the autonomy related decisions focus on the institution's autonomy in education and research, this does not mean that economic issues cannot have an impact in this direction. In the dissenting opinion, Judge Béla Pokol also expressed the view that the panel could have interpreted the concept of autonomy more broadly, providing some points of reference. In addition, the opinion argues that the reform was implemented in the right direction, because of the academic communities, academic assessment and their political context and implications: but these arguments were not reflected in the decision, and hence he could not support it as a whole.

2.5. Conclusions based on Hungarian Constitutional Court decisions

Although the control by the maintainer and the professionals has an administrative content, the Constitutional Court did not refer to it in its decision no. 21/2021 (VI. 22.), nor did it use it in its final decision. Béla Pokol's unique dissenting opinion reflects the extreme caution of the panel on this issue. Especially in light of the fact that, at the time of the decision, it was already known that more than 20 Hungarian institutions would change their model in 2021 and continue to operate as non-state institutions.

It is also noteworthy that, in relation to university autonomy, the Constitutional Court is keen to use the tool of tautology in the scientific sense to explain autonomy on the basis of autonomy itself. On this notion, it does not really break away from the starting point that the origin of autonomy in higher education is freedom of teaching and learning, which – as Gábor Hamza agrees – is the correlation between the right to freedom of expression and the right to education. It looks at organisational and financial management issues exclusively through the same lens, although it has already pointed out that autonomy is an organisational issue to be examined separately.

Although there is an increasingly rich literature on autonomy in the international literature, the Constitutional Court has made little use of it. However, it is precisely the Constitutional Court decisions that have mapped out the European practice on a number of issues (fair trial principle, objective sanctions and many others), which is also known and exists in the context of autonomy. The new decision did not set any substantive cornerstones and also avoided the

²² At the same time, it should be noted that the petition and the reasoning of the decision did not (and could not have) dealt with the interpretation of the Fundamental Law, but instead only established that the specific provision was contrary to the Fundamental Law.

elements of control by the maintainer. Particularly important at this point is the distinction, to which Gábor Hamza also draws attention, that while autonomy is linked to the institution, the freedom of teaching and learning is a criterion of constitutional right.

3. International standards

3.1. The Magna Charta Universitatum and autonomy

Although the history of autonomy in higher education has been dealt with by Miklós Kocsis on several occasions, international concepts of autonomy hardly ever appear in the Hungarian literature and, when they do, they are closely linked to the concept of freedom of teaching and learning, as in the case of Constitutional Court decisions.²³

Perhaps the most important element, which is inescapably reflected in both Constitutional Court decisions and professional articles, is the outline of the Magna Charta, which contains the following principles:

- “The university is an autonomous institution which produces, examines, appraises and hands down culture by research and teaching. To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power.

- The unity of teaching and research; Teaching and research in universities must be inseparable if their tuition is not to lag behind changing needs, the demands of society, and advances in scientific knowledge.

- Freedom in research and training is the fundamental principle of university life, and governments and universities, each as far as in them lies, must ensure respect for this fundamental requirement.

- “A university is the trustee of the European humanist tradition; its constant care is to attain universal knowledge; to fulfil its vocation it transcends geographical and political frontiers, and affirms the vital need for different cultures to know and influence each other.” (Magna Charta Universitatum, 1988)

The Magna Charta, signed in 1988, also briefly sets out the means to achieve the principles, while stressing that different social and cultural contexts may have different concrete solutions, which may change over time, and that the concept of autonomy is not a permanent one. However, the Magna Charta did not define the universal nature of autonomy, because although the text contains the term autonomy, as mentioned above, and the principles are closely related to it, they are not a definition of autonomy and mainly discuss cultural and ideological issues among the principles, and the economic elements mainly appear among the means.

