DECISION 41/2005 (X. 27.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

On the basis of a petition submitted by the President of the Republic seeking the prior constitutional examination of certain provisions of an Act of Parliament adopted and not yet promulgated, the Constitutional Court – with concurring reasoning by Dr. Péter Kovács, Judge of the Constitutional Court, and a dissenting opinion by Dr. László Kiss, Judge of the Constitutional Court – has adopted the following

decision:

The Constitutional Court holds that Section 25 para. (1), Section 25 para. (2) item fg), Section 32 para. (11) item c), Section 37 para. (4), Section 115 paras (3) and (8), Section 151 para. (5), Section 153 para. (1) item 5 of the Act on Higher Education adopted by the Parliament at its session of 23 May 2005 are unconstitutional.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

1. The Parliament adopted the Act on Higher Education (hereinafter: "new AHE") at its session of 23 May 2005. On 26 May 2005, the Speaker of the Parliament sent the Act to the President of the Republic 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 31 May 2005, within the required deadline, claiming the unconstitutionality of certain provisions of the Act. 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: "ACC"), the President of the Republic initiated the prior constitutional examination of Section 25 para. (1), Section 25 para. (2) item fg), Section 32 para. (11) item

c), Section 115 paras (3) and (8), Section 151 para. (5) and Section 153 para. (1) item 5 of the Act not yet promulgated.

2. The President of the Republic supports his petition with the following arguments:

2.1. The President of the Republic considers that Section 25 para. (1) and Section 25 para. (2) item fg) of the new AHE are contrary to Article 70/G of the Constitution.

The President of the Republic claims – with reference to the Constitutional Court's practice in respect of the freedom of scientific life granted under Article 70/G of the Constitution – that the mere existence of state higher education institutions does not guarantee the enforcement of the fundamental right. Those entitled to this freedom – i.e. persons engaged in practising sciences – can only perform their scientific activity without any unjustified influence if that is duly ensured by the organisation of the higher education institution, in particular with regard to the rules of decision-making directly related to science (research and education). To this end, higher education institutions must possess autonomy in relation to the executive power in issues directly related to scientific activity. Therefore, in issues directly related to research and education, those entitled to the freedom of scientific life – the scientific community – must have a right to make decisions autonomously. In that sense, the freedom of scientific life and the freedom of learning and teaching are realised through the autonomy of higher education institutions. The holder of such autonomy is the higher education institution. Consequently, the restriction of the autonomy of the higher education institution by taking away the decision-making competences, in respect of issues directly related to practising science, from the community comprising the persons entitled to the freedom of scientific life in the given higher education institution violates the obligation of institutional protection stemming from Article 70/G of the Constitution.

The President of the Republic points out that pursuant to Section 20 para. (1) of the new AHE, the governing body is an organ of the higher education institution that is in charge of making strategic decisions and monitoring the implementation thereof. According to Section 23 para. (1) of the new AHE, the establishment of this body is obligatory in state higher education institutions. Section 23 paras (3)-(4) of the new AHE ensure that the members delegated by the senate or by the student council in agreement with the senate shall, together with the rector, have a majority over the members delegated by the Minister of Education.

However, Section 23 para. (6) item f) explicitly excludes – with the exception of the rector – the governing body membership of those who have a legal relationship of employment or studies with the higher education institution in question. Pursuant to Section 23 para. (9), agreements with the members of the governing body are concluded by the Minister of Education, and coverage for their remuneration is provided by the Ministry of Education. Section 23 para. (5) provides that – with the exception of the rector – no scientific degree or teaching experience is required from the members of the governing body, and only three members are required to have a higher education degree in the educational, scientific research, or artistic field of the higher education institution.

As the members of the governing body have no legal relation with the higher education institution, they are not members of the institution's scientific community, and they do not participate in the scientific activity of the institution, they do not necessarily possess knowledge of the everyday practice of science. As a result, the governing body cannot be considered to be an organ of autonomy granting a right of discretion as per Article 70/G of the Constitution in issues directly related to practising science to those entitled to the freedom of scientific life, i.e. the scientific community.

This deficiency violates Article 70/G of the Constitution because the governing body may make decisions on questions directly affecting the freedom of science and in particular research and publication. For example, Section 25 para. (1) of the new AHE authorises the governing body – among others – to adopt a research, development and innovation strategy as part of the institutional development plan. The content of this strategy is defined in Section 5 para. (3) of the new AHE in such a manner that it directly and substantially affects the performance of scientific activities, in particular the freedom of research and creation. Another fact to support the above argument is that according to Section 27 para. (1) of the new AHE, the senate must define the tasks of training and research with consideration to the strategic decisions made by the governing body. The decision-making competence of the governing body is not limited, either, by the rule in Section 5 para. (4) of the new AHE, according to which the elaboration of the research, development and innovation strategy must be managed by a scientific council consisting of the representatives of university and college professors, university and college associate professors, as well as researchers with a scientific degree and students of doctoral schools (Ph.D. students). In the opinion of the President of the

Republic, the competence of the scientific council is merely of a preparatory character, and it does not change the right of the governing body to make substantial decisions.
Section 25 para. (2) item fg) of the new AHE even authorises the governing body to decide "on the transformation or termination of an uneconomical activity and of the related organisation or organisational unit." This way, the governing body is empowered to transform or terminate a scientific or research activity, together with the organisational unit engaged therein, merely on economic grounds. By exercising this right, the governing body has the opportunity to fundamentally determine the activities of those practising science. This is especially so because uneconomical operation is a concept not defined precisely, which considerably broadens the scope of discretion of the governing body.

In view of the above, the authorisation of the governing body to make the decisions specified in Section 25 para. (1) and Section 25 para. (2) item fg) of the new AHE restricts the autonomy of higher education institutions in violation of Article 70/G of the Constitution. The challenged provisions vest the right to decide on issues directly related to scientific activity and in particular research with persons other than the community of those entitled to the right to the freedom of scientific life.

2.2. In the opinion of the President of the Republic, Section 32 para. (11) item c) and Section 153 para. (1) item 5 of the new AHE violate Article 70/G para. (2) of the Constitution, as they empower the Government to make decisions on issues belonging to the field of science.

The President of the Republic refers to Article 70/G para. (2) of the Constitution, providing that only scientists are entitled to decide on questions of scientific truth and to establish the scientific value of researches. This rule not only reserves the evaluation of specific scientific results for scientists, but it excludes the State in general from determining the concrete activities that can be regarded as scientific ones and the methods that can be used in scientific research, as well as from defining science in general. Consequently, from the point of view of Article 70/G para. (2) of the Constitution, the definition of accepted branches of science is a scientific issue, similarly to the determination of individual scientific results.

However, on the basis of Section 32 para. (11) item c) and Section 153 para. (1) item 5 of the new AHE, the Government defines in a decree the branches of science – within the various fields of science – where Ph.D. training may be performed. Practically, the Government is

free to decide what is considered as a branch of science in respect of Ph.D. training. The Government's right of discretion is not restricted, either, by the right of the Hungarian Higher Education Accreditation Committee to deliver an opinion, based on Section 109 para. (2) of the new AHE, or that of the Higher Education Scientific Council, based on Section 112 para. (5) of the new AHE.

Ph.D. training typically serves the purpose of educating prospective scientists. However, in the long term, no branch of science can "survive" without a Ph.D. training to educate a new generation of scientists. Consequently, the Government's decision on the branches of science where Ph.D. training may be performed substantially determines – in the long term – the branches of science that can be practised and taught in Hungary. This is contrary to the above aspect of Article 70/G para. (2) of the Constitution.

2.3. Section 115 para. (3) and Section 115 para. (8) of the new AHE are contrary to Article 57 para. (1), Article 70/G and Article 70/K of the Constitution, because higher education institutions are not granted a right to turn to court in relation to the decisions of the Minister of Education as maintainer. Pursuant to Section 7 para. (4) and Section 104 para. (6) of the new AHE, the Minister of Education – save if provided otherwise in the Act – performs maintainer's management tasks in the case of state higher education institutions. Section 115 of the new AHE defines the content of maintainer's management, providing that on the basis of Section 105 para. (10), in respect of state higher education institutions, the maintainer may not exercise the rights vested with the governing body by the Act. Thus, in the case of state higher education institutions, the Minister of Education exercises the rights – specified in Section 115 – not included by the new AHE in the competence of the governing body. Accordingly, in the case of state higher education institutions, the competences defined in Section 115 paras (3) and (8) are exercised by the Minister of Education.

On the basis of Section 115 para. (3) of the new AHE, the Minister of Education (as maintainer) may call upon the governing body or the rector to prepare an action plan. This may take place, among others, in the following case: if the higher education institution has not complied with the requirements of reasonable and economical management, and as a consequence, it has overrun its budget, and the amount of its overdue liabilities of more than 60 days has reached 20% of its yearly budget during more than a budgetary year, therefore the higher education institution may be closed down on the basis of Section 37 para. (4) item c).

If the Minister of Education rejects the action plan, he may decide on continuing the operation of the state higher education institution, or on its reorganisation or closing down. Thus, in that case, the Minister of Education has an almost unlimited scope of discretion in forming the organisation and activities of the state higher education institution.

In addition, Section 115 para. (8) of the new AHE empowers the Minister of Education (as maintainer) to suspend the transfer of normative budgetary support if – due to the default of the senate – the state higher education institution has failed to set up a governing body. Such a decision may well result in the impossibility of the operation of the higher education institution.

On the basis of Section 115 of the new AHE, the maintainer does not, in general, act as an authority, thus – save if provided otherwise by the new AHE – its acts are not based on the rules of public administration proceedings, and thus no legal remedy is available against such acts. This follows *a contrario* from the provision under Section 115 para. (6) explicitly ordering in the scope of legality control the application of the provisions in Chapter VI of the Act on Public Administration Procedure and Services. [According to the petition, that provision of the new AHE shall enter into force on 1 September 2005 – based on Section 151 para. (1) thereof – while Act CXL of 2004 on Public Administration Procedure and Services referred to in the AHE shall only enter into force on 1 November 2005. This means that in the scope of legality control, the new AHE makes a reference – in respect of legal remedy – to an Act not in force when the AHE enters into force.] At the same time, the exercise of the maintainer's management rights defined in Section 115 paras (3) and (8) indirectly affects the fundamental right to the freedom of scientific life, and it directly restricts the autonomy of higher education institutions resulting from Article 70/G of the Constitution. Naturally, autonomy is not unrestrictable if the restriction complies with the above criteria. However, on the basis of Article 57 para. (1) of the Constitution and in view of Articles 70/G and 70/K as well, the possibility of turning to court must be available in respect of individual decisions restricting autonomy to such an extent.

Higher education institutions are institutions ensuring the enforcement of Article 70/G of the Constitution, and they are also qualified by the new AHE as autonomous institutions. As the decisions specified in Section 115 paras (3) and (8) of the new AHE indirectly affect the subjective rights of those subject to Article 70/G as well, the enforceability of claims based on

such subjective rights must be ensured at court. The exclusion of the right of higher education institutions to turn to court against such decisions would only be constitutional if it were absolutely necessary and, at the same time, proportionate. However, there is no circumstance excluding – or making such exclusion necessary – the judicial review of the lawfulness of the decision of the Minister of Education based on Section 115 paras (3) and (8) on the merits.

Consequently, Section 115 para. (3) and Section 115 para. (8) of the new AHE are contrary to Article 57 para. (1), Article 70/G and Article 70/K of the Constitution, because higher education institutions are not granted a right to turn to court in relation to the decisions of the Minister of Education.

