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The 'Autonomy Concept': The Constitutional Protection of Public Organs**

Abstract

It is a widely accepted constitutional legal axiom that public organs and state entities do not have fundamental rights. The state is the obligor in a fundamental right relationship; the function of fundamental rights is to set boundaries to potential state interference. But what happens in the case of the autonomous public organs within the public administration system? How could their freedom of research and education be exercised, if the state universities cannot be protected from the central state administration? How do we protect local governments' fundamental right to property from the central government itself? These questions raise intense political debates, although the constitutional legal practice might already have a solution for them, which I aim to present briefly in this article. I will summarise the role of the so-called *autonomy concept* in the practice of the constitutional protection of state entities.

Keywords: constitutional legal personality, constitutional petition, public organ, municipality, autonomy

I Introduction – Doubting an Axiom?

It is a widely accepted constitutional legal axiom that public organs and state entities do not have fundamental rights. The state is the obligor in a fundamental right relationship; the function of fundamental rights is to set boundaries to state interference. Despite this axiom, several potential answers exist to the question of whether it is possible for a state entity or public organ to enjoy constitutional protection. The first optional approach is to prohibit the right of state bodies to fundamental rights protection categorically, i.e. not to accept,

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in any case, that an entity linked to the state should be constitutionally protected. There is no exception according to this approach: if at the beginning of a procedure it is established that the petitioner is linked to the state (part of the state administration, or an independent entity but owned or controlled by the state), the procedure for the protection of fundamental rights cannot be pursued. This is the approach taken, *inter alia*, by the European Court of Human Rights (hereinafter: 'ECtHR'). According to the Strasbourg body, the Convention does not protect public bodies, not only to avoid having the same plaintiff as the defendant *(state 'X' vs state 'X')*, but also because the aim is to protect the individual against the state, and thus public bodies are excluded from protection *per definitionem*.

Another possible approach, which is the extreme opposite of the above explained interpretation of the ECtHR, is to go beyond the generally accepted view of the function of fundamental rights as a means of ensuring protection against state interference, by giving primary importance not to whether the body seeking protection of a fundamental right is a private or a public entity, but to other factors. For example, we might distinguish by whether the body in question acted as a private law subject (e.g. as a contracting party) or exercised public authority in the case before the court. In the most extreme interpretation, it is also possible that we do not attach any importance to the *public* character at all, and that we assess the defence of public bodies against each other as a *fundamental rights violation* rather than as a mere jurisdictional dispute. According to this interpretation, even the government itself may successfully bring a constitutional complaint alleging a violation of its own fundamental rights.[1]

Both conflicting responses may be open to criticism. While the former certainly has the advantage of being consistent and clear, it is easy to imagine cases where its application may prove inappropriate. For example, freedom of research and education requires the maintenance of an independent, autonomous system of institutes of higher education, of which university autonomy is one of the pillars. When university autonomy is violated – by the central administration –, the fundamental rights of natural persons are violated. It is therefore necessary to recognise the specific nature of such cases and to treat them as exceptions where appropriate. While the rights of self-governments and their constitutionally declared autonomy is also wildly recognised, their protection might however face challenges, since the ECtHR consistently refuses to accept the applications of local governments/municipalities on the basis that they are included in the definition of 'governmental organisations', and therefore are not able to apply for protection.[2]

As compared to this, there are a number of objections to the latter, extreme approach. The distinction between private and public institutions cannot be denied, just as the

[1] This is the current approach of the Hungarian Constitutional Court, where, *inter alia*, the government has successfully applied to the HCC.

[2] See the relevant case law e.g. European Court of Human Rights (52559/99) – Court (First Section) – Decision – *Danderyds Kommun v. Sweden, Gouvernement de la Communauté Autonome du Pays Basque c. Espagne* (dec.), no 29134/03, du 3 février 2004, European Court of Human Rights (55346/00) – Court (Fourth Section) – Decision – *Ayuntamiento de Mula v. Spain*.

relationship between the exercise of public power and fundamental rights must be taken into account, not to mention the need for a thorough and thoughtful system of arguments to dispense with the idea of a unitary state and to interpret the *state 'X' vs. state 'X'* fundamental rights cases and not merely view them as a jurisdictional dispute.

