Decision 39/2006 (IX. 27.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition submitted by the President of the Republic seeking prior constitutional review of a provision of an Act passed by the Parliament but not yet promulgated, the Constitutional Court has – with dissenting opinion by dr. László Kiss, Judge of the Constitutional Court – adopted the following

decision:

The Constitutional Court holds that Section 2 para. (1) of the Act adopted at the session of the Parliament on 24 July 2006 on the amendment of Act CXXXIX of 2005 on Higher Education is unconstitutional in respect of the part determining Section 25 para. (1) item *a)* of Act CXXXIX of 2005 on Higher Education.

The Constitutional Court publishes this Decision in the Official Gazette.

Reasoning

I

At its session of 24 July 2006, the Parliament adopted an Act (hereinafter: the AHE Amendment) on the amendment of Act CXXXIX of 2005 on Higher Education (hereinafter: the AHE). On 28 July 2006, the Speaker of the Parliament forwarded the Act for promulgation with a request of urgency. The President of the Republic, exercising his right granted under Article 26 para. (4) of the Constitution, submitted a petition to the Constitutional Court on 2 August 2006, within the required deadline, claiming the unconstitutionality of Section 2 para. (1) of the Act in respect of the part determining Section 25 para. (1) *a)* of the AHE. With reference to Section 1 item *a)*, Section 21 para. (1) item *b)* and Section 35 of Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), the President of the Republic initiated prior constitutional review by the Constitutional Court of the challenged provision of the Act not promulgated.

The petition of the President of the Republic is supported by the following:

The President of the Republic considers that Section 2 para. (1) of the AHE Amendment impairs – in respect of the part determining Section 25 para. (1) item *a)* of the AHE – Articles 70/F and 70/G of the Constitution, as the relevant provision "allows a body not considered to be an organ of self-government in higher education to block the passing of decisions safeguarded by the autonomy of higher education institutions".

As pointed by the President of the Republic in his petition, under Section 29 para. (6) of the AHE, the rector is responsible for preparing certain acts falling into the scope of activity of the senate. Furthermore, the rector's right to make initiatives is also made clear in Section 2 para. (1) of the AHE Amendment affected by the petition. The latter provision, however, "offers an opportunity for the financial board to pass substantial decisions – by requiring the consent of the financial board for the submission of proposals by the rector to the senate. (...) This means that the financial board may block the adoption of the decisions specified in Section 25 para. (1) item *a)* to be introduced in the AHE, as without its consent" the relevant issues may not be put on the agenda of the senate, and the senate may not adopt any resolution in that scope.

As explained by the President of the Republic, the financial board may not be regarded as an autonomous representative body of the higher education institution. This conclusion follows from the fact that in the financial board, the members delegated by the Minister of Education and Culture have the right to vote. In addition, only one member of the financial board is required to possess a higher education degree corresponding to the educational, scientific, research or artistic activity of the higher education institution concerned.

Having regard to earlier decisions of the Constitutional Court, the President of the Republic argues that "the resolutions covered by the financial board's right of consent are fundamental decisions affecting the scientific, educational and research activities safeguarded by the autonomy of the higher education institution". However, based on the practice of the Constitutional Court, "the adoption of decisions related to the scientific, educational and research activities safeguarded by the autonomy of the higher education institution may not fall into the scope of competence of a body which is alien to the higher education institution and which is not a body of self-government". Accordingly, any provision to the contrary shall

be considered a violation of the autonomous operation of higher education institutions as guaranteed under Article 70/G of the Constitution.

II

1. When examining the petition, the Constitutional Court drew on the following provisions of the Constitution:

“Article 70/F (1) The Republic of Hungary guarantees the right of education to its citizens.

(2) The Republic of Hungary shall implement this right through the dissemination and general access to culture, free compulsory primary schooling, through secondary and higher education available to all persons on the basis of their abilities, and furthermore through financial support for students.”

“Article 70/G (1) The Republic of Hungary shall respect and support the freedom of scientific and artistic expression, as well as the freedom to learn and to teach.

(2) Only scientists are entitled to decide in questions of scientific truth and to determine the scientific value of research.”