2.4. Section 151 para. (5) of the new AHE violates the requirement of legal certainty resulting from the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution, as it determines the date of the end of the applicability of the AHE in force in an unclear manner.

According to Section 151 para. (3) item a) of the new AHE, the AHE in force shall be repealed as from 1 September 2006. At the same time, Section 151 para. (5) provides that the provisions of the AHE may be applied from the date of the entry into force of the new AHE if the "introduction of the new AHE has not been commenced". On the basis of this rule, it is impossible to determine the period of applicability of the provisions of the AHE in force. This violates the essence of the principle of legal certainty resulting from the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution, requiring that (the validity, force, applicability of) a norm be unambiguous and identifiable beyond doubt.

The concept of "introduction" is not known in the law of Hungary. Its synonym could be entry into force, but that would be uninterpretable in the context of the given provision. Thus it is up to those applying the law to determine the applicability of the AHE in force. Consequently, in handling the multitude of life situations, those applying the law would be in charge of establishing the precise relation between two comprehensive Acts of Parliament in force – codes regulating the same life situations – and of drawing the conclusions therefrom. This raises serious concerns not only because this task is impossible to perform, but also because the regulation of the various life situations of tens of thousands of affected persons becomes uncertain. [Certain provisions of the AHE in force would be applicable even after its repeal, as Section 151 para. (5) of the new AHE differentiates between the applicability and

the force of the AHE in force, and it does not set a concrete final deadline for the applicability of the AHE in force.]

In view of the above, Section 151 para. (5) of the new AHE violates the principle of legal certainty, thus being contrary to the requirement of the rule of law guaranteed under Article 2 para. (1) of the Constitution.

3. Upon being informed about the petition submitted by the President of the Republic, the Minister of Education, who had submitted the Bill on Higher Education to the Parliament, sent his opinion to the Constitutional Court.

II

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

"Article 2 para. (1) The Republic of Hungary is an independent democratic state under the rule of law."
"Article 70/F para. (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 ability, and furthermore through financial support for students."

"Article 70/G para. (1) The Republic of Hungary shall respect and support the freedom of scientific and artistic expression, 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 provisions of the new AHE challenged in the petition of the President of the Republic are as follows:

“Section 1 para. (1) The aim of this Act is to establish the legal guarantees necessary for the enforcement of the constitutional rights of teaching and learning. Based on the right to learn, all citizens of the Republic of Hungary are entitled to use the services of higher education, provided that their abilities make them suitable for studies in higher education. The freedom of teaching, research, and artistic life is realised in higher education through the autonomy of the higher education institutions.”

“Section 5 para. (3) The higher education institution shall prepare a research, development and innovation strategy including in particular the planning of research programmes, the rules of procedure of competitions, scientific events, tasks related to the development of national and international scientific cooperation, the conditions of supporting the publication of scientific works and research activities, and the ways of utilising research results.
(4) The elaboration and realisation of the research, development and innovation strategy of the higher education institution shall be managed by a scientific council consisting of the representatives of university and college professors, university and college associate professors, as well as researchers with a scientific degree and students of doctoral schools (hereinafter: “Ph.D. students”).”

“Section 7 para. (4) On behalf of the State, maintainer’s rights shall be exercised – save if provided otherwise in this Act – by the Minister of Education.”

“Section 20 para. (1) The governing body of the higher education institution shall be in charge of making strategic decisions and monitoring the implementation thereof.”

“Section 23 para. (1) The governing body is a body laying down the foundations for the implementation of the tasks of the higher education institution, making annual budgetary decisions serving the purpose of the effective and sound management of public finances and public property as well as strategic decisions, monitoring the implementation of such decisions, and contributing – as laid down in the present Act – to the performance of maintainer’s tasks. A governing body shall be established in the case of state higher education institutions; in the case of non-state higher education institutions a governing body may be set up as laid down in the Deed of Foundation of the institution.
(…)
(3) The president of the governing body shall be the rector of the higher education institution.

(4) The governing body of seven or nine members shall consist of two or three members delegated by the Minister of Education, and four or five members delegated by the senate. One of the senate's delegates shall be proposed by the student council. If the proposal is rejected by the senate, the student council may propose another person. The senate, with the unanimous vote of at least two-thirds of its members, may raise an objection against the members delegated by the Minister of Education, with a separate vote for each. A person to whom the senate has raised a reasoned objection in writing shall not be a member of the governing body, and such a person shall be replaced by a new delegate of the Minister of Education; the senate may not raise an objection to the new delegate.

(5) At least one of the members delegated by the Minister of Education and at least two of the members delegated by the senate shall possess a higher education degree in the educational, scientific research or artistic field of the higher education institution and at least five years of managerial experience in the field of their professional qualification.

(6) A member of the governing body may not be

a) a person having a criminal record

b) a public official or a mayor,

c) a person subject to Act LXXIX of 1997 on the Legal Status and Responsibility of Members of the Government and Undersecretaries of State,

d) a person currently or formerly holding an office in a political party, a person who is or was employed and paid by a political party, unless the cause of exclusion ceased to exist at least 5 years before,

e) a member of a local government, the Parliament or the European Parliament,

f) a person employed by or studying at the higher education institution concerned,

g) a member of the governing body of another higher education institution,

h) a person engaged in public service at a budgetary organisation under the supervision of the Minister of Education, with the exception of state higher education institutions,

i) a person over the age of seventy.

(…)

(9) Members of the governing body shall be appointed and dismissed by the Minister of Education. The appointment of the members delegated by the senate shall be initiated at the office of the Minister of Education by the president of the senate. The members of the governing body shall receive a monthly remuneration, the amount of which shall equal, if there are seven members in the governing body, three times the minimum obligatory wage in force on the last workday of the year preceding the budgetary year and five times that amount

in the case of the president; if there are nine members in the governing body, the remuneration shall be four times and six times the above amount, respectively. The members of the governing body shall conclude an agreement with the Minister of Education. Coverage for remuneration shall be provided by the Ministry of Education."

"Section 25 para. (1) The governing body shall adopt the strategic, employment and business plan (hereinafter: "institutional development plan"). The institutional development plan shall contain plans on development, the utilisation and safeguarding of the property placed by the maintainer at the disposal of the higher education institution, as well as the expected revenues and expenses. The research, development and innovation strategy shall be part of the institutional development plan. The research, development and innovation strategy shall be sent to the regional development council in order for it to be taken into account during the preparation and implementation of the medium-term social and economic development programme of the region. The institutional development plan shall be prepared for a medium term, for at least a period of four years, defining the tasks of implementation in an annual breakdown. The employment plan shall be part of the institutional development plan. The employment plan shall define the number of staff needed for performing the tasks of the higher education institution.

(2) The governing body shall – within the framework of the statutes –
(…)
b) approve
ba) the budget and the annual report of the higher education institution in compliance with the rules on accounting,
(…)
f) decide
(…)
fg) on the transformation or termination of an uneconomical activity and of the related organisation or organisational unit;
(…)

(3) The organisational structure of the higher education institution shall be defined by the governing body. The governing body shall obtain the opinion of the senate before making a decision. The senate may deliver its opinion within thirty days after being requested by the

governing body. The deadline is a forfeit one. Based on the decision of the governing body, the senate shall determine the rules of operation of the higher education institution in the Statutes."

"Section 27 para. (1) The senate shall define the tasks of training and research and monitor the implementation thereof with consideration to the provisions of the Deed of Foundation and the strategic decisions adopted by the governing body. The senate shall define the rules of its own operation, and – save if provided otherwise by this Act – it shall elect its president from its members employed as teachers or researchers."

"Section 32 para. (11) The Government shall define
(…)
c) the conditions of obtaining a Ph.D. degree and the rules of procedure of establishing a doctoral school, as well as the branches of science – within the various fields of science – where Ph.D. training may be performed."

"Section 37 para. (4) The maintainer may close down the higher education institution – in addition to the cases specified under paragraph (1) – in the following cases:
a) if the admission procedure has been unsuccessful in three consecutive years. For the purposes of this provision, the admission procedure is deemed to be unsuccessful if in a given year the resulting number of students at the higher education institution is below seventy per cent of the maximum number of students admissible in that year;
b) if the operation of the higher education institution is unlawful or contrary to the Deed of Foundation despite having been warned by the maintainer more than once;
c) if the higher education institution has not complied with the requirements of reasonable and economical management, and as a consequence, it has overrun its budget, and the amount of its overdue liabilities of more than 60 days has reached 20% of its yearly budget during more than a budgetary year;
d) if it establishes one or more new higher education institutions to replace the existing higher education institution;
e) if the higher education institution no longer has the conditions necessary for continuous operation."

“Section 99 para. (2) The Parliament shall officially acknowledge the status of a higher education institution by including it in the list contained in Annex 1 to this Act. When a higher education institution is closed down, the Parliament shall delete it from Annex 1 by amending this Act.”

“Section 104 para. (6) The Minister of Education – save if provided otherwise in this Act – performs maintainer’s management tasks in the case of state higher education institutions.”

“Section 109 para. (2) The Hungarian Higher Education Accreditation Committee shall deliver an opinion on the drafts of the Act on Higher Education and its implementing decrees as well as of ministerial decrees regulating higher education.”

“Section 112 para. (5) The Higher Education and Scientific Council shall deliver an opinion on the drafts of the Act on Higher Education and its implementing decrees as well as of ministerial decrees regulating higher education.”

“Section 115 para. (3) The maintainer shall call upon the governing body and the rector of the higher education institution to prepare an action plan if the conditions of the application of Section 37 para. (4) item a) or c) are fulfilled. The maintainer shall either accept the action plan and monitor the implementation thereof or decide on continuing the operation of the higher education institution or its reorganisation or closing down.
(…)
(8) The Minister of Education may suspend the transfer of normative budgetary support if – due to the default of the senate – the state higher education institution has failed to set up a governing body.”

“Section 151 para. (3) As from 1 September 2006
a) the following Acts of Parliament shall be repealed: Act LXXX of 1993 on Higher Education (hereinafter: “Act of 1993 on Higher Education”) and the amending Act LVIII of 1994, Act LXI of 1996, Act VIII of 1997, Act CXXVI of 1997, Act CXXVII of 1997, Act XXXVIII of 1998, Act LII of 1999, Act CVII of 2000, Act LXV of 2001, Act XCI of 2001, Act XXXVIII of 2003,
(…).

(5) The provisions of the Act of 1993 on Higher Education may be applied from the date of entry into force of this Act if the introduction of this Act has not been commenced."

"Section 153 para. (1) The Government is hereby authorised to issue a decree on
(…)
5. the rules of multi-cycle training and vocational higher education, the qualification framework, the procedure of launching training courses, the rules of Ph.D. training, the fields and branches of science [Section 32 para. (11), Section 145 para. (7)],
(…)."

III

1. When assessing the unconstitutionality of the provisions objected to in the petition, the Constitutional Court first dealt with the issue of the autonomous operation of higher education institutions.

1.1. In the practice of the Constitutional Court, the operation and the autonomy of higher education institutions have been considered as a rule related to Articles 70/F and 70/G of the Constitution. The Constitutional Court has dealt with Articles 70/F and 70/G of the Constitution in several Decisions.