For presenting the above approaches to the question in focus, and to propose a possible compromise between the two opposing approaches, the practice of the Hungarian Constitutional Court (hereinafter 'HCC') is a good example. The HCC, in its short history, has applied many different approaches, therefore it is valuable to illustrate the advantages and disadvantages of its different views. Light was shed recently upon the respective practice of the HCC, due to an amendment of the legislation, namely the Act on the Constitutional Court. The applicable text of the Act from 20 December 2019 says 'In the case of a public organ petitioner exercising public authority, it is required to examine whether they are entitled to the quoted fundamental right ensured by the Constitution'[3].

As a result of the amendment, a public and professional discussion began, on those cases in which the HCC may admit a constitutional complaint filed by a state organ to. The practice of the HCC in this regard was neither clear nor unified even before this amendment, so the need for the clarification of the position of the HCC arose. When are public organs entitled to file a constitutional complaint? Which fundamental rights ensured by the Constitution are those that public organs are entitled to?

These questions arose since the amendment itself might imply that – even if only in a restricted way – public organs exercising public authority are entitled to fundamental rights.[4] Therefore, the HCC and the legal practitioners had to face the dilemma presented in this paper, and choose an approach for looking at the fundamental rights protection of state entities and specifically public organs exercising public authority. As stated before, it is an axiom that fundamental rights exist to set boundaries to state interference, and the role of public organs can only be interpreted as the obligor in a fundamental rights relationship. As such, it seemed hardly justifiable that those public organs that exercise public authority should be able to turn to the HCC with a constitutional complaint. It would mean that the state asks for protection from itself. According to this axiom, the fundamental right of a public organ is excluded by definition.

The constitutional complaint is a type of mechanism for fundamental rights protection. Its current form in the Hungarian legislation was introduced by the Fundamental Law of Hungary, 2012 and its introduction has shifted the HCC's function of fundamental

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[3] Az Alkotmánybíróságról szóló 2011. évi CLI. törvény (Act CLI of 2011 – on the Constitutional Court) s 27, para (3), the official translation states: 'In the case of a petitioner exercising public authority, it shall be examined whether the right guaranteed by the Fundamental Law, indicated in the complaint, applies.'

[4] On the impact of the modification of the legislation and for the arguments included in this chapter, see also: Dominika Kincső Hollós, 'Vannak az államnak alapjogai? Közhatalmat gyakorló szervek alkotmányjogi panaszhoz való joga az Alkotmánybíróság gyakorlata alapján' in Veronika Szikora (eds), *Díjnyertes gondolatok: Tanulmányok a 35. OTDK Állam-* és *Jogtudományi szekciójának első helyezett szerzőitől* (DE ÁJK 2021, Debrecen) 139–166.

rights protection from objective (abstract) towards subjective (concrete) legal protection.[5] The essence of fundamental rights protection is – in addition to declaring fundamental rights – that the state must establish and operate institutions and mechanisms of legal protection that guarantee the operation of state entities in accordance with the protection of fundamental rights and that the exercise of public authority remains within the limits set by fundamental rights.[6]

According to this approach, the state is the obligor of the fundamental rights relationship, and the essence of the fundamental rights protection mechanisms, such as the constitutional complaint, is to ensure that this obligation of the state is enforced. This interpretation is also reflected in the decisions of the HCC. In Decision 65/1992. (17.12.1992), the HCC had laid down the much-cited principle that fundamental rights are intended to 'create constitutional guarantees against state authority for the protection of the rights of the citizen, the individual or a community, and for the safeguarding of its autonomy of action'. This sentence has been cited by the HCC in many of its decisions and has long been used to argue that state entities do not have fundamental rights. This principle was reaffirmed after the introduction of the Fundamental Law of Hungary.[7]

A great example of the adherence to this thesis, although it was not part of the majority decision, is the dissenting opinion to Decision 3128/2019. (VI. 5.) AB of the HCC, that 'Fundamental rights guarantee the freedom of individuals from the state, the holder of public power, and their purpose is to limit public authority. Fundamental rights cannot, therefore, in principle, be enjoyed by state entities nor legal persons owned by the state. Fundamental rights protect the individual against the state'[8]. This is to argue against the entitlement to the right of a non-profit organisation (company) owned by a local municipality to file a constitutional complaint, which would mean that, in the absence of procedural rights, the HCC must reject the complaint without further examination.