Going further, Miklós Kocsis states that the Magna Charta considers intellectual independence to be more important than economic independence (Kocsis, 2010, 55), which, in my opinion, cannot be read from the document in this form, since the means of implementing the principles (selection of students and teachers, mobility, scholarships) are rather economic in nature. Rather, the Charta is not explicitly designed to define autonomy, but to set out certain operational ideals for universities. In this respect, the international literature is also more cautious in its assessment of the Magna Charta’s nature. The European Higher Education Area argues that the

²³ The same can be found in Gergely G. Karácsony’s article; he also takes the Humboldtian idea as the basis of interpretation, since the two concepts are indeed closely intertwined in Hungarian literature (G. Karácsony, 2022).

document aims to define the self-definition of universities and to set out so-called governance principles, including the freedom of teaching and learning and autonomy (European Higher Education Area, 1988), and the same is specified in other publications as well (Adendorff, 2012). On this basis, it can be said that, although university autonomy is a value that belongs to universities, the Magna Charta does not define its exact concept, but only gives some points of reference.

3.2. Elements of autonomy in the present era

There have been a number of international studies and comparisons on the issue of autonomy in higher education, ranging from various summary works by the OECD to a major study by Thomas Estermann, head of the European University Association (hereinafter EUA). Within the framework of this publication, it is not possible to present the international development and standards of university autonomy in depth, so I will focus primarily on their defining elements and, according to the research, on the situation of Hungarian institutions.

International research on autonomy in higher education, similarly to Gábor Hamza's summary paper, states that autonomy is a concept that is changing in time and space, and is strongly influenced by the modernisation processes affecting universities, while at the same time autonomy reform has repercussions on university modernisation as well (Estermann, 2015). At the same time, the concept of autonomy can be found in international academia, in public policy, in legal and fundamental rights related documents, and highlighting that increasing university autonomy is an important step towards modernisation. It is also important to note that there is a rich literature on university autonomy in the international literature, which has resulted in several definitions of the concept. Each of these models seeks to strike a balance between the appropriate degree of autonomy and its enhancement, and the accountability, social and socio-cultural embeddedness of the institution. The studies also stress that there is no single, ideal model for all countries in this field either, but that there are good practices and guiding principles that should be known and taken into account in the national system concerned. One such principle is the Salamanca Declaration of 2001, which linked the principles of autonomy and accountability and called for greater management freedom and adequate funding for universities to increase competitiveness, while deeming over-regulation harmful.

In 2007, the Lisbon Declaration was adopted within the framework of the EUA, which distinguished between four areas of autonomy, as outlined in the studies: organisational autonomy, financial autonomy, staffing autonomy and academic autonomy. The 'Autonomy Scorecard project', launched by the EUA, then looked at the 28 higher education structures of 26 EU countries, and compared them to the structures of 3 different federal states, due to Germany's federal structure. Data collection first started in 2007 (Estermann & Nokkala, 2009) and continued between 2009 and 2011 based on questionnaire surveys, processing the responses from these 26 countries, including Hungary. The questionnaires were sent to the rectors' conferences of the countries concerned and were evaluated for the first time in 2011, based on the methodology and weighting system developed in 2010, and the new results were published in 2017 again (Estermann et al., 2017). The scoring was based on the following main criteria:

- organisational autonomy (a)
- budget setting, economic autonomy (b)
- staffing autonomy (c)
- freedom of teaching and learning (d).

ad a) With regard to organisational autonomy, it is important to emphasise that it is based

on common European rules, but, due to its framework character, national legislation is granted a great deal of freedom, as the specific cultural, social and legal context must be taken into account, adapting to changes over time. Seven main aspects were identified in this respect, three of which concerned institutional management/leadership. Thus, the selection procedure, the range of criteria that can be taken into account in the selection process and the removal of the head of the institution from office are important issues, but so is the extent to which external actors can participate in the governing body of the institution, the extent to which the institution is free to determine its own structure and whether it can establish legal entities. The seven criteria are to be assessed according to additional sub-criteria, for example, the latter according to the type of legal entity, i.e. whether only a non-profit or any legal entity can be established, and whether there are any restrictions on it.²⁴