As established by the Constitutional Court upon the interpretation of the right to education (training) enshrined in Article 70/F of the Constitution, "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) The Constitutional Court also pointed out that, on the basis of 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]

The Constitutional Court examined the close interrelation between the provisions contained in Article 70/G paras (1) and (2), qualified the freedom of scientific and artistic life as well as the freedom of learning and teaching as an aspect of the so-called communicational fundamental rights, and deduced in this context the extra protection of the autonomy of science and the scientists' right to decide on questions affecting science:

"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.

Search for the truth, cognition and the development of science are the fundamental aims of all sciences. The State must remain neutral in respect of scientific truths, but as a constitutional requirement it must guarantee that scientists can exercise – within the constitutional limits – the freedom of disseminating the results of scientific research and scientific knowledge. As a consequence, the State may only impose restrictions upon the freedom of scientific creation, learning and teaching if such restrictions comply with the constitutional requirements concerning the restriction of the communicational freedoms. As in a broad sense the freedom of science is in general an element of the freedom of expression, it enjoys the same level of constitutional protection from interference and restriction by the State as guaranteed for the specific subjective rights deriving from the freedom of expression.

Whenever, throughout history, the State imposed political, ideological, religious or other restrictions upon the freedom of science, the development of the entire society was hindered as a result. History teaches us that the freedom of science is a basic guarantee of progress, and

it is closely related to the individual's autonomy as well. Thus, the freedom to search for scientific theses, findings and truths, as well as the free flow of scientific theories and views are preconditions to the development of the entire society and mankind, and they constitute one of the guarantees of the free development of the individual. As the freedom of scientific life is one of the manifestations of the fundamental constitutional right to the freedom of expression, the statements of the Constitutional Court made in Decision 30/1992 (V. 26.) AB on the prominent role of free communication also apply to the freedom enshrined in Article 70/G of the Constitution (ABH 1992, 178). Therefore, although the freedom of science and scientific learning and teaching is not an unrestrictable right in general, it is a freedom that may only be restricted in exceptional cases, when such restriction directly serves the purpose of enforcing or protecting a fundamental right or when it is absolutely needed for the enforcement of an abstract constitutional value (e.g. the statutory protection of secrets)." [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 182-183]

Later on, the Constitutional Court examined the self-government (autonomy) of higher education institutions in the context of the provisions of the AHE in force:
"Pursuant to Article 70/G para. (1) of the Constitution, the Republic of Hungary respects and supports the freedom of scientific expression, and the freedom to learn and to teach. This freedom is realised through the self-government (autonomy) of higher education institutions, regulated in part 4 of the AHE. According to Section 64 of the AHE, the higher education institution shall decide on any institutional matter in the case of which no Act of Parliament or other statute – upon the authorisation of an Act of Parliament – stipulates the competence of the State or a local government. Besides, pursuant to Section 65 para. (1) of the AHE, the State shall perform its duties related to higher education by respecting the rights, obligations and competences of higher education institutions as regulated in the Constitution and in that Act. The Constitutional Court establishes that in respect of matters within the scope of the autonomous decisions of higher education institutions, universities and colleges do not qualify as organisations managed by the Government." [Decision 40/1995 (VI. 15.) AB, ABH 1995, 170, 172]

As explained by the Constitutional Court with regard to the holders of institutional autonomy in the context of the AHE in force:
"Section 32 para. (1) of the AHE does not narrow down the scope of persons having the rights related to the freedom of scientific life to university professors, on the contrary: it explicitly

expands that scope to include the persons embodying the university's autonomy (»Higher education institutions ensure the freedom of teaching, scientific research, creative artistic activity, and learning for teachers, researchers and students«). The holder of autonomy is the institution, i.e. the university; it is the holder of the rights of self-government granted by the AHE, 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)

1.2. The autonomous operation of higher education institutions is based on constitutional grounds. At the same time, the autonomy of higher education institutions is also guaranteed by the Magna Charta of European Universities (hereinafter: "Magna Charta"), referred to in the preambles of both the AHE in force and the new AHE. According to point 1 of the Magna Charta's Principles: "The university is an autonomous institution at the heart of societies differently organized because of geography and historical heritage; it 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."
Then, according to point 3: "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. Rejecting intolerance and always open to dialogue, a university is an ideal meeting ground for teachers capable of imparting their knowledge and well equipped to develop it by research and innovation and students entitled, able and willing to enrich their minds with that knowledge."

1.3. The autonomy of higher education institutions is also declared, in accordance with the Constitution, in Section 1 of the new AHE. Section 1 para. (1) of the new AHE provides that "the freedom of teaching, research, and artistic life is realised in higher education through the autonomy of the higher education institutions." The Minister's reasoning related to the institutional autonomy enshrined in Section 1 of the new AHE contains the following:

"The right to education and the freedom of teaching and learning as granted in Article 70/G of the Constitution are manifested in ensuring the independence of scientific and artistic life from external influence, and in the evaluation of matters of science and arts by the persons engaged in science and arts, respectively, or by the bodies representing them. This purpose is

served by the institutional autonomy granted to higher education institutions, by the establishment of the statutory guarantees for their independence, and by the definition of the aim, content and limitations of their autonomy and independence. (…)
This autonomy is realised through teaching, research, the development of the institution's internal organisation, and the independence of operation and management; the subjects of the autonomy are the institution, the teachers, the researchers, the students and their community. However, the autonomous individual or collective exercise of rights may not violate the same rights of others."

1.4. Accordingly, the right to education (training) included in Article 70/F of the Constitution ensures the setting up and operation of higher education institutions, while Article 70/G of the Constitution guarantees the freedom of scientific and artistic life, and the freedom of teaching and learning. Furthermore, it was pointed out by the Constitutional Court that "in a broad sense the freedom of science is in general an element of the freedom of expression". [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 182] Stemming from the freedom of expression, the freedom of science ensures the protection of scientific activities. Scientific activity is not an individual activity separated from others', but it is a collective activity based on the discussions and debates of scientists in the framework of independent scientific workshops. Therefore, in order to protect the freedom of scientific activity, it is not sufficient to guarantee individual rights for scientists and to secure protection from interference and restrictions by the State. The Constitution not only requires the State to exercise self-restraint, but also to take positive action. [cf.: Decision 22/1999 (VI. 30.) AB, ABH 1992, 176, 194] This is why the State must provide statutorily regulated solutions to secure the free performance of professional scientific activities without any external influence. The related institutional framework is to be established by the State.

The Constitutional Court has established that the State has a duty of institutional protection. Resulting from its objective duty of institutional protection, the State "shall guarantee the statutory and institutional conditions needed for the realisation of fundamental rights by taking into account its duties related to other fundamental rights and its other constitutional duties; it shall ensure the most favourable enforcement of the specific rights with regard to the whole order, thus facilitating harmony among the fundamental rights as well." [Decision 64/1991 (XII. 17.) AB, ABH 1991, 297, 302-303] In relation to the fundamental rights referred to above, the State must ensure the existence of institutions and adequate

organisational rules that guarantee the freedom of scientific, teaching and research activities. The essence of free scientific activities is the enforcement of scientific values without any external influence. For the purpose of the free determination of scientific quality, the freedom of discretion and the independence of scientists – i.e. the autonomy of science – must be ensured. The autonomy of science is realised through the rights of self-government to be granted to the higher education institutions established on the basis of the State's duty of institutional protection. Consequently, the establishment of autonomous higher education institutions with self-government is a fundamental guarantee for the freedom of scientific, teaching and research activities. This is acknowledged, guaranteed and supported not only by the practice of the Constitutional Court, but also by the Magna Charta referred to in the AHE in force and the new AHE, as well as Section 1 of the new AHE and the Minister's reasoning attached thereto.

The autonomy of higher education guarantees the independence of higher education institutions from the government and public administration. Autonomy and independence are not limited to scientific, teaching 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.

On the basis of institutional autonomy, the higher education institution is an independent organisation with a right of self-government. Independent – i.e. autonomous – operation can only be secured if an Act of Parliament defines the basic rules pertaining to higher education institutions, and the Parliament makes the fundamental decisions affecting the existence and operation of higher education institutions (setting up, closing down, central budgetary support of higher education institutions etc.). The internal life, organisation and operation of the higher education institution is laid down in the institution's own regulations adopted by the institution itself within the framework set by the Parliament's decision. Accordingly, such questions may only be decided by the Parliament and the higher education institutions, and not by any other organ or organisation.

Higher education institutions, similarly to all institutions with autonomy, i.e. self-government, must have an elected representative organ: a 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.

The self-government of the higher education institution must be empowered to adopt the regulations and norms pertaining to its own operation, and to make individual decisions. However, in the case of individual decisions made by the institution's organs, affecting rights and obligations, the persons concerned must have a right to legal remedy, including the possibility to turn to an independent court.

The State acts not only as the maintainer of higher education institutions, supporting their operation. It also supervises the lawful operation of higher education institutions through the right of legality supervision exercised by the Minister. Naturally, there is a difference between the rights of legislation pertaining to higher education institutions, legality supervision and the maintainer's rights institutionalised by the new AHE. However, autonomous higher education institutions may not be put into a subordinated position. To secure the protection of the independence of higher education institutions – according to Section 65 para. (2) of the AHE in force – statutes and individual decisions violating the self-government of higher education institutions may be challenged at the Constitutional Court. However, turning to the Constitutional Court is not permitted by the new AHE.

The autonomy of financial management is part of the institution's autonomy. Accordingly, within the framework of the Act, the higher education institution may determine its own budget and manage its financial assets independently. State support to the higher education institution is the guarantee for the freedom of scientific, teaching and research activities. Without endangering the autonomous operation of the higher education institution, during the distribution of the means of higher education, the legislator may define the level of State support in such a manner that the performance criteria corresponding to the requirements of science are enforced. When determining the criteria of evaluation, much more than merely the aspects of profitability and political interests must be taken into account.

1.5. The Constitutional Court has a constitutional duty concerning the protection of autonomy and the organisations possessing autonomy (e.g. local governments, higher education institutions, professional chambers). The Constitutional Court has already examined the constitutionality of restricting autonomy and the rights of self-government in the case of local governments. Although there are many differences between local governments as autonomous organisations established on a territorial basis and higher education institutions as autonomous public institutions, the statements related to autonomy (self-government) can be applied to higher education institutions as well.

The Constitutional Court explained that autonomy "provides a constitutional guarantee for local governments primarily against the Government and the organs of public administration". According to the Constitutional Court, self-government "provides constitutional protection for local governments' right to make decisions on their organisation and rules of operation with independent responsibility". Furthermore: "the statutory regulations must allow autonomous decisions by the local government in respect of setting up an organisation necessary for and capable of performing its duties with consideration to its conditions of operation and special tasks". It was also pointed out by the Constitutional Court that "the autonomy in forming an organisation is not manifested in the exercise of a single right, but it means the exercise of the totality of decision-making rights in respect of organisational matters and of organisational competences. The statutory restriction of individual competences does not result (...) in the unconstitutional restriction of the right of self-government as long as (...) the competences remain sufficient for making decisions with independent responsibility on setting up an organisation in accordance with the tasks to be performed.
Statutory rules are unconstitutional if they regulate the organisation of local governments by restricting the essential content of the right to set up an organisation, leading to the emptying of the content of the right of self-government and to the actual takeover of this right, and depriving the local government of the opportunity to make decisions on its own organisation with independent responsibility." [Decision 1/1993 (I. 13.) AB, ABH 1993, 27, 28-29]

1.6. The autonomy of higher education institutions is a fundamental guarantee for the enforcement of the freedom of scientific and artistic life, and the freedom of learning and teaching. The protection of autonomy is thus rooted in Articles 70/F and 70/G of the Constitution. Accordingly, the Constitutional Court has acknowledged the autonomous

operation of higher education institutions as a constitutional value, and the protection thereof is supported by the Decisions so far adopted by the Constitutional Court.