If we accept that the essence of fundamental rights is the restriction of public authority and the state is an obligor in these relationships, the question necessarily arises as to how we should interpret the clause introduced by the amendment, according to which, *in the case of a public organ petitioner exercising public authority, it is required to examine whether they are entitled to the quoted fundamental right ensured by the Constitution.* The regulation has made it clear that the mere fact that the petitioner exercises public authority should not automatically lead to the rejection of a constitutional complaint in the absence of the right to file a petition.

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[5] László Sólyom, 'The Constitutional Court of Hungary' in Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (online edn, 20 Aug. 2020, Oxford Academic) https://doi.org/10.1093/oso/9780198726418.003.0008

[6] András Sajó, Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (online edn, 21 Dec. 2017, Oxford Academic) 373. https://doi.org/10.1093/oso/9780198732174.001.0001

[7] E.g. Decision 3291/2014. (XI. 11.) AB of the HCC, Statement of Reasons [11].

[8] Decision 3128/2019. (VI. 5.) AB of the HCC, Statement of Reasons [70].

Whether a legal entity is entitled to a certain fundamental right can rarely be deduced from the national constitution or other legislation alone, therefore, when analysing the potential fundamental rights of state entities, it is necessary to examine the case law of the bodies protecting fundamental rights. It is because, in most cases, it is left to the legal practitioner to determine whether or not a legal entity can initiate a fundamental rights protection procedure, and therefore case law analysis is required to understand the issue – the fundamental legal personality of public organs – more deeply. The first step in a fundamental rights protection procedure (e.g. the constitutional complaint procedure for the HCC) is to examine the formal and substantive conditions of the admissibility of the complaint, including whether the petitioner has the right to file it. The right to constitutional protection of state organs exercising public authority can therefore be assessed on the basis of the arguments put forward in the admissibility procedure

The aim of the current paper is to present the autonomy concept, a possible in-between solution for the dilemmas detailed above. The main focus will be on explaining the concept using Hungarian examples, since the approach of the Hungarian courts is quite unique, and enables us to highlight the main aspects of the problem and illustrate its difficulties; however, for supporting the relevance of each approach presented, we need to have a look at the European common ground, namely the practice of the ECtHR and the Court of Justice of the European Union (hereinafter: 'CJEU' or 'ECJ'). Moreover, since the Hungarian legislation, the Fundamental Law of Hungary and the constitutional legal practice was highly influenced by the German *Grundgesetz*, it is necessary to analyse the German approach in this regard. Thus, this research is mainly based on the jurisprudential analysis of the practice of the HCC and partly applies a comparative approach

II What is the Autonomy Concept?

There are two very opposing answers to the question of whether public bodies should be entitled to constitutional protection and to fundamental rights, both of which indicate difficulties. In theory, both could result in arguable decisions on cases, either by denying constitutional protection where it could be well established or whether accepting applications for protection where it there are no strong grounds. Thus, we need to have an approach that would give us guidance on how to decide the admissibility of cases where a public organ requests the protection of their *fundamental rights*.

The core of the problem is the fact that, from a fundamental rights perspective, there is a significant difference between an organ established by the state and an organisation established by human beings.[9] As discussed earlier, it is a widely common approach of

[9] Lívia Granyák, 'Do Human Rights Belong Exclusively to Humans? The Concept of the Organisation from a Human Rights Perspective' (2019) (2) ELTE Law Journal 17–24.

fundamental rights law that the state is the obliged party and the individual or the organisation established by a natural person is the entitled party. This is a cornerstone of the fundamental rights dogmatic which was highlighted in the practice of the HCC in 2009 and was quoted many times later. In this decision, the HCC stated that 'Public organs granted with public authority do not have such fundamental rights that could be protected against the state and would entitle them to submit a constitutional complaint'.[10]

According to this principle, the HCC consequently dismissed petitions filed by public organs, among others, the department of National Tax and Customs Administration, the notaries of several local municipalities and the chair of local election offices.[11] However, even between public organs, there can be relevant differences from a fundamental rights approach. There are certain types of public organs where some fundamental rights can be interpreted as applicable.