Among the main trends, two main solutions can be identified in terms of leadership: in Southern and Eastern European countries, the head of the institution is chosen by the institution from among the members of the academic community on a *primus inter pares* basis, while in Western models there is a managerial type of leadership. Moreover, a mix of the two elements can be observed, where the institution is under dual management (Estermann et al., 2011, 23). In addition, there are significant differences in that some systems link the position of rector to an academic degree or promotion level, while others consider managerial leadership to be more relevant, and whether or not the level of the requirement is fixed by law. Although most countries have maximised the length of the rector's term of office, there are also significant differences in the length of the rector's term of office and in the number and composition of the governing body. For example, while the vast majority of Western universities require the participation of external persons, in Italian, British and Estonian universities this is only an option, while in some Eastern European universities, such as in Poland and Latvia, it is excluded. It is noteworthy and illustrative of the structural differences that the three Baltic countries, for example, have three different solutions in this respect, and even with regard to the participation of external members, several subtypes can be distinguished, which also shows that the issue requires a more in-depth analysis in relation to the reasons and socio-historical differences. (Estermann et al., 2011, 25–27)

ad b) In the context of economic autonomy, the issue of public funding is paramount, but an important aspect is the autonomy of financial management and the disposal over residual funds, whether the institution can retain them or have the possibility to borrow, whether it has the right to dispose of property, possibly ownership rights, and whether it is free to set tuition fees for EU and non-EU students at different levels, such as in bachelor's, master's and doctoral degree programmes.²⁵

Setting the budget of the institution may be subject to specific constraints. In general, the countries of Eastern Europe are characterised by strong constraints on the use of funds, mainly in terms of the use of individual grants between the different areas. In the latter case, there is neither free redistribution nor free use of revenues. However, a certain degree of constraint can be observed in all institutions; for instance, in almost all cases, the university's real estate assets are considered to be marketable only to a limited extent, while in other cases they may be completely unmarketable, and expenditure above a certain amount may be subject to authorisation, and the amount of tuition fees that can be charged to students may also be subject to constraints.

²⁴ <https://www.university-autonomy.eu/dimensions/organisational/>

²⁵ <https://www.university-autonomy.eu/dimensions/financial/>

Generally speaking, universities in Eastern Europe are more financially constrained and, on top of that, the procedures for spending money are strictly regulated, making the system, which is also bound by substantive law regulations, quite bureaucratic. At the same time, these latter institutions can also count on state subsidies based on government decisions.

ad c) With regard to staff, it is mainly the institution's autonomy that is important in the selection of the leaders for both the teaching and the administrative staff, as well as autonomous decisions on salaries and wages, and personnel decisions, such as termination of employment, continued employment or promotions.²⁶ In terms of staffing, the main constraints may be the public service schemes and the constraints imposed there.

ad d) The last segment is the academic dimension of autonomy, the yardstick of which is primarily not the freedom of teaching and learning, but administrative restrictions, such as the number of students to be admitted or the process of accreditation of new degree programmes. The freedom of teaching and learning include the freedom to decide on capacity numbers, to decide on admission-related options, to start or stop new bachelor's, master's or doctoral degree programmes, to define language requirements and the content of the degree programmes, to define the training and output framework, and to assure quality.²⁷

Within these, there are also additional sets of specific requirements. Thus, the definition of decisions on admission numbers is already tangentially included in the Magna Charta, and other documents consider it an important element of autonomy as well. In this respect, full autonomy is achieved when the institution has a general autonomous decision-making power. A worse situation is when the institution can decide independently on the capacity number of students on fee-paying courses, but the number of students on state-funded courses can be determined by the state. It is a similar situation, when the issue can be settled through negotiations between the institution and external actors, while the least autonomous scenario is when an external governing body takes the individual decisions. In this context, the possibility of an overcapacity procedure should specifically be assessed. However, it is noteworthy that there is a wide variation in the different aspects across the countries examined. There are even significant differences between countries in the extent to which the mandatory elements of the training and output requirements are seen as actual constraints by different institutions. (Estermann et al., 2011, 44–52)

The complexity of the evaluation process is indicated by the fact that the result is expressed as a percentage, with both a nominal and a weighted value being disclosed. In the 2011 survey, Hungarian universities were ranked 17th out of 28, tied with France. Great Britain came first with a score of 100%, while the Hungarian score was 59% and Luxembourg came last with 31% (Estermann et al., 2011, 53). As the survey considered scores between 60% and 40% as medium-low and countries above 60% as medium-high, it can be concluded that Hungary scored in the middle of the European average. This situation has not changed significantly in the 2017 evaluation, with the creation of the post of chancellor in 2014, the creation of rules on the accreditation of courses and the setting of the amount of tuition fees as new elements among the changes highlighted.²⁸ In terms of the aggregate result, the nominal result has thus changed to 60% and the weighted result to 56%. In terms of rankings, Hungarian universities scored best in terms of the freedom of teaching and learning and worst in terms of financial autonomy. The