2. The relevant provision of the AHE is as follows:

“Section 29 para. (6) The rector shall be responsible for securing the conditions necessary for the working of the bodies operating in the higher education institution, for the preparation of affairs falling into the senate’s scope of competence, and for the implementation of the decisions passed.”

3. The provision of the AHE Amendment challenged in the petition of the President of the Republic is as follows:

“Section 2 para. (1) Section 25 para. (1) of the AHE shall be replaced by the following provision:
(1) The financial board

a) shall cooperate in the preparation of the senate's decisions, and therefore its prior consent is required for the rector to submit to the senate the following:
aa) the plan of the higher education institution for institutional development,
ab) the accounting regulations of the higher education institution,
ac) the launching of development projects,
ad) the establishment of a company, acquisition of share in a company, and cooperation with a company,
ae) utilisation or alienation of real property placed at the disposal of, or owned by, the higher education institution,
af) advance of loan as defined herein,
ag) conclusion of a cooperation agreement,
ah) establishment, transformation, and dissolution of the organisation or organisational unit of the higher education institution;
ai) the budget and the annual report of the higher education institution in compliance with the rules on accounting;«"

III

1. The Constitutional Court has been engaged in interpreting the autonomy of higher education institutions in several decisions. In the practice of the Constitutional Court, the operation and the autonomy of higher education institutions have been considered a rule related to Articles 70/F and 70/G of the Constitution.

As established by the Constitutional Court in respect of the constitutional right to culture (education), "According to Article 70/F of the Constitution, the citizens' right to culture is deemed to be realised in higher education when it is accessible by anyone who possesses the necessary skills and when the students receive financial support. (...) The State has a constitutional duty related to higher education to ensure the objective, personal and material preconditions of the right to learn, and to develop them in order to ensure the enforceability of this right for all citizens who wish to exercise it and who have the abilities necessary for participation in higher education." (Decision 1310/D/1990 AB, ABH 1995, 579, 586) As further pointed out by the Constitutional Court based on Article 70/F of the Constitution, "the State's duties are diverse in respect of activities of regulation, organisation, and provision concerning the creation of the conditions of operation of both state and non-state higher

education institutions." [Decision 35/1995 (VI. 2.) AB, ABH 1995, 163, 166] In another Decision, the Constitutional Court underlined that "the exercise of the right to pursue studies in higher education, as part of the right to education, (…) can only be ensured if the State creates the conditions of pursuing studies in higher education." [Decision 51/2004 (XII. 8.) AB, ABH 2004, 679, 686]

When interpreting Article 70/G of the Constitution, the Constitutional Court established the following:
"By declaring respect for and support of the freedom of scientific life, and by stating that only science itself can be competent to take a stand on questions of scientific truth, Article 70/G of the Constitution does not merely declare a fundamental constitutional value under the rule of law, but it turns the freedom of scientific creation and of obtaining scientific knowledge – research itself – together with the freedom of teaching it into a subjective right, as an aspect of the so-called communicational fundamental rights. The freedom of scientific life includes the freedom of scientific research and the freedom of disseminating scientific truth and knowledge related in a broader sense to the freedom of expression and, at the same time, it contains the State's obligation of respecting and securing the total independence of scientific life, as well as the cleanness, evenness and impartiality of science. Although in theory the right to the freedom of scientific life is enjoyed by anyone, in fact only scientists are subject to this freedom. Similarly, due to the autonomy of science, only scientists are competent to decide on the definition of scientific quality." [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 182]

Thus, the rights related to the freedom of scientific life pertain especially to the scope of persons embodying the autonomy of higher education. This has been reinforced in one of the subsequent decisions of the Constitutional Court stating that "higher education institutions ensure the freedom of education, scientific research, creative artistic activity, and learning for teachers, researchers and students. (...) The holder of autonomy is the institution, i.e. the university", possessing the rights of self-government, "and it is this institution that must guarantee the freedom of learning and ensure the enforcement of the freedom of scientific research as well." (Decision 861/B/1996 AB, ABH 1998, 650, 654)