However, the autonomy guaranteed in the Constitution and protected by the Constitutional Court does not exclude the permissible statutory restriction of the rights of autonomy. The restrictions must be in line with the Constitution and the Decisions of the Constitutional Court. An Act of Parliament may contain restrictive rules to promote the economic efficiency and organisational reasonableness of higher education institutions [e.g. the AHE in force contains such rules, too (Section 10/C)]. It is not unconstitutional to monitor the scientific and teaching activities of higher education institutions on the basis of the criteria of economy and organisational reasonableness, for the maintainer to provide for economic requirements, or to grant budgetary means and funds on the basis of performance. Furthermore, it is not unconstitutional to distribute – on the basis of performance criteria fixed in advance in line with the needs of science – extra budgetary resources over the basic level necessary for the institution's operation and the performance of its basic scientific, research and teaching tasks.

2. In his petition, the President of the Republic initiated the prior constitutional examination of Section 25 para. (1) and Section 25 para. (2) item fg) of the new AHE. These two provisions regulate the governing body's decision-making competence.

2.1. Pursuant to Section 23 para. (1) of the new AHE, a governing body is to be established in state higher education institutions as – according to Section 20 para. (1) – the higher education institution's organ that makes strategic decisions and monitors the implementation thereof. Section 23 para. (2) of the new AHE provides that the governing body consists of seven or nine members, in line with the number of admissible students. Section 23 paras (3)-(4) of the new AHE provide that the members delegated into the governing body by the senate or by the student council in agreement with the senate must, together with the rector, have a majority over the members delegated by the Minister of Education.

However, according to Section 23 para. (6) item f) of the new AHE, those who have a legal relationship of employment or studies with the higher education institution in question – with the exception of the rector – may not be members of the governing body. Furthermore, Section 23 para. (5) provides that – with the exception of the rector – no scientific degree or teaching experience is required from the members of the governing body, and only three

members are required to have a higher education degree in the educational, scientific research, or artistic field of the higher education institution. Pursuant to Section 23 para. (9) of the new AHE, the members of the governing body are appointed and dismissed by the Minister of Education, agreements with them are concluded by the Minister of Education, and coverage for their remuneration is provided by the Ministry of Education.

Thus, the new AHE completely transforms the structure of higher education institutions. The governing body dominating the management of a higher education institution consists of external persons – with the exception of the rector – delegated partly by the Minister and partly by the senate. Due to the strict rules on incompatibility contained in Section 23 para. (6) of the new AHE, the members delegated by the Minister or the senate may not be teachers, researchers or students of the higher education institution. Therefore, the governing body – with the exception of the rector – consists of persons other than the teachers, researchers and students having a legal relation with the higher education institution – i.e. the holders of the freedom of learning – or external experts invited by them. Having a higher education degree is not a requirement for the majority of the members of the governing body. In addition, the members are employed part-time, i.e. they may also have another employment. The governing body is thus essentially an external decision-making body independent from the higher education institution.

According to the new AHE, the Minister delegates two/three members into the governing body of seven/nine members. The senate, with the unanimous vote of at least two-thirds of its members, may raise an objection against the members delegated by the Minister on one occasion, with a separate vote for each. After the written objection with reasoning, the senate may not raise an objection against the other person delegated by the Minister. Agreements with the two/three ministerial delegates to the governing body and with the four/five delegates of the senate are concluded by the Minister of Education. The legal form, framework and content of such an agreement is completely unclear. Due to the strict rules on incompatibility contained in Section 23 para. (6) of the new AHE, in the case of the members of the governing body the nearly only possible form of the agreement to be concluded is a contract of agency under civil law. If the agreement takes the form of a contract of agency, the Minister, acting as principal, may even give orders to the members of the governing body as agents. Besides, as coverage for the remuneration of the members of the governing body is provided by the Ministry of Education, it can influence the conduct of the members.

Furthermore, from among the members of the governing body, the appointment and dismissal of the rector is initiated by the maintainer (the Minister of Education in the case of state higher education institutions), and employer's rights over the rector are also exercised by him (in this respect the governing body and the senate may only put forward proposals). The exercise of employer's rights results in a relation of subordination between the rector and the maintainer (Minister of Education).

Considering the position and composition of the governing body, it clearly cannot be regarded as the higher education institution's body of self-government. Such a governing body alienated form the higher education institution may not be empowered to exercise the rights of self-government enjoyed by the holders of institutional autonomy and protected by the autonomy of the higher education institution, as that would mean the takeover of autonomy from the institution.

2.2. Nevertheless, according to the new AHE, major issues within the scope of the self-government of the higher education institution are decided on by the governing body.

2.2.1. Pursuant to Section 25 para. (1) of the new AHE, the governing body adopts a research, development and innovation strategy as part of the institutional development plan. Section 5 para. (3) of the new AHE provides that research programmes, the rules of procedure of competitions, scientific events, tasks related to the development of national and international scientific cooperation, the conditions of supporting the publication of scientific works and research activities, and the ways of utilising research results must be planned in a research, development and innovation strategy. Furthermore, according to Section 27 para. (1) of the new AHE, the senate defines the tasks of training and research and monitors the implementation thereof with consideration to the strategic decisions adopted by the governing body. In view of the above, it can be concluded that the governing body significantly determines the higher education institution's training and research activities through the adoption of the research, development and innovation strategy.

The decision-making competence of the governing body concerning training and research activities is not limited, either, by the rule in Section 5 para. (4) of the new AHE, according to which the elaboration of the research, development and innovation strategy must be managed by a scientific council consisting of the representatives of university and college professors,

university and college associate professors, as well as researchers with a scientific degree and students of doctoral schools (Ph.D. students). This is so because, according to the Act, the competence of the scientific council is merely of a preparatory character, i.e. it does not reduce the right of the governing body to make substantial decisions.

2.2.2. In addition, on the basis of Section 25 para. (2) item fg) of the new AHE, the governing body is even authorised to decide "on the transformation or termination of an uneconomical activity and of the related organisation or organisational unit" of the higher education institution. Thus, the governing body is empowered by the new AHE to transform or terminate a scientific or research activity, together with the organisational unit engaged therein, merely on economic grounds not specified in detail. As a result, the governing body may even transform or close down an educational or scientific organisational unit on the basis of criteria set by the governing body itself. This means that the governing body can fundamentally determine the scientific, teaching and research activities of higher education institutions – constituting the basic activities thereof – and directly subordinate them to the market interests established by itself.

2.2.3. The setting up, competence and composition of the governing body as per the new AHE are, in principle, contrary to the freedom of scientific life.

Section 25 para. (1) and Section 25 para. (2) item fg) authorise the governing body to make fundamental decisions affecting the scientific, teaching and research activities pursued at the higher education institution and protected by the higher education institution's autonomy (e.g. acceptance of the institution's development plan, determination of its organisational structure, acceptance of the budget and the report on the implementation thereof, putting forward a proposal on the appointment of the rector etc.). In view of the fact that the governing body is an organisation external to the higher education institution and managed by the Minister of Education, it is not entitled to make the above decisions within the scope of institutional autonomy.

Striving for economical operation and the evaluation of the higher education institution on the basis of its performance are not unconstitutional in themselves. However, an organisation external to the higher education institution may not exercise, through the evaluation of the performance thereof, the rights of self-government of the higher education institution, which

performs its functions on the basis of fundamental rights In any case, the evaluation of performance may not be merely based on aspects of utility and expediency as well as uncertain and non-public criteria, because that would empty the autonomy of higher education.

According to Decision 861/B/1996 AB of the Constitutional Court referred to above, the scope of persons embodying the autonomy of the higher education institution is the community of teachers, researchers and students. (ABH 1998, 650, 654) The rights of self-government deriving from the institution's autonomy may only be exercised by the subjects of the autonomy. In respect of matters within the scope of the higher education institution's autonomous decisions, universities and colleges do not qualify as organs managed by the Government. [Decision 40/1995 (VI. 15.) AB, ABH 1995, 170, 172] Due to the above, the takeover of the higher education institution's rights of self-government on the basis of Section 25 para. (1) and Section 25 para. (2) item fg) of the new AHE violates the enforcement of the freedom of scientific life and the freedom of teaching and learning enshrined in Article 70/G of the Constitution.

3. In his petition, the President of the Republic also initiated the prior constitutional examination of Section 32 para. (11) item c) and Section 153 para. (1) item 5 of the new AHE. On the basis of Section 32 para. (11) item c) and Section 153 para. (1) item 5 of the new AHE, the Government defines in a decree "the branches of science – within the various fields of science – where Ph.D. training may be performed", as well as "fields of science and branches of science".

The definition of fields of science and branches of science, as well as the specific branches of science where Ph.D. training may be performed has a fundamental and long-term influence on scientific life, the performance of teaching and research activities, the support thereof, and the education of new generations of scientists. Based on institutional autonomy, only those engaged in science have the right to determine such scientific quality. [Decision 34/1994 (VI. 24.) AB, ABH 1994, 177, 182]

The regulation of fields and branches of science in decrees and the definition by the Government of the branches of science where Ph.D. training may be performed do not ensure a right of decision-making for the subjects of autonomy in respect of the scientific, teaching

and research activities safeguarded by the institution's autonomy. Consequently, the Government is free to decide – regardless of the opinion of the subjects of the autonomy of higher education – on what is to be regarded as a field or branch of science, or a branch of science where Ph.D. training may be performed, a Ph.D. degree may be obtained, and where scientific applications may be submitted. The authorisation to issue decrees – without the participation of scientists in the decision-making process – might even result in the use of criteria foreign to science, which endangers the freedom of obtaining scientific degrees and the professionalisation of branches of science.

It can be concluded that, although during the drafting of decrees the Hungarian Higher Education Accreditation Committee and the Higher Education Scientific Council have the right to deliver an opinion on the basis of Section 109 para. (2) and Section 112 para. (5) of the new AHE, respectively, this fact does not essentially restrict the Government's right of discretion. Thus the subjects of autonomy may deliver an opinion but may not actually decide on issues within the scope of institutional autonomy. It is not unconstitutional in itself to define fields and branches of science normatively. However, the substantial participation of the subjects of autonomy in the determination of the content of the regulations pertaining to the autonomy of higher education must be ensured.

As the subjects of institutional autonomy cannot substantially participate in making essential decisions on the activities protected by institutional autonomy, the regulation of the scientific quality protected by the autonomy of higher education in decrees may lead to the takeover such autonomy.

As pointed out by the Constitutional Court in Decision 40/1995 (VI. 15.) AB, "in respect of matters within the scope of the autonomous decisions of higher education institutions, universities and colleges do not qualify as organisations managed by the Government." (ABH 1995, 170, 172) The exclusion of the subjects of autonomy from exercising the rights of self-government constitutes a violation of autonomy, thus causing a serious restriction of the freedom of scientific and artistic life and the freedom of teaching and learning enshrined in Article 70/G para. (1) of the Constitution. Furthermore, it violates Article 70/G para. (2) of the Constitution, providing that only scientists are entitled to decide on questions of scientific truth and to establish the scientific value of researches.