1 Distinguishing between Public Organs

Providing an answer to whether state entities are entitled to certain fundamental rights is not easy, since the public organs and entities connected to the state are not a homogenous group. We can distinguish between organs on whether they were established and are owned by natural persons or the state. Some legislations emphasise whether the entity in question is subject to private or public law. Others separate state entities from fundamental right protection perspective according to whether they were acting as a private party (e.g. taking a loan from a bank) or exercising public authority. A possible approach – and this paper is to advocate for this one – is to distinguish according to the connection of the state entity to a certain fundamental right of the people, which results in a constitutionally protected autonomy of that state entity. This *autonomy concept* would mean that the state entity is entitled to constitutional protection when strongly connected to a fundamental right, especially if it was established to enable a certain fundamental right of the people to be exercised.

This difference between state entities from a fundamental rights perspective, however, is not recognised universally. In order to understand the European standards, the *minimum requirement*, a closer look at the practice of the ECtHR and the CJEU is necessary. According to their practice, the legal personality and the right of the plaintiff to petition are closely linked, so we can understand the courts' concept of a fundamental rights legal personality (whether they are entitled to any fundamental rights) by examining the decisions taken in the admissibility procedures.

In the case-law of the ECtHR, the concept of standing of public authorities is clear; Article 34 of the European Convention on Human Rights (hereinafter: 'ECHR' or the

[10] Decision 23/2009. (III. 6.) AB of the HCC, quoted later in e.g. Decision 3077/2015. (IV. 23.) AB of the HCC.

[11] E.g. Decision 198/D/2008. of the HCC, Decision 3307/2012. (XI. 12.) AB of the HCC, Decision 3291/2014. (XI. 11.) AB of the HCC, Decision 3077/2015. (IV. 23.) AB of the HCC.

'Convention') itself states that the ECtHR may receive applications from natural persons, non-governmental organisations or groups of persons, thus excluding governmental or public bodies. Thus, the ECHR maintains a strict and very consistent view, as presented above. However, this does not mean, of course, that in practice there have not been questionable situations where the ECtHR has had to deal with the status (and thus fundamental rights legal personality) of (public) entities referred to it.

Such was the case, for example, when the Slovenian state bank turned to the ECtHR, claiming that Croatia had violated its right to property.[12] The ECtHR unanimously decided that accepting the state-owned bank as petitioner would be incompatible with the Convention, emphasising that state entities and state-controlled companies cannot turn to the ECtHR.[13] Since the ECtHR found that the bank is dependent on and controlled by the government, despite the fact that it was a separate legal entity, the bank's petition of the was dismissed. The argument that the Convention's restriction on the right of state entities to petition was merely intended to prevent both the plaintiff and the defendant from being (part of) the same state (i.e. to avoid *state 'X' vs. state 'X'* cases), was not well-founded.

However, the ECtHR has only taken such a strong position regarding the right to petition, so the question whether a person can have a fundamental right without the right to petition (and ask for protection for that fundamental right) may arise as a theoretical question with practical importance. The practice of the ECtHR does not cover whether, in the absence of the right to petition, state organs exercising public authority have a fundamental right guaranteed by the Convention. This was the basis of Slovenia's position when, following the bank's unsuccessful application, it brought the case before the ECtHR to defend the bank's rights in an interstate dispute.[14] It argued that, although the bank, as a public body, could not bring proceedings before the ECtHR, it had Convention rights (right to a fair hearing, right of appeal, right to property) which Slovenia could enforce. The question arose whether it was possible for Croatia to infringe the rights of a body which could not bring an action before the ECtHR, i.e. the relationship between the fundamental right of legal personality and the right to complain, the right to petition. In the critical literature, it was pointed out that it would lead to contradictions if it were accepted that there are persons who have certain rights but cannot bring proceedings to defend them. Fundamental rights and the right to bring proceedings are therefore closely linked.[15]

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[12] *Ljubljanska banka v Croatia,* ECLI:CE:ECHR:2015:0512DEC002900307.

[13] Janja Hojnik, 'Slovenia v. Croatia: The First EU Inter-State Case before the ECtHR' EJIL:Talk! Blog of the European Journal of International Law, <https://www.ejiltalk.org/slovenia-v-croatia-the-first-eu-inter-state-case-before-the-ecthr/> accessed 30 December 2022.

[14] *Slovenia v. Croatia,* ECLI:CE:ECHR:2020:1118DEC005415516.