In addition, as established by the Constitutional Court "autonomy and independence are not limited to scientific, educational and research activities in the strict sense. In order to ensure

the autonomy of science, the higher education institution has independence in forming its organisation, operation and financial management. (...) Higher education institutions, similar to all institutions with autonomy, i.e. self-government, must have an elected representative organ of self-government. It is the right of those concerned to set up the autonomous representative organs, and the rights of self-government vested with the higher education institution can be exercised by such organs. The holder and subject of the autonomy of higher education is the higher education institution, i.e. the community of teachers, researchers and students. Therefore, the participation of teachers, researchers and students in the autonomous representative organs and in the exercise of the rights of self-government resulting from autonomy is to be ensured. In addition to teachers, researchers and students, other experts or the representative of the founding and maintaining organisation may be involved in such activities, provided that the autonomy of the higher education institution is retained." [Decision 41/2005 (X. 27.) AB, ABH 2005, 459, 474-475]

2. In his petition, the President of the Republic initiates prior constitutional examination of Section 2 para. (1) of the AHE Amendment in respect of the part introducing a new provision to replace Section 25 para. (1) item *a)* of the AHE.

2.1. Under Section 2 para. (1) of the AHE Amendment challenged in the petition by the President of the Republic, the rector is entitled to make initiatives. In accordance with the relevant provisions, the rector submits proposals to the senate on the following: adoption of the institutional development plan and the rules on accounting of the higher education institution, launching of development projects, establishment of a company, acquisition of share in a company, utilisation or alienation of real property, advance of loan, conclusion of a cooperation agreement, adoption of decisions in organisational matters, and adoption of the budget and the annual report of the higher education institution in compliance with the rules on accounting. Having regard to the above list, Section 2 para. (1) of the AHE Amendment undoubtedly vests with the rector a right to initiate decisions fundamentally determining the operation of the higher education institution, and thus being safeguarded by the autonomy of higher education. This way, the senate can only decide on the above issues, falling into the scope of autonomy of the higher education institution, upon the rector's initiative.

2.2. Under Section 20 para. (1) of the AHE, the senate is in charge of making strategic decisions related to the higher education institution and to monitor the implementation

thereof. As regulated in Section 27 para. (2) of the AHE, the member of the senate – with the exception of the delegates of the student union and of the representative trade unions – shall only be a person holding a teacher's, researcher's or other job in the higher education institution, under a labour contract or as public employee. Under Section 28 para. (1) of the AHE, the statutes of the higher education institution shall set forth the stipulations concerning the establishment and the operation of the senate, and the termination of the mandate of its members. However, under Section 28 para. (1) item *a)*, the senate may – according to the maximum number of admissible students – not have less than seven or nine members, and the members delegated by teachers and researchers together with the chair, i.e. the rector, shall form a majority in the senate. Section 78 para. (4) of the AHE provides that the student union shall be entitled to delegate members to the senate in a number equalling at least one quarter and maximum one third of the senate members. Under Section 28 para. (1) item *c)* of the AHE, the number of members employed in other positions, and that of the representatives of representative trade unions may not be fewer than five percent – each – of the number of members of the senate, but it shall be at least one person for each.

Under Section 20 para. (3) of the AHE, the rector is the head of the higher education institution. In accordance with Article 30/A para. (1) item *i)* of the Constitution, the President of the Republic shall appoint and dismiss the rectors of the universities. The rector is appointed on the basis of a call for applications and the procedure is finished – according to Section 96 para. (7) of the AHE – by the senate electing the candidate rector with a majority vote. Then under Section 96 para. (11) of the AHE, the provisions laid down in Section 89 of the AHE shall be applicable to the appointment and the dismissal of college and university rectors, i.e. the proposal on the appointment shall be sent to the maintainer of the higher education institution in order to have it forwarded to the competent person authorised to perform the appointment. Under Section 29 para. (7) of the AHE, the eligibility for the rector's position requires – among others – having or establishing full-time employment or a public employee status with the higher education institution. The rector of a university shall be required to hold a position as university professor, whilst the rector of a college shall be employed as university or college professor, associate professor, scientific advisor or research professor, or senior research fellow. As provided for in Section 115 of the AHE, the maintainer shall exercise the employer's rights with regard to the rector, and, in the case of a State higher education institution, the maintainer shall – on the financial board's proposal –

determine the rector's emoluments, and approve the rector's job description; the maintainer may transfer to the financial board further employer's rights regarding the rector.