4. In his petition, the President of the Republic also initiated the prior constitutional examination of Section 115 paras (3) and (8) of the new AHE.

The content of maintainer's management is defined in Section 115 of the new AHE. In the case of state higher education institutions, on the basis of Section 7 para. (4) and Section 104 para. (6) of the new AHE, maintainer's management tasks are performed by the Minister of Education, save if provided otherwise in the Act.

4.1. On the basis of Section 115 para. (3) of the new AHE, the maintainer (in the case of state higher education institutions, the Minister of Education as maintainer in charge) may call upon the governing body or the rector to prepare an action plan if the conditions of the application of Section 37 para. (4) items a) and c) are fulfilled.

Section 115 para. (3) of the new AHE explicitly refers to the provisions under Section 37 para. (4), therefore the latter is also affected by the President's petition related to Section 115 para. (3) of the new AHE. According to Section 115 para. (3) of the new AHE, the exercise of maintainer's rights may only take place in the cases regulated under Section 37 para. (4). Consequently, Section 115 para. (3) of the new AHE cannot be interpreted without Section 37 para. (4). In addition, in the cases specified in Section 37 para. (4) items a)-e) – similarly to Section 115 para. (3) – the maintainer (the Minister of Education) is authorised to close down the higher education institution. Due to the identical and interrelated regulation of the maintainer's rights, Section 115 para. (3) of the new AHE can only be examined with due consideration to Section 37 para. (4) referred to therein. Therefore, the Constitutional Court has examined Section 115 para. (3) of the new AHE together with Section 37 para. (4) referred to therein; however, it has not dealt with the other provisions in Section 37.

Pursuant to Section 37 para. (4) items a) and c) of the new AHE, the higher education institution may be closed down if the admission procedure has been unsuccessful in three consecutive years (the resulting number of students at the higher education institution is below seventy per cent of the maximum number of students admissible in that year), or if the higher education institution has not complied with the requirements of reasonable and economical management, and as a consequence, it has overrun its budget, and the amount of its overdue liabilities of more than 60 days has reached 20% of its yearly budget during more than a budgetary year.

If the maintainer (the Minister of Education) rejects the action plan prepared in the cases specified in Section 37 para. (4) items a) and c) referred to in Section 115 para. (3) of the new AHE, he may decide on continuing the operation of the higher education institution, or on its reorganisation or closing down.

Section 115 para. (3) of the new AHE refers – among others – to the requirement of "reasonable and economical management" included in Section 37 para. (4) item c). The enforcement of the requirement of reasonable and economical management is not unconstitutional in itself. However, it is a constitutional requirement that the requirements of reasonable and economical management be normatively defined in the form of predefined, public, precise and stable performance criteria complying with the needs of science, and that the support given for compliance with such requirements should not endanger the basis of operation of the higher education institution. The content of "reasonable and economical management" included in Section 37 para. (4) item c) is practically unidentifiable. The assessment of compliance with the conditions set in Section 37 para. (4) essentially depends on the discretion of the maintainer (the Minister of Education) as decision-maker. The legal character and the content of the maintainer's action plan to be prepared on the basis of Section 115 para. (3) are completely unclear. Moreover, the maintainer is free to decide on accepting the action plan prepared. If the maintainer rejects the action plan, he may decide on continuing the operation of the higher education institution, or on its reorganisation or closing down. On the basis of the above, in the absence of exact conditions, the decision on continuing the operation of the higher education institution, its reorganisation or closing down belongs to the maintainer's (the Minister of Education in the case of state higher education institutions) free discretion.

4.2. Section 115 para. (8) of the new AHE also empowers the Minister of Education (as maintainer) to suspend the transfer of normative budgetary support if – due to the default of the senate – the state higher education institution has failed to set up a governing body.

According to Section 23 para. (4) of the new AHE, the senate may raise an objection – as regulated in the Act – to the members of the governing body delegated by the Minister of Education. Persons against whom the senate has raised a reasoned objection in writing may not be members of the governing body. However, the Minister of Education may delegate

another person to replace such a person, and the senate may not raise an objection to the new delegate. It is not clear whether the senate is considered to be in default on the basis of Section 115 para. (8) of the new AHE if it raises an objection, on the basis of Section 23 para. (4) of the new AHE, to the members of the governing body delegated by the Minister of Education, and thus the governing body cannot be set up immediately. In that case, higher education institutions may feel compelled to unconditionally accept the members of the governing body delegated by the Minister of Education (as maintainer), because they are under the threat of having their normative budgetary support suspended. Thus, Section 115 para. (8) of the new AHE makes the higher education institution helpless against the maintainer (the Minister of Education), as a decision to suspend the normative budgetary support of the higher education institution may result in the impossibility of the higher education institution's operation.

Furthermore, it is uncertain whether the senate is considered to be in default if in respect of the delegates of the senate the student council fails to make a proposal in line with Section 23 para. (4) of the new AHE, or the senate and the student council fail to reach an agreement on the person to be delegated on behalf of students. Thus, with regard to the students' delegate the senate may be held liable for default even if it is not in a position to eliminate such default. Consequently, due to the default beyond the control of yet formally attributable to the senate, the maintainer (the Minister of Education) may suspend the payment of normative budgetary support to the higher education institution.

4.3. Due to the maintainer's (the Minister of Education's) right of discretion in making decisions on the operation, reorganisation and closing down of higher education institutions, as well as on the suspension of normative budgetary support for higher education institutions, the existence, operation, organisation and economic management of higher education institutions depend on the maintainer (the Minister of Education). Such centralisation and concentration of the decision-making rights related to higher education institutions and the allocation of these rights to the maintainer (the Minister of Education) constitutes a takeover of the higher education institution's autonomy.

The existence of higher education institutions is a requirement based on Article 70/F of the Constitution, while their organisational, operational and financial independence results from their institutional autonomy stemming from Article 70/G of the Constitution. Thus the

autonomous operation of higher education institutions is guaranteed by Articles 70/F and 70/G of the Constitution. However, Section 37 para. (4), Section 115 para. (3) and Section 115 para. (8) of the new AHE provide the maintainer (the Minister of Education) with almost unlimited rights to close down a higher education institution and to take over the institution's autonomy, which is in itself contrary to Articles 70/F and 70/G of the Constitution. In addition, on the basis of the provisions under review, the maintainer (the Minister of Education) exercises discretion related to the existence, operation and organisation of higher education institutions. Higher education institutions thus become subordinated to and helpless against the maintainer (the Minister of Education). This results in the uncertainty of the higher education institutions' existence and operation rather than in the autonomous operation thereof. On account of the above, the rights of decision-making defined in Section 115 para. (3) of the new AHE and Section 37 para. (4) referred to therein, together with Section 115 para. (8), entail the violation of the fundamental rights referred to above.

The autonomy of higher education requires that – for the purpose of guaranteeing the independence and autonomy of higher education institutions – only Acts of Parliament and the Parliament decide on issues related to the existence (setting up and closing down) of higher education institutions. Furthermore, it is a requirement resulting from institutional autonomy that the rights of self-government be only exercised by the subjects of institutional autonomy. However, it is the maintainer (the Minister of Education) that is authorised by Section 115 para. (3) of the new AHE and the above-mentioned Section 37 para. (4), as well as Section 115 para. (8) to exercise rights of discretion that directly affect the autonomous operation of higher education institutions. Such a wide scale of authorisation results in the termination of institutional autonomy, i.e. the higher education institution's autonomy and independence.

In view of the above, the Constitutional Court has established the unconstitutionality of the maintainer's management rights specified in Section 115 paras (3) and (8) and Section 37 para. (4) of the new AHE. Thus, the maintainer may not be constitutionally authorised to exercise such rights. The maintainer (the Minister of Education) may not possess the rights of discretion – specified in Section 115 paras (3) and (8) and Section 37 para. (4) of the new AHE – in making decisions on the operation, reorganisation and closing down of higher education institutions as well as on the suspension of normative budgetary support for higher

education institutions. Accordingly, the Constitutional Court has not examined the relation between the reviewed provisions and Articles 57 para. (1) and 70/K of the Constitution.

5. In his petition, the President of the Republic also initiated the prior constitutional review of Section 151 para. (5) of the new AHE with reference to it violating the requirement of legal certainty resulting from the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution by determining the date of the end of the applicability of the AHE in force in an unclear manner.

According to Section 151 para. (3) item a) of the new AHE, the AHE in force shall be repealed as from 1 September 2006. At the same time, Section 151 para. (5) provides that the provisions of the AHE may only be applied from the date of the entry into force of the new AHE, i.e. from 1 September 2005, if the "introduction of the new AHE has not been commenced".

On the basis of the new AHE, it is not clear when the AHE in force and the new AHE, respectively, are applicable. Another question is whether the AHE may be applied even after its repeal if the new AHE has not been introduced. The application of a repealed statute after the date of repeal may in itself cause legal uncertainty. It is unclear when the application of the new AHE commences because the "introduction of the Act" – terminating the application of the AHE in force and commencing the application of the new AHE – cannot be precisely defined. This is an unclear concept opening up possibilities for subjective decisions during the application of the law, the formation of different practices at different authorities applying the law, and the lack of legal unity. As pointed out in a previous Decision of the Constitutional Court, this "diminishes legal certainty". (Decision 1160/B/1992 AB, ABH 1993, 607, 608)

It is a fundamental requirement resulting from the principle of the rule of law enshrined in Article 2 para. (1) of the Constitution that (the validity, force, applicability of) a norm be unambiguous and identifiable beyond doubt. "Legal certainty is an indispensable component of the rule of law. Legal certainty compels the State – and primarily the legislature – to ensure that the law in its entirety, in its individual parts and in its specific statutes, is clear and unambiguous and that its operation is ascertainable and predictable by the addressees of the norm." [Decision 9/1992 (I. 30.) AB, ABH 1992, 59, 65]

As pointed out by the Constitutional Court in a subsequent Decision, "A rule causing legal uncertainty by way of its uninterpretability may be declared unconstitutional as its effects cannot be foreseen and predicted by its addressees". [Decision 42/1997 (VII. 1.) AB, ABH 1997, 299, 301]

The applicability of the AHE in force as depending on the introduction of the new AHE causes uncertainty, because Section 151 para. (5) of the new AHE differentiates between the applicability and the repeal of the AHE in force, and it does not set a concrete final deadline for the applicability of the AHE in force even after the repeal thereof.

In view of the above, Section 151 para. (5) of the new AHE violates the principle of legal certainty, thus being contrary to the requirement of the rule of law guaranteed under Article 2 para. (1) of the Constitution.

Based on the above, the Constitutional Court has established – acting in accordance with Section 35 paras (1) and (2) of the ACC – the unconstitutionality of Section 25 para. (1), Section 25 para. (2) item fg), Section 32 para. (11) item c), Section 37 para. (4), Section 115 paras (3) and (8), Section 151 para. (5) and Section 153 para. (1) item 5 of the new AHE.

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

Budapest, 25 October 2005

Dr. András Holló
President of the Constitutional Court

Dr. István Bagi
Judge of the Constitutional Court

Dr. Mihály Bihari
Judge of the Constitutional Court, Rapporteur

Dr. András Bragyova
Judge of the Constitutional Court

Dr. Árpád Erdei
Judge of the Constitutional Court

Dr. Attila Harmathy
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. István Kukorelli
Judge of the Constitutional Court

Dr. Éva Tersztyánszky-Vasadi
Judge of the Constitutional Court

Concurring reasoning by Dr. Péter Kovács, Judge of the Constitutional Court

I agree with all points in the holdings of the Constitutional Court's Decision.