[15] Igor Popović, 'For Whom the Bell of the European Convention on Human Rights Tolls? The Curious Case of Slovenia v. Croatia' EJIL:Talk! Blog of the European Journal of International Law, 2019, <https://www.ejiltalk.org/for-whom-the-bell-of-the-european-convention-on-human-rights-tolls-the-curious-case-of-slovenia-v-croatia/> accessed 30 December 2022.

Contrary to the above, the Court of Justice of the European Union has – to a limited extent – recognised the fundamental rights of public bodies. In one case,[16] for example, the Bank Saderat Iran, owned by the Iranian state, successfully invoked its fundamental right to effective judicial protection. The Court rejected the Council's and the Commission's argument that the state-owned bank was not entitled to the protections and guarantees attached to fundamental rights. In its appeal, the Council argued that the interpretation of the law according to which an institution belonging to the Iranian state can claim fundamental rights protection is false. The Council based its reasoning on the ECHR provision quoted above: the Convention excludes the possibility for government bodies to turn to the Court of Justice, since states cannot be beneficiaries of fundamental rights, and this principle applies before the Court of Justice of the European Union as well. The CJEU has held that it is irrelevant whether the bank is in fact a governmental body or a public law entity, because the right to a fair trial, the right to effective judicial protection and the requirements of essential procedural requirements are also available to all legal persons. In its reasoning, the Court also refers to the effectiveness of judicial review as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. It appears that, in its practice, the CJEU also recognises certain fundamental rights (rights of defence, the right to an effective remedy, the right to judicial review) for public bodies, which are linked to the right to a fair trial.

Hungarian fundamental rights thinking relies heavily on German practice, so it is necessary to address the German legislation in the research in order to understand the Hungarian practice better. In Germany, the classical idea that the state cannot be subject to fundamental rights due to the nature of its function prevails.[17] The Federal Constitutional Court itself defines its task as 'monitoring the enforcement of the Basic Law *(Grundgesetz)*, which is the duty of all state bodies'.[18] According to the German interpretation of the law, state bodies cannot invoke fundamental rights, since the cases they invoke as a violation of fundamental rights can in fact only be considered as a dispute of jurisdiction between the organs of the unitary state.[19]

First, the German legislation accepts the theory that the state performs its actions within the frameworks of the unitary state and therefore applies the principle that state organs cannot be entitled to fundamental rights. Second, German constitutional thinking makes a difference between legal bodies according to whether they are subject to public or private legislation. This also means, for example, that a state-owned business (company)

[16] Case C-200/13 P *Council of the European Union v. Bank Saderat Iran*, ECLI:EU:C: 2016:284.

[17] Lóránt Csink, Johanna Fröhlich, 'Mire lehet alkotmányjogi panaszt alapítani? – A jogvédelem alapjául szolgáló alaptörvény-ellenesség és az Alaptörvényben biztosított jog fogalma' MTA Law Working Papers 2017/25.

[18] Official website of the Federal Constitutional Court *(Bundesverfassungsgericht)* of Germany: <https://www.bundesverfassungsgericht.de/DE/Das-Gericht/Aufgaben/aufgaben_node.html> accessed 19 October 2022.

[19] Lecture of Professor Dr. Klaus Ferdinand Gärditz at Rechts- und Staatswissenschaftliche Fakultät of Universität Bonn, 2019, <https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Gaerditz/Vorlesung/AuslR/Grundrechte-AP3.pdf> accessed 19 October 2022.

is only a special manifestation in which the public administration body itself is exercised; it is no different from the public administration body itself regarding the question of the fundamental rights. According to the German practice, the state has no private affairs; its legal transactions under private law are the fulfilment of state tasks, and therefore only within limits can there be any talk of a 'contractual freedom' of the state (even though private law may be applicable), therefore even legal persons under private law should not be entitled to fundamental rights if they perform public tasks in the form of private law. Moreover, a significant difference between a state entity and a private legal entity is that there are no natural persons, whose fundamental rights should be protected, behind a state entity, just the state.