According to the regulations on the composition and the establishment of the senate, as well as on appointing the rector, the senate and the rector obtain their mandates on the basis of the will of the higher education institution, i.e. the community of lecturers, researchers, and students, and the senate consists of persons bearing the autonomy of higher education. As a result, both the rector and the senate are considered to be autonomous representative – i.e. self-governing – organs of the higher education institution.

2.3. The President of the Republic challenges in his petition Section 2 para. (1) of the AHE Amendment as this provision extends the right of consent of the financial board – a body not considered to be an organ of self-government in higher education – to the initiation of decisions within the scope of autonomy of higher education and – indirectly – to decision-making based on such initiatives.

2.3.1. Under 20 para. (2) of the AHE, the financial board is in charge of presenting opinions, participating in preparing strategic decisions related to the higher education institution and in monitoring the implementation thereof; under Section 23 para. (2) of the AHE, the establishment of a financial board is compulsory in all State higher education institutions.

Section 23 paras (3) to (5) of the AHE deal with the composition of the financial board. Accordingly, the financial board shall comprise seven or nine members, in line with the maximum number of admissible students. The senate shall delegate three or four members to the financial board, partly on the proposal of the student union, and the Minister of Education shall delegate two or three more members. In addition, the rector, the financial director-general or – in the absence of the latter person – the financial director is also member of the financial board.

Thus, according to Section 23 paras (3) to (5) of the AHE, the members delegated by the senate, together with the rector, have a majority in the financial board. Still the financial board may not be considered an autonomous representative body of the higher education institution as in the financial board the members delegated by the Minister of Education and Culture have the right to vote. Therefore, the financial board may not exercise the self-government

rights that fall into the autonomy of the higher education institution. Consequently, the financial board may not block decision-making by the organs of self-government or the exercising of the rights of self-government.

2.3.2. However, the provision challenged by the President of the Republic allows the financial board to make substantial decisions related to the higher education autonomy. The right of prior consent vested with the financial board – under Section 2 para. (1) of the AHE – makes it impossible for the rector – as the single head of the university elected by the senate and appointed by the President of the Republic – to exercise his right to make initiatives, and, indirectly, the senate's right to make decisions, as no proposal can be submitted to the senate without the rector initiating it.

Only with the consent of the financial board may the rector submit to the senate any proposal falling into the scope of autonomous decisions under Section 2 para. (1) of the AHE Amendment. The rector enjoys an exclusive right of putting forward such initiatives as according to the AHE, no other body or person may make such proposals in the scope laid down in Section 2 para. (1) of the AHE Amendment.

Nevertheless, the right of consent by the financial board – as a body not considered to be an autonomous representative organ of the higher education institution – may block the exercising of the rector's exclusive right to make initiatives, although the rector is an "organ" of self-government in higher education. On the basis of the right of consent, the financial board may hinder any of the rector's initiatives purely on the basis of economy, thus preventing the enforcement of scientific quality. This way, the financial board can fundamentally determine, and subordinate to the interests established by itself, the rector's initiative and – indirectly – decision-making by the senate, which forms the scientific, educational and research activities, i.e. the basic operation of the higher education institution. Thus, by obstructing the rector's initiative, the financial board may – indirectly – block the senate's decision-making as well.

Consequently, the financial board's right of prior consent in respect of the rector's initiative for decision-making by the senate is suitable for hindering the operation of self-government organs and autonomous decision-making in higher education. Preventing the free exercise of self-government rights under the autonomy of higher education may result in restricting or

terminating the higher education institution's independence and liberty, and it may impair the autonomy of higher education. The regulation violating the autonomy of higher education is deemed to violate Articles 70/F and 70/G of the Constitution.

Having regard to the above, the Constitutional Court – acting in accordance with Section 35 paras (1) and (2) of the ACC – has established the unconstitutionality of Section 2 para. (1) of the AHE Amendment in respect of the part establishing Section 25 para. (1) *a)* of the AHE.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette (*Magyar Közlöny*) in view of the establishment of unconstitutionality.