²⁶ <https://www.university-autonomy.eu/dimensions/staffing/>

²⁷ <https://www.university-autonomy.eu/dimensions/academic/>

²⁸ <https://www.university-autonomy.eu/countries/hungary/>

lack of access to loans, the lack of ability to retain savings and the problems relating to ownership rights of buildings were major shortcomings, as were gaps in the way that tuition fees payable by national and EU students were determined.

As regards the criteria, it is easy to imagine that a new study would produce a different result, as several criteria have changed significantly, such as the definition of training and output requirements²⁹ or the right to dispose of assets due to the change of model. However, the above list clearly shows that autonomy in higher education is not only an ideal based on the freedom of teaching and learning, but is now a concrete set of criteria, the understanding of which could yield important results, as the importance of autonomy is stressed by international governmental and academic organisations and supported by empirical research. Autonomy is undoubtedly closely linked to the quality of research in terms of economic autonomy, which therefore has a direct impact on the ranking of universities (Estermann, 2015). The EUA Trend study also showed a direct correlation between the development potential of the university and its ability to generate income, and also highlighted that all these factors can also have a reverse impact on autonomy, which is seen by both government actors and universities themselves as one of the most important elements for development.

4. Summary

It may be stated that a common feature of previous Constitutional Court decisions is that they examine autonomy only in its historical and domestic context and do not deal with its international developments. This is interesting because, on the one hand, there is a strong international literature on the autonomy of higher education and, on the other hand, the Constitutional Court often refers to international standards in relation to other types of principles (such as the principle of fair trial in the law of misdemeanours or the administration of justice). However, this has hardly happened in the context of higher education autonomy.

Another characteristic feature is that the Constitutional Court basically interprets the question of higher education autonomy from the content of the freedom of teaching and learning. The definition of autonomy in higher education has therefore become a question of terminology rather than that of content. At the same time, the Constitutional Court has become increasingly reticent on the content elements, and the 2021 decision did not even undertake to assess the model change. It is true that the motion itself would have only given a theoretical opportunity to express the position, but the decision as a whole was not intended to interpret it. The current practice in Hungary can therefore be summarised as one giving the legislator a fairly wide room to manoeuvre within the legal framework, provided that it provides the institution with appropriate guarantees. With regard to the latter, however, there is no more concrete guidance in the latest case law of the Constitutional Court, developed in 2021. All that can be concluded is that, in the opinion of the panel, the current legislation allows for several possible solutions that are in line with the Fundamental Law.

In the international literature, a set of criteria is used, based on a number of aspects, which are well defined and detailed, with weighted scoring. This scoring system is also open for revision.

So while the Hungarian Constitutional Court, in its collective decisions, abandoned its definition of autonomy as being linked to the freedom of teaching and learning for the first time

²⁹ See the Higher Education Act Chapter 7/A.

in 2021, at the international level, although the link between autonomy and the freedom of teaching and learning is also undeniable, it is not the only factor. In the Hungarian literature, it is mainly at the level of dissenting opinions that elements have appeared that have attempted to distinguish the two concepts, and it is a particularly interesting interaction that while in the Hungarian literature the decline of autonomy has been continuously examined (Nagy, 2017) since the 2005 law, this is not easily justified on the basis of the set of criteria and requires more thorough investigation, since the freedom of teaching and learning, considered as the starting point in Hungary, is only one of the four main components. Unjustifiably little attention is paid, however, to institutional norm-setting, which has been appearing as a constant element among the different elements of autonomy, such as the possibility of establishing organisational rules and defining internal operations, and which also deserves further study.

On this basis, the impact of the model change on university autonomy cannot be easily verified, since this article could not undertake a detailed analysis of the aspects – this is being done by the EUA with the involvement of several institutions – but it is certain that the economic-financial autonomy from the state, which was rated the worst so far, has certainly improved at first sight. However, it remains to be seen how much the situation in Hungarian higher education has actually changed.

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