However, with regard to the reasoning related to the holdings of the Decision, in my opinion, the Constitutional Court should have specifically dealt with the aspects of international law related to the autonomy of higher education. It would have been justified to do so because the Magna Charta of European Universities is referred to in the argumentation of the Decision as an important point of reference, and the contents of the Magna Charta are compared to the relevant provisions of the Act on Higher Education, with contradictions being identified between the Act and the Magna Charta. However, the Magna Charta Universitatum is not a document of international law, as it was adopted by rectors of European universities rather than states.

Therefore, the Constitutional Court should have substantiated the application of Magna Charta Universitatum. Accordingly, it should have referred to the fact that the states (including Hungary) have issued documents of "*factum concludens*" to declare the acknowledgement of the document. The European Ministers of Education expressed the acknowledgement of the principles of the Magna Charta at their meetings in Bologna (19 June 1999), Prague (19 May 2001) and Berlin (19 September 2003). (Paragraph 16 of the Bologna Declaration specifically refers to the autonomy of universities. The Berlin Declaration deals with autonomy in two subpoints: i. quality assurance and ii. higher education institutions and students, and in the latter "the ministers acknowledge that it is necessary to grant a right for the institutions to make decisions on their organisation and internal administration.") The

communications and joint declarations of the Ministers' meetings do not make this document binding under international law, as the Ministers intentionally concluded a document other than an international treaty, however, these declarations represent the "acknowledgement" of the document as applicable.

Even in the absence of an international treaty providing for the autonomy of universities as a clear obligation, there are several relevant documents under international law. These include the recommendations adopted by international organisations, especially the ones explaining and interpreting the short references made in international treaties signed by Hungary as well. Such recommendations can be taken into account when examining the harmony between international law and domestic law. Obligations of Hungary under international law must be applied by both those applying the law in Hungary and the Constitutional Court, regardless of the weight of the matter in question, while decisions qualified as recommendations may be taken into account, and the resulting consequences are to be established by those applying the law. Under the applicable rules of international law, this means that it is not mandatory to apply such recommendations, but their application is not unlawful. As the Constitutional Court may only interpret international treaties in conformity with international law, special attention is to be paid to international documents containing interpretations by bodies authorised by the states parties to that effect.

References to the following documents would have supported the arguments and reinforced the positivist foundations of the Constitutional Court's Decision:

According to Article 17 of the Recommendation of 1997 of the United Nation's Educational, Scientific and Cultural Organisation (UNESCO) concerning the Status of Higher-Education Teaching Personnel, "autonomy is that degree of self-governance necessary for effective decision making by institutions of higher education". As stated in Article 18, "autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions." Pursuant to Article 21, "self-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education."

The International Covenant on Economic, Social and Cultural Rights was adopted in 1966 in the framework of the UN, and Hungary is a state party thereto. Here, the performance of the obligations undertaken in the Covenant is supervised by a monitoring committee, namely the Committee of Economic, Social and Cultural Rights. This body issued, on 8 December 1999, General Comment 13 on the right to education (Article 13 of the Covenant on Economic, Social and Cultural Rights; General Comment E/C.12/1999/10). According to Article 39 of the General Comment, "academic freedom includes the liberty (…) to participate in professional or representative academic bodies", and Article 40 provides that "the enjoyment of academic freedom requires the autonomy of institutions of higher education". Repeating the provisions of the UNESCO Recommendation referred to above, it points out that "given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible."

Recommendation 2002/6 (Appendix 3/i/a) of the Council of Europe's Committee of Ministers on lifelong higher education policy refers to the autonomy of higher education institutions, and the preamble of Convention 165 of the Council of Europe on the Recognition of Qualifications concerning Higher Education in the European Region (Lisbon Agreement) – to which Hungary is a state party – states that the autonomy of higher education is to be interpreted not only as the autonomy of teaching, but also as "institutional autonomy".

The above facts support the statement that in the relations between the states under international law higher education autonomy means more than the freedom of teaching and research. By referring to these documents, the Constitutional Court could have made it clear that the present Decision is built not only on its own previous Decisions, but the practice that has been developed is at the same time consistent with Hungary's obligations under international law, i.e. the harmonisation required by Article 7 of the Constitution is realised.

In my opinion, the Constitutional Court should examine conformity with international law *ex officio* – possibly even if the petition in question does not refer thereto – in each case where there is a *prima facie* connection between the statute under review and Hungary's international obligations.

Budapest, 25 October 2005

Dr. Péter Kovács
Judge of the Constitutional Court

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

I agree with the majority of the holdings of the majority Decision. However, I do not agree with the establishment of the unconstitutionality of Section 32 para. (11) item c), Section 37 para. (4) item c) and Section 115 para. (3) of the new AHE.

In the examination of the constitutional concerns raised in the petitions, I also consider it necessary to take stock of the substantial elements of self-government (autonomy) and to examine the (possible) limits of State interference in relation to them.

I agree with starting out from the foundations of principle, by defining the relevant requirements to be used during the examination of the individual constitutional concerns raised in the petition.
However, prior to that, I wish to mention three circumstances underlying the differences of approach between the majority Decision and my own views.

I

Fundamental points of principle

1. I agree with the distinction between territorial self-governments and institutional self-governments (autonomies). At the same time, I consider that there are requirements applicable to all types of self-governments (for example, certain issues related to organisation and financing). With regard to those issues, no significant differentiation can be made. In their case (i.e. in respect of the fundamental guarantees of autonomies), essential similarities must exist. Consequently, there is a cause and reason behind the comparison – at the most general level – of local governments and autonomous institutional organisations (here: higher education institutions). This is what we find in the majority Decision, too.

There is a separate chapter in the Constitution on (local) self-governments, which includes several significant guaranteeing rules. The Constitutional Court has "pardoned" the statutory violation of these provisions on several occasions, emphasising the constitutionality of State interference. [It was established through grammatical interpretation that if the Act on Local Governments (hereinafter: "ALG") mentions "vice-president" as an official of county government, then the county government may only elect one vice-president; furthermore, when determining the obligatory tasks of the local government, the State does not have to secure the "financial means proportionate with the performance of the task" (as provided for in the Constitution), it is sufficient to ensure the existence of the "complex system" of providing funds. The Constitutional Court established and consistently applied the standard of the "emptying" of the rights of self-government, i.e. "their becoming impossible to exercise".]

However, in respect of higher education institutions, I see a different standard in the majority Decision. It seems to me that in this case much more "protection" can be derived from two Articles of the Constitution (Articles 70/F and 70/G) than from a whole chapter in the other case: as if the mere "touching" of universities and colleges were unconstitutional. (For example, the maintainer may not even call upon the institutions to perform their statutory duties.)

The cause, as I see, is that the previous Decisions of the Constitutional Court related to higher education have actually strived to provide complete independence for these institutions. Therefore, I consider that the time has come for the Constitutional Court to review its Decisions (at least the early ones) from this point of view, and to "step over" those Decisions and follow new directions where necessary. The Constitutional Court does not share this opinion of mine, which is the cause of the first difference of approach.

2. The second difference of approach manifests itself in the interpretation of the petitions. The draft Decision is strictly based on the principle of adherence to the petition, however, I consider – on the basis of the Constitutional Court's general duty to protect the Constitution – that in certain cases, adherence to the petition may be interpreted in the broad sense if the provisions concerned are closely interrelated in terms of content.

The broad interpretation of adherence to the petition has been part of the Constitutional Court's practice from the very beginning of its operation. Such cases have mainly included

ones where on the basis of "close connections in terms of content and logic" the Constitutional Court decided on the constitutionality of statutes not challenged by the relevant petitions. [Decision 3/1992 (I. 23.) AB, ABH 1992, 329, 330; Decision 29/1993 (V. 4.) AB, ABH 1993, 227, 229; Decision 34/1992 (VI. 1.) AB, ABH 1992, 192, 193; Decision 34/1994 (VI. 24.) AB, ABH 1994, 175, 180; Decision 4/1998 (III. 1.) AB, ABH 1998, 72; Decision 16/1998 (V. 8.) AB, ABH 1998, 153] The above Decisions show a diverse picture: for example, it has happened that the Constitutional Court annulled a statutory provision not unconstitutional in itself, on the basis of close connections in terms of content. [Decision 797/B/1995 AB, ABH 1995, 812, 813] It has also happened that the Constitutional Court rejected the petition but established the unconstitutionality of and annulled another statutory provision not challenged in the petition. [Decision 14/1990 (VI. 27.) AB; Decision 29/1995 (V. 25.) AB] In another case, the constitutional review was extended – on the basis of close connections – to another provision serving the purpose of implementing the provision challenged by the petitioner. [Decision 31/1995 (V. 25.) AB, ABH 1995, 159]

In my opinion as well, striving for "the comprehensive examination of the constitutional problem" concerned and the Constitutional Court's role therein (i.e. the broad interpretation of the petition within the cited limits) are in accordance with the Constitutional Court's public law functions vested with and fulfilled by it in the protection of the Hungarian Constitution. As the "supreme organ of protecting the Constitution" [pursuant to the preamble of Act XXXII of 1989 on the Constitutional Court (hereinafter: "ACC")], the Constitutional Court is engaged in the objective protection of the Constitution, in respect of which it has the right to interpret petitions in a broad sense. In this regard – in the absence of an explicitly prohibiting rule in the ACC – it may "shift" – with reference to close connections – between its competences granted in the ACC in order to ensure the complete protection of the Constitution, with due account to the relevant provisions of the ACC. This was done in Decision 48/1993 (VII. 2.) AB, where – albeit with reference to the lack of another statute – the Constitutional Court established *ex officio* an unconstitutional omission of legislative duty in addition to deciding on the petition of the President of the Republic seeking a prior constitutional examination. [In respect of Section 14 para. (2) of Act II of 1986 on the Press. See: ABH 1993, 314, 319] Moreover: the same Decision defined a constitutional requirement on the manner of applying Section 24 of the Act adopted but not yet promulgated. (ABH 1993, 314, 318)

Thus, the Constitutional Court has not used the competences vested with it in the ACC rigorously, sometimes freely "shifting" between them with reference to close connections, on the basis of the rules of the ACC pertaining to the specific competences. [It has also merged petitions seeking prior and posterior constitutional examinations. (Decision 66/1997 (XII. 29.) AB, ABH 1997, 398)]

Undoubtedly, in recent years, the Constitutional Court has deviated from its former practice, strictly applying the principle of adherence to the petition, particularly in the case of prior constitutional examination. As I have already mentioned, I do not completely agree with that, and this is the basis of the second difference of approach between the majority Decision and my views concerning the present case.

3. As according to Section 23 para. (1) of the new AHE, "state" higher education institutions must set up governing bodies, the Constitutional Court, when answering the petition, did not have to directly take into account universities maintained by churches, private entities or foundations. (In the case of which the setting up of a governing body is only an option.) 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. This element is the third cause of the differences of approach between the majority Decision and my views.
After this introduction, my position presented hereunder.

II

The pillars of autonomies (self-governments)

In my opinion, in order for any organisation to be considered as an autonomous organisation (with special attention to the case under review), the following must be guaranteed by an Act of Parliament:

1. It must have an independent legal personality.
This means that the organisation must be able to enter into legal relations independently, it must have rights guaranteed in an Act of Parliament, and it must be free to undertake obligations. (To this end, it needs to possess own property mentioned in point 4.)