However, some institutions that are closely related to the fundamental rights of natural persons have special status in the German constitutional system. For example, public broadcasting institutions and universities are atypical in this sense. Universities are dependent on the freedom of research, and their self-government to which they are constitutionally entitled, and they have an autonomy from the central state bodies, the public administration itself. The same applies to the broadcasting public bodies: although they are subject to public legislation; it is obvious that they are not actually part of the public administration, but have a special, atypical status. Churches also enjoy a wider protection of fundamental rights since, regardless of the fact that they are subject to public law, their essential tasks and powers are not derived from the state. According to German legal theory, the above detailed interpretation of the fundamental rights (i.e. public bodies are not entitled) cannot be a reason for the limitation of the effective protection of the fundamental rights (of the people) themselves.[20] Moreover, the German constitutional regulation has special rules on the defence of autonomous bodies, such as the local municipalities.

As a conclusion, in Germany, as per the general rule, state organs can only turn to the Constitutional Court for protection in the event of a conflict of powers. In their view, public organs do not have fundamental rights and their dispute can only mean a conflict of power between the parts of the unitary state. In Germany, it is evident that the state is the obligor in relation to fundamental rights and state organs have the duty to keep and respect fundamental rights. However, there are some exemptions from this general rule.

At the first phase of its practice, the HCC followed the German approach and distinguished between state organisations according to whether they have a strong connection with a fundamental right of the people, especially if it was established to enable people to exercise their fundamental right.[21] Universities, the Hungarian Academy of Sciences and museums can be examples of this. They therefore have the right to turn to the Hungarian Constitutional Court for protection of their fundamental rights. This approach is what I call the *autonomy concept*.

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[20] Herbert Bethge, 'Grundrechtsträgerschaft juristischer Personen: Zur Rechtsprechung des Bundesverfassungsgerichts' (1979) 104 (1) Archiv des öffentlichen Rechts, published by Mohr Siebeck GmbH & Co. KG, 54–111.

[21] Decision 198/D/2008. AB of the HCC.

There are two types of public organs with regard to which the practice of the HCC is quite developed and their right to file a constitutional complaint is supported, due to their autonomy from the central state administration: the universities and local municipalities.

2 Public (State) Universities

The first type of state entity that was granted the right to file a constitutional complaint were state universities. The tradition of academic self-governance is an essential part of the life of the universities, regardless of whether it is a state university or a private institute. Moreover, states nowadays usually intend to ensure the freedom of research and education by maintaining the system of higher education institutions.[22] Institutional autonomy and the preservation of academic freedom are strongly linked.[23]

From the very beginning, universities have been closely linked to an aspiration for autonomy and privileges, the protection of which is still a sensitive issue and a cardinal question for higher education. From the constitutional point of view, this autonomy is a guarantee of academic freedom and freedom of education, which the state also seeks to fulfil primarily through the maintenance of institutions. The institutionalised exercise of fundamental rights requires universities to have self-government, protected at constitutional level.[24]

This special status of state universities is reflected in the considering whether they should be entitled to fundamental right protection. Even from the strict view of the German approach, state universities are one of the few exceptions, as an example of where the state body itself is established for the *purpose* of ensuring the exercise of a fundamental right. The constitutional protection of the self-government *(institutional autonomy)* of universities exists, since this autonomy was established to protect the freedom of expression, arts and sciences granted in the *Grundgesetz*,[25] and it is recognised and defended by the Federal Constitutional Court. According to constitutional case law, universities were established to ensure academic freedom and can therefore claim constitutional protection on the basis of the constitutional right to academic freedom.[26] The universities are view as having been

[22] Miklós Kocsis, *A felsőoktatási autonómia elmélete és gyakorlata Magyarországon* (PhD thesis, Pécsi Tudományegyetem Állam és Jogtudomány Kar Doktori Iskolája).

[23] On the relationship between academic freedom, institutional autonomy and democracy is fundamental, see also: Sjur Bergan, Tony Gallagher and Ira Harkavy (eds), *Academic Freedom, Institutional Autonomy and the Future of Democracy*, Council of Europe Higher Education Series No. 24, Council of Europe, April 2020.

[24] Kocsis (n 22).

[25] Paragraph (1)–(3) of Article 5 of the *Grundgesetz* states that: 'Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour. Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.'

[26] For example, in the decision about the compliant of the Justus-Liebig-Universität, Giessen, BVerfGE 15, 256.

founded to maintain and protect the freedom of education, therefore the Constitutional Court acknowledges the constitutional protection of the self-governance of the universities, and they can file a complaint in cases where academic freedom may have been breached.