Budapest, 25 September 2006.

Dr. Mihály Bihari
President of the Constitutional Court
Judge of the Constitutional Court, Rapporteur

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
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Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Péter Paczolay
Judge of the Constitutional Court

Dissenting opinion by Dr. László Kiss, Judge of the Constitutional Court

I disagree with the Decision adopted by majority.

1. As detailed in my dissenting opinion attached to Decision 41/2005 (X. 27.) AB (ABH 2005. 459, 488-503), I agreed with establishing the unconstitutionality of the provision repealed by Section 25 para. (1) of the AHE. I argued as follows: "This provision – interpreted together with Section 5 para. (3) of the new AHE – deprives higher education institutions of the possibility of autonomous operation (and of the free practice of science) by not ensuring in the challenged provisions even the institutions' right to present their opinions in (a) case(s) where the provisions contained in Article 70/G of the Constitution would only be complied with through guaranteeing the institutions' right to make decisions. It is not the existence of the governing body but the manner of regulating its competences that is unconstitutional. (The governing body has been empowered to make decisions on matters belonging to the essential content of institutional autonomy.)"

Relying on the same theoretical basis, I hold that not all of the provisions – of inhomogeneous subjects and contents – replacing Section 25 para. (1) of the new AHE are unconstitutional. However, the majority Decision declared the uniform unconstitutionality of all the scopes of competence under Section 25 para. (1) item *a)* of the AHE. As stressed in the petition itself, the financial board's right of consent pertains to the "proposals listed in an itemised manner", submitted by the rector to the senate. The petitioner picks up some of them ("launching of development projects" or "conclusion of a cooperation agreement"), and generalises their unconstitutionality concerning all the components of the whole paragraph: "with respect to the CCDec, the resolutions covered by the financial board's right of consent are fundamental decisions affecting the scientific, educational and research activities safeguarded by the autonomy of the higher education institution. The CCDec. illustrated the above by, namely, using the examples of adopting the development plan of the institution, establishing its the organisational structure, adopting its the budget, and approving the report on its implementation.

Under the provision challenged in the present petition, all the above questions fall under the financial board's right of consent, but it is beyond doubt that all the decisions mentioned in Section 25 para. (1) item *a)* of the AHE – including the launching of development projects or the conclusion of cooperation agreements – are of the same importance, and thus they fall into the scope of autonomy."

The majority Decision shares the above view expressed in the petition. In my opinion, however, there is no constitutional ground to directly connect all the scopes of competence listed in Section 25 para. (1) item *a)* of the AHE to the autonomy of the higher education institution (and to the freedom of scientific activity).

With regard to the above, I hold it necessary to form three groups. The first one includes the competences in respect of which the right of consent vested with the financial board really results in an unconstitutional situation. These competences are the following:

aa) the plan of the higher education institution for institutional development;

ae) utilisation or alienation of real property owned by the higher education institution;

ah) establishment, transformation, and dissolution of the organisation or organisational unit of the higher education institution.

The second group contains the competences where – in my opinion – the granting of the right of consent does not cause unconstitutionality (as they are not organic elements of the autonomy of the higher education institution.) These competences are the following:

(ab) the accounting regulations of the higher education institution;

(ad) the establishment of a company, acquisition of share in a company, and cooperation with a company;

(ad) advance of loan as defined herein (in the AHE);

(ae) utilisation or alienation of real property placed at the disposal of the higher education institution;

(ai) the budget and the annual report of the higher education institution in compliance with the rules on accounting.

The third group includes the competences detailed in Section 25 para. (1) item *a)*, and they can be regarded as either constitutional or unconstitutional depending on the concrete subject covered. This group includes the following:

af) the launching of development projects. (The concrete competence would be unconstitutional in the case of educational-training reforms, but constitutional when related to investment projects, renovations, etc.) However, can an opinion be actually formed with regard to the constitutionality of a competence when the legislation is so generally worded? Therefore, I disagree with unconditionally establishing the unconstitutionality of the right of consent related to exercising this competence regardless of its subject.

ag) conclusion of a cooperation agreement. [Similarly, I cannot see any constitutional ground for establishing the unconstitutionality of exercising in any case the right of consent related to the cooperation agreements to be concluded by higher education institutions. In any case, for

example, cooperation agreements solely based on the use of State funds (which are bound to consent) are to be judged differently from the ones financed by means of the institution's own resources.]