2. It must have its own competences and be able to exercise such competences independently (but under legality control), and the prohibition of competence takeover must be applicable.
More specifically: an Act of Parliament must guarantee that no organ may take over the competences vested with the organisation by an Act of Parliament (prohibition of the positive takeover of competence), and the organisation must be able to make decisions (and must be "protected" in doing so) within the competences remaining at its disposal (prohibition of the negative takeover of competence).

3. It must be able to (independently) establish its own organisation and rules of operation within the framework established by an Act of Parliament. It must be able to make decisions in relation to its own staff.
Autonomy (territorial and/or institutional rights of self-government) is established and restricted in an Act of Parliament. The only limitation in this respect is that the Act of Parliament may not violate the provisions of the Constitution.
However, in my view, emphasising the priority of regulation in an Act of Parliament does (and may) not exclude the possibility of ensuring autonomy through a decree clearly connected to an Act of Parliament. In this regard, the determining factor is the accuracy and quality of allocating competences.

4. It must have economic independence and own property.
More specifically, it must have funds that it can use freely and on the allocation of which it can decide independently, without any State interference or influence. All this requires that its own independent revenues be sizeable. Organisations financed exclusively or excessively from the State budget only have an "illusion of autonomy", or at least they are required to

fulfil the expectations of the financing party (as well). When using the money of someone else, there is no unrestrictable autonomy, or if there is, it can only be an illusory one. In such a model, it is certainly up to the financing party to define the fields and extent of autonomy and to draw the limits of interference. Such limits may be fixed (through self-restraint) by the financing party itself (e.g. by guaranteeing the independence of the institution or organisation maintained by it in the Constitution or in some other Act of Parliament).

5. It must be entitled to adopt its own (internal) rules.
In addition to determining the organisation and the rules of operation mentioned in point 3, such regulation may include the determination – within the legal framework – of the conduct, rights and obligations of those belonging to the organisation (institution).

III

The autonomy of higher education institutions (in the light of the above)

1. Legal personality is granted to higher education institutions by the new AHE, too. Thus, in this respect, their operation as self-governments (autonomous organisations) is guaranteed.

2. When examining the prohibition of competence takeover, it is indispensable to take into account Articles 70/F and 70/G of the Constitution. They are as follows:
"Article 70/F para. (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 ability, and furthermore through financial support for students."
Article 70/G para. (1) "The Republic of Hungary shall respect and support the freedom of scientific and artistic expression, 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."
The constitutional provision referred to above obliges the legislator to take into account these requirements during regulation.

The legislator can fulfil this expectation if:
a) it regulates the relations of higher education institutions on as few levels as possible (focusing on regulation in Acts of Parliament, although – as emphasised above – not only regulation in Acts of Parliament can guarantee autonomy. Actually, it does not depend on the level of regulation, but rather on the allocation of competences and on the development of a system of guarantees, which, naturally, must be based on an Act of Parliament or a strict provision thereof;).
b) the enforcement of the provisions of Article 70/G of the Constitution is not restricted on any regulatory level (Parliament, Government, Minister). More specifically: the essential content (core) of Article 70/G of the Constitution may not be violated by provisions on any regulatory level. This means that the legal provisions allocating competences must – in the course of determining tasks and competences – provide a real possibility for the institutions to perform their constitutional tasks, including the enforcement of the right enshrined in Article 70/F para. (2) of the Constitution.

Conclusion: the manner of allocating the rights (of delivering opinions, making proposals, consultation) specified in Article 70/G of the Constitution during regulation is important. If, in this respect, the institution has an actual right of participation, then State interference (whether in the form of a decision or only a right of contribution) is permissible, or at least it cannot be challenged on constitutional grounds.

3. Regardless of the existence of explicit regulation to that effect in the case of higher education institutions, they may only develop their organisation and rules of operation within the framework specified by an Act of Parliament. Specifically:
a) Pursuant to Article 70/G of the Constitution, the right to form an organisation is an essential and fundamental precondition to the operation of a higher education institution. As a result, this is a matter of essential "autonomy", and as such – in Hungary – it must generally be regulated in an Act of Parliament. (This also applies to the establishment, reorganisation and closing down of a specific organisation.) As an expectation present through several decades, it is also implied in the above requirement that an organisation set up by the legislator may only be reorganised or closed down by the legislator. However, it is important to note that if the legislator has clearly and unambiguously determined the criteria and cases of reorganisation and closing down, a specific decision (by the "maintainer", based on the

authorisation of the founder) to that effect is not necessarily unconstitutional. In such cases, the "maintainer" acts on behalf of the State, on the basis of an authorisation given by it in an Act of Parliament, applying the criteria precisely specified by the State (as founder). Accordingly, the separation of founder's and maintainer's rights (including the rights of reorganisation and closing down) – in such cases – cannot always be considered unconstitutional. (The new AHE indeed applies this solution.) In this case, the closing down of an institution is the enforcement of the founder's will rather than a decision based on the free discretion of the maintainer. Emphasising it again: founder's and maintainer's rights may only be separated (e.g. in the case of closing down) – such separation being tolerated as constitutional – if they (for example, the maintainer's decision on closing down) can be clearly and unambiguously traced back to the founder's (the Parliament's) will. (Therefore, I stress that if a higher education institution in Hungary were set up, reorganised or closed down by an entity other than the Parliament, it could still possess autonomy. Several examples from abroad show that such rights are exercised, for example, by the Government.)

The majority Decision does not acknowledge the constitutionality of regulation in a decree restricting autonomy. I consider this approach to be contrary to the content of Decision 870/B/ 1997 of the Constitutional Court. That Decision is clear-cut in this question: "... institutional autonomy is not unlimited, it may be (and is) restricted in an Act of Parliament or other statute issued upon the authorisation of an Act of Parliament on the basis of a public interest, for example, the standardisation of higher education or the provision of the basic requirements of the training upon which the diploma is to be issued." (ABH 1999, 611, 613)

With reference to public interest, the founder is free to set up and close down higher education institutions. However, the maintainer does not have the same – undefined – right to close down an institution. (Once again: it may only do so in specific cases listed, acting in the name and on behalf of the State, and upon authorisation by the State in an Act of Parliament.) At the same time, in the course of forming the organisation (reorganisation) of the institutions set up (founded on the basis of its free discretion) by the State as founder, the State is bound to act in compliance with the Constitution, because no reorganisation under an Act of Parliament may violate the provisions of Articles 70/F and 70/G of the Constitution. Actually, in the present situation, the State (as founder) is free to act in respect of the rights with serious consequences (setting up, closing down), while the less important rights (reorganisation, forming the organisation) may be restricted. (Based on Articles 70/F and 70/G of the Constitution.)

Thus, the legislator is entitled to define the basic elements of the internal structure of higher education institutions, consequently, interference by the State in that respect does not qualify as a violation of institutional autonomy. (Decision 870/B/1997 AB, ABH 1999, 611, 613)
b) The Government's and the Minister's competences concerning higher education institutions also constitute an issue related to the organisational autonomy (and rules of operation) of higher education institutions.

Pursuant to the Constitution:
"Article 35 para. (1) The Government shall

f) define State responsibilities in the development of science and culture, and ensure the necessary conditions for the implementation thereof."

"Article 37 para. (2) The Ministers shall head the branches of public administration falling within their respective portfolios and direct the public authorities they are responsible for in accordance with the law and Government resolutions …"

Both the Government and the Minister may only exercise their competences referred to above without violating the institutional autonomy resulting from Article 70/G of the Constitution.
However, the cited constitutional provisions also impose obligations on both the Government and the Minister, and they must comply with those obligations.
Accordingly, any failure of the Government or the Minister to perform such obligations qualifies as a violation of the Constitution.

The Government defines State responsibilities in the development of science and it must ensure the necessary conditions for the implementation thereof. Its acts thus remain constitutional as long as the exercise of its competence does not violate the provision under Article 70/G of the Constitution. However, the Government must exercise its constitutional rights within the above framework and limits. Furthermore, it must also take into account the provision in Article 70/F of the Constitution. ["Article 70/F para. (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 ability, and furthermore through financial support for students."]

The Minister can only head the branch of public administration falling within his respective portfolio and direct the "public authorities he is responsible for" [Article 37 para. (2) of the Constitution] if he possesses the tools necessary therefor. In respect of higher education institutions, the Minister is only restricted in the full-scale exercise of his constitutional powers by Article 70/G of the Constitution. This constitutional provision vests a significant role with the legislator with regard to the creation of the system of guarantees of autonomy. (See, however, the notes written under point a) above.)

4. Economic independence is an essential element of institutional autonomy.

It is important to emphasise that the universities and colleges concerned by the petition are state universities and colleges, where the "State" as founder, maintainer and financing party may have competences to change and form the organisation and rules of operation of the higher education institutions. (If it were not so, the State would only be an organisation ensuring the economic management of the institution as "guarantor".)

Consequently:

a) The State has a right and obligation to strive for securing the "operability" of higher education institutions. For this purpose, it is not unconstitutional in itself if the State sets up a new organisation which seems more efficient than the existing one. (In the case concerned, the governing body is such an organisation.) It must, however, place the new organisation in the system of the (managing) organs of higher education without violating the provisions under Articles 70/F and 70/G of the Constitution. (To note in brackets: in fact, the "governing" body has powers of "leadership" rather than "government".)

It appears to me that the majority Decision regards the mere existence of the governing body as unconstitutional.

Thus, it follows from the above that the State may draw conclusions concerning organisation (even in the form of setting up new types of organisations) on the basis of the fact that currently the management of Hungarian higher education is mostly performed by laymen who have no managerial skills and act on the basis of collegiality. (This has not been, and cannot be, changed through the introduction of the existing Social Councils, chief financial officers and university chancellors.)

With regard to such an organisational reform, I do not consider it significant that the members of the given new organisation (here: the governing body) are not employed by the institution

and they are not required to have appropriate qualification. (In this respect, I share the opinion of the German Education and Science Trade Union, according to which "no objections can be raised to the lack of regulation of certain criteria of qualification regarding the members of the higher education councils of the states. The legitimacy of the members is properly guaranteed by the process of appointment." (*Mutatis mutandis*, the situation is similar to that of the provisions contained in the new AHE, where the majority of the members of the governing body are elected by the institutions.)

In Decision 1/BvR 911/00, dated 26/10/2004 of the German Constitutional Court, these institutions are positioned correctly: "In order to ensure the scientific appropriateness of the decisions related to the organisation of higher education institutions, the participation of scientists is necessary; such participation does not necessarily have to take the form of traditional self-government. Organisations external to higher education institutions may also contribute to the restriction of State government for the purpose of protecting the freedom of science, and to counteracting the "danger of fixing" *status quo* interests in a clear "model of self-government". As pointed out in this regard, "The legislator is not bound either to the existing structures of higher education or to specific elements thereof. It is not only entitled to develop and test new models and techniques of management (cf. BVerf.GE 47, 37<404>: science management), but it has an outright obligation to use a critical approach concerning the existing organisational forms with a view to developing them. (cf. BVerf.GE 35, 79 <117> resolution of the Constitutional Court)"

The constitutionality or unconstitutionality of a new organisation does not depend on its mere existence, but on whether its assigned competences result in the impossibility of the fulfilment of the constitutionally protected roles of the institutional bodies. This question can only be answered by examining the provisions challenged in the petition one by one.

b) The State, as maintainer and financing party, may even make "orders" to higher education institutions. Thus it is not unconstitutional if, for example, the State temporarily prefers applied research and finances basic research to a lesser extent. The State has the right and possibility to establish such a system of support, which does not, in itself, violate the freedom of science.

c) The State may also support research specifically related to the performance of its duties of public interest. If it were not so, with reference to the freedom of science, the State would even be obliged to support hobby-like research till the end of time.

d) The State may also define the basic rules of training. As maintainer, it may even differentiate (as regulated in an Act of Parliament) by supporting (or even preferring) certain trainings and leaving others within the free discretion of the institutions, including their financing by the institutions. The maintainer's exercise of such competence does not violate Article 70/F of the Constitution, on the contrary, it is an obligation resulting therefrom. In higher education institutions the freedom of scientific research and the freedom of learning and teaching on the one hand, and citizens' right to education and the conditions for the enforcement thereof on the other hand must be ensured at the same time. According to Article 70/F para. (2) of the Constitution, participation in higher education must be made available to all persons on the basis of their abilities. This entails the State's obligation to operate a system of higher education institutions complying with Article 70/F para. (2) of the Constitution (securing its financial etc. conditions), and at the same time – as a result – the State may determine the rules of operation of higher education institutions. In this context, higher education institutions do not have complete autonomy, as in this respect the State may interfere – to the extent and in the manner necessary for the enforcement of the right to education – with the structure, organisation and rules of operation of higher education institutions, as well as with the structure of training.

IV

Answers to the petition

On the basis of the above, the following statements can be made:

1. I also consider the provision under Section 25 para. (1) of the new AHE to be unconstitutional.
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.)

2. In my opinion, Section 25 para. (2) item fg) of the new AHE is also unconstitutional, because it provides that the governing body makes exclusive and "sovereign" decisions on matters belonging to the "core" of institutional autonomy in terms of essence and content, namely the right to reorganise and close down organisational units.
I emphasise that participation (delivering opinions, putting forward proposals) in making such decisions (possibly by a "governing body") would not qualify as unconstitutional, since the State is even entitled to set up a new organisation for the purpose of securing "operability". Again, the problem lies in the competence of the organisation rather than its existence.
At the same time, it should be noted that Section 25 para. (3) must also be included in the examination. The entire paragraph is unconstitutional as it clearly shows that the governing body practically takes over the competence of the senate in relation to an issue fundamentally belonging to the autonomy of higher education. The same applies to Section 20 para. (1). Although not challenged in the petition, it must also be taken into account. This is the point where the issue of adherence to the petition, detailed in point I/2, emerges. With reference to the principle of adherence to the petition, the Decision does not examine Section 20 para. (1) and Section 25 para. (3) of the new AHE. As a consequence, despite the Constitutional Court establishing the unconstitutionality of the provision under Section 25 para. (2) item fg) of the new AHE, provisions like "The governing body of the higher education institution shall be in charge of making strategic decisions and monitoring the implementation thereof" remain in force as "constitutional". [Section 20 para. (1)] Furthermore: "The organisational structure of the higher education institution shall be defined (sic!) by the governing body. The governing body shall obtain the opinion of the senate before making a decision. The senate may deliver its opinion within thirty days after being requested by the governing body. The deadline is a forfeit one. Based on the decision of the governing body (sic!), the senate shall determine the rules of operation of the higher education institution in the Statutes." [Section 25 para. (3)] In the light of the above, was there any sense in the Constitutional Court's annulling Section 25 para. (2)? Not much, in my opinion.

3. At the same time, I do not claim the complete unconstitutionality of Section 32 para. (11) item c) of the new AHE, according to which the Government determines the conditions of obtaining a Ph.D. degree and the rules of procedure of establishing a doctoral school.
By establishing the unconstitutionality of this provision, the Government is deprived of the possibility of fulfilling its duty specified in Article 35 para. (1) of the Constitution. Thus, I deem this provision to be in line with the constitutional role of the Government. (From another point of view: if we deprive the Government of this competence as well, what tools remain at its disposal for the fulfilment of its duty defined in Article 35 para. (1) item f) of the Constitution? Why is this competence considered to be out of the Government's constitutional duty to "define State responsibilities in the development of science (...), and ensure the necessary conditions for the implementation thereof"?)
I agree that the provision "The Government defines the branches of science – within the various fields of science – where Ph.D. training may be performed" can be evaluated differently. In this respect, it is indeed the Parliament that must be granted a right of substantial contribution, but it is not necessary that the Parliament exercise this right in the form of an Act of Parliament.

4. The majority Decision annuls Section 37 para. (4) of the new AHE. In my view, not all items of the paragraph are unconstitutional.

Let me note first: the text "– in addition to the cases specified under paragraph (1) –" included in the first sentence of Section 37 para. (4) refers to the fact that the maintainer shall (may) "close down" the higher education institution in the cases mentioned in paragraph (1), too. Here, however, "deletion" is mixed with "closing down". In my view, Section 37 para (1) does not deal with closing down by the maintainer, but Section 37 para. (2) indeed does so. (However, this remains hidden due to the narrow interpretation of the petition.)
Upon the differentiated examination of the provisions found in the items of Section 37 para. (4), I have drawn the following conclusions:
a) Section 37 para. (4) item a): here, the establishment of unconstitutionality could be based on the unclear (unelaborated) nature of the regulation (more precisely: that of the terminology). In the case defined in item a), the maintainer has the right to close down the higher education institution itself, and not, for example, the organisational units hosting majors poorly performing in respect of admission for years. The latter – in my opinion – would not be unconstitutional.

b) Section 37 para. (4) item b): in this case weighing is necessary, which is the right of the founder, based on the maintainer's proposal supported by facts. Therefore, I consider that closing down – by the maintainer – for this reason is unconstitutional. (If it were not so, the maintainer would be free to decide on closing down, which is an essential component of higher education autonomy.

c) Section 37 para. (4) item c): it is only an illusion that the legislator uses undefined terms ("requirement of reasonable and economical management"). Indeed, its content is well-defined in the Act: "as a consequence, it has overrun its budget, and the amount of its overdue liabilities of more than 60 days has reached 20% of its yearly budget during more than a budgetary year." Thus, the definition is quite clear: the legislator itself explains what the requirement of reasonable and economical management means in the given case. Here I also regard the criteria as clear-cut, therefore – in my opinion – this provision may not be declared unconstitutional. (To note: the application of annulment on the basis of unclear legal concepts would require the annulment of dozens of other statutes for the same reason. Certain criteria have been elaborated in the practice in respect of the content and components of the above, used for example by the State Audit Office.) As in the present case the legislator specifies the content of the concept, I do not see the justification of stating in the majority Decision that "the content of reasonable and economical management is practically unidentifiable." On the contrary: in the case concerned, the decision-maker has no right of free discretion, and its procedure is strictly based on facts: the overrunning of the budget and the fact that the amount of the institution's overdue liabilities of more than 60 days has reached 20% of its yearly budget during more than a budgetary year. However, it is important to point out that such an amount of debts must not be caused by the fault of the institution itself, i.e. it must not be caused – for example – by a centrally ordered integration, where the indebtedness of a higher education institution has resulted from forced integration. (For example, if it has had to take over the debts of another faculty of the university.) This situation is thus out of the category of cases examined, it is rather an issue of damage caused by legislation or the maintainer's decision.

d) I deem Section 37 para. (4) item d) to be unconstitutional because the current text suggests that the maintainer may also establish higher education institutions. ["The maintainer may close down the higher education institution – in addition to the cases specified under

paragraph (1) – in the following cases: …d) if it establishes one or more new higher education institutions to replace the existing higher education institution."] Thus this provision is unconstitutional for the above reason.

e) Section 37 para. (4) item e) is also unconstitutional. Here again, closing down performed by the maintainer on the basis of his free discretion is incompatible with the interest and value to be protected (higher education autonomy). The lack of "conditions necessary for continuous operation" should be verified by the maintainer in his proposal based on facts, but the decision should only be made by the founder.

To sum up, I do not regard the provision under Section 37 para. (4) item c) referred to in Section 115 para. (3) as unconstitutional. Examining the entire Section 37 para. (4), I agree with the establishment of the unconstitutionality of items a), b), d) and e). [However, I note that the majority Decision covers the above items. In my opinion, on the basis of a strong connection in terms of content and logic, the same should have been done in the case of Section 20 para. (1), Section 25 para. (3) and Section 37 para. (2).]

5. I do not claim the unconstitutionality of the first sentence in Section 115 para. (3) of the new AHE, either. Is it reasonable that the maintainer is not even entitled to make a simple "call" despite being responsible for the debts of the institution? There are two reasons for authorising the maintainer to make a "call": the first possibility is that the action plan solves the problems. In that case it is clear that no further action is needed. The second possibility is that the problems remain unsolved (e.g. the action plan is not suitable for solving the problem): then such "call" provides a basis for the necessary measures of the founder.

In my opinion, the second sentence in Section 115 para. (3) in itself should not have been declared unconstitutional, either. If we consider (as I do) the maintainer's scope of action to be exactly defined in Section 37 para. (4) item c) of the new AHE, then the second sentence built on the first one can be regarded as self-restraint exercised by the legislator, as the founder authorises the maintainer to implement the consequences mentioned there (continuing operation, reorganisation, closing down etc.). Article 35 para. (1) item f) and Article 37 para. (2) of the Constitution constitute the basis of accepting such an authorisation. Let me emphasise in particular: the Ministers' constitutional rights of management – not colliding with Article 70/G of the Constitution – apply in the case of higher education institutions as well, as the latter have not been defined by the legislator as exceptions. (The term "in itself" refers to the possibility of establishing unconstitutionality for another reason.)

[After establishing the unconstitutionality of Section 37 para. (4) item a) of the new AHE, it is evident that the constitutionality or unconstitutionality of the second sentence in Section 115 para. (3) cannot be raised in that regard.]
As the provision under Section 37 para. (4) is not unconstitutional in accordance with the arguments in point 4, the second sentence in Section 115 para. (3) cannot be held unconstitutional in relation to it.

6. However, I agree with the establishment of the unconstitutionality of the provision under Section 115 para. (8) of the new AHE, because the "level of exercising competence" (ministerial level) is low in comparison with the nature and content of the task (i.e. its relation with Article 70/G of the Constitution). This discretionary right of the Minister of Education – practically lacking any specific criteria – (he "may suspend the payment of normative budgetary support") could actually result in the impossibility of the operation of higher education institutions.

7. According to the petition, Section 115 para. (3) and Section 115 para. (8) of the new AHE are contrary to Article 57 para. (1), Article 70/G and Article 70/K of the Constitution also because higher education institutions are not granted a right to turn to court in relation to the decisions of the Minister of Education as maintainer.
Allowing to turn to court against the maintainer's decisions is foreign to the legal system of Hungary, i.e. it would be an unprecedented possibility. It would also be unprecedented in the practice of the Constitutional Court to apply in this respect – as proposed in the petition – the test of "absolute necessity" and "proportionality". In my view, it is possible even today for the institutions to turn to the Constitutional Court (as "Anyone") against such maintainer's decisions based on a statute.

8. I consider that Section 151 para. (5) of the new AHE is only unconstitutional if we apply a strict standard.

9. Section 153 para. (2) of the new AHE is unconstitutional. (My reasons are the same as the ones contained in the draft Decision.)

Budapest, 25 October 2005 Dr. László Kiss
Judge of the Constitutional Court