I hold that the majority Decision should have considered one-by-one, in a differentiated manner, the competences listed and detailed under Section 25 para. (1) item *a)* of the AHE. This item is comprised of nine "sub-competences", the constitutional assessment of which would have required a differentiated analysis. [Not to mention that some (partial) competences themselves are complex ones, worth examining by elements. Clearly, the two possibilities covered by item *ae)* would have required differentiated answers in terms of constitutionality.]

2. In my opinion, it follows from the above that the State may draw conclusions concerning organisation (even in the form of setting up new types of organisations) based on the fact that at present, the management of higher education is mostly performed by laymen who have no managerial skills and act on the basis of collegiality. The financial board serves the above purpose, and the composition of the board does not support its classification as an "external" body – as stated in the reasoning of the majority Decision. [According to Section 23 paras (3) and (4) of the AHE, the members delegated by the senate, together with the rector, have a majority in the financial board.] Therefore, it is able to sense "internally" the problems arising in the field economy and finance, but without having adequate competences to solve the problems (the right of consent in the case of economic-financial issues), its presence can be a formal one, imposing a burden on the institution rather than being integrated into the structure of higher education as a supportive partner. (Its right being limited to give opinions will undoubtedly make the financial board such a lightweight body.)

By an undifferentiated establishment of the unconstitutionality of the financial board's right of consent, the majority Decision has "liberated" the higher education institutions from these bodies, and by bearing reference to autonomy, it has practically granted them independence from the maintaining-financing State, which is quite unique in the administrative and institutional system of Hungary. (In this construction, all that is left for the maintaining State is the obligation of financing, while it does not have any word concerning the use of the funds granted by it.)

Furthermore, I would have held it necessary to clarify in the majority Decision the question of who is the actual holder of autonomy in higher education institutions. According to Decision 861/B/1996 AB, "The holder of autonomy is the institution, i.e. the university (...)

and it is this institution that must guarantee the freedom of learning and ensure the enforcement of the freedom of scientific research as well." (ABH 1998, 650, 654) In this sense, the holder of autonomy is neither the senate nor the rector, but the higher education institution itself. Consequently, it is a question of principle whether the autonomy of the institution is violated by the right of consent when in specific affairs certain organs of the higher education institution (the rector and the financial board) may only act in consensus? In my view, this is the essential question of the petition submitted by the President of the Republic. My answer is that in general, the right of consent vested in specific cases with certain organs of autonomous institution does not impair the institutions' autonomy. This is why the (partial) competences listed in Section 25 para. (1) item *a)* of the AHE should have been considered in a differentiated manner in the majority Decision.

3. Let me repeat the following: as only "State" higher education institutions shall set up a financial board, the Constitutional Court, when answering the petition, has not had to directly take into account universities maintained by churches, private entities or foundations, as the setting up of a financial board is only on option for such universities. However, in judging upon possible future petitions concerning the latter ones, the Constitutional Court will undoubtedly apply the principles elaborated in the present Decision. The comparative examination of interference by maintainers in respect of higher education institutions founded and maintained by various bodies is justified by Article 70/G of the Constitution, which does not make a difference between types of higher education institutions regarding the freedom of scientific research. I am afraid that in respect of the maintainer's rights interpreted very strictly in the case of State higher education institutions, the principles established in the majority Decision will not (and cannot) be followed in the case of universities other than those founded and maintained by the State: in their case, a different standard will be applied in relation to Article 70/G of the Constitution, despite the fact that the Constitution itself does not differentiate between the various types of higher education institutions when declaring the freedom of scientific research and scientists.

For example, for me it would be impossible to hold that in the case of a school maintained by a church or a foundation, the maintainer or the founder would not (be authorised to) require being able to monitor the economical and effective utilisation of the funds granted by it. A simple right to give opinions will obviously not satisfy such entities either.

Budapest, 25 September 2006.

Dr. László Kiss
Judge of the Constitutional Court

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