In Hungary as well, the possibility for institutes of higher education to appeal to the HCC; it was even declared in the legislation itself.[27] It declares that

> the State shall perform the functions of higher education in compliance with the rights, obligations and powers of higher education institutions as regulated by the Constitution and this Act and the institutional regulations established pursuant to this Act. Legislation and individual decisions infringing the self-government of higher education institutions may be challenged before the HCC.

According to the above, between 1995 and 2005, in cases where the petitioner was an institute of higher education, it was not for the HCC to consider whether universities had the right to seek the protection of fundamental rights, but the legislator itself declared that the self-governance of universities (regardless of whether private or public institutions) was an *autonomy* to be constitutionally protected. Moreover, the HCC also explained that the freedom of scientific research and artistic creation, the freedom of learning and teaching, guaranteed by the Constitution, is manifested in university autonomy and therefore must be protected at constitutional level.[28]

In the first case[29] in which an institute of higher education applied to the body on the basis of the above-quoted legislation, the HCC rejected the petition, but not because it 'generally lacked jurisdiction to hear a case of harm to the self-government of a higher education institution, but because it lacked jurisdiction to hear a case of academic performance'. The HCC also stated that, in addition to university autonomy, the decision on academic disputes is the exclusive right of the academic community, and therefore neither the Court nor the legislator may interfere in it.

In another decision,[30] the Constitutional Court found that the Minister of Culture and Public Education had violated the right of self-government of a catholic university by refusing to publish in full the information on the university admission conditions for several faculties of the university. The HCC held that the Minister should have published the information provided by the university – which was in the public interest – in full, since universities were entitled to impose additional requirements in the admission procedure and, by failing to do so, the Minister had infringed the autonomy of universities.

The HCC appeared to believe that the provision explicitly contained in the Higher Education Act, i.e. that universities could seek constitutional protection from the HCC in

[27] Act LXXX of 1993 on Higher Education.
[28] Decision 40/1995. (VI. 15.) AB of the HCC.
[29] Decision 1079/H/1995. AB of the HCC.
[30] Decision 1430/H/1997. AB of the HCC.

order to defend their autonomy, could be derived from the Constitution itself. Later, the Act on Higher Education was replaced and the new legislation no longer contained a provision on the procedure of the HCC.[31]

The new legislation was referred to the HCC, following a constitutional veto by the Hungarian President, who explained that the autonomy of higher education means that it is autonomous and independent of the government and the state administration, and that this does not only extend to academic, teaching and research activities in the narrow sense. In order to ensure academic autonomy, institutes of higher education should also have autonomy in their organisation, operation and management, and the legislator should ensure the meaningful participation of the subjects of autonomy in the definition of the content of the relevant legislation. Several petitioners challenged different sections of the new law before the HCC, claiming that they infringed the autonomy of universities.

In its decision, the HCC set out the purposes of university autonomy, which are two different things: on the one hand, to provide an institutional framework for the right to education and, on the other hand, to guarantee the neutrality of the State in academic matters. It derived this from the Constitution[32] (right to education, freedom of academic life). In this decision,[33] the HCC reviewed its practice on the autonomy of institutes of higher education and their right to constitutional protection. The HCC pointed out that, in its initial decisions concerning university autonomy, it had established that autonomy is to be exercised 'within the limits of the law', and thus annulled government decrees for conflict with the autonomy provision of the Higher Education Act, and not directly for conflicting with the Constitution. Nevertheless, the Court already recognised in these early decisions the link between the autonomy established in the law and Articles of the Constitution.

However, in its later decisions, the HCC derived the autonomy of institutes of higher education directly from the Constitution and explained its content and scope.[34] The autonomy of universities has been interpreted in practice as the autonomy and independence of institutes of higher education from the government and the state administration, which, according to the HCC, should be interpreted in line with the fact that the purpose of autonomy is to ensure the right to education and the neutrality of the state in academic matters, and thus to ensure the independence of such institutions from the executive. Since it follows from this that autonomy does not derive from a law but directly from the Constitution, the HCC held that it is also possible to examine the constitutionality of legal provisions if they do not sufficiently guarantee the independence of institutes of higher education from the Government and the state administration.[35]

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[31] Act LXXX of 1993 on Higher Education was in force until the introduction of Act CXXXIX of 2005 on Higher Education on 1 March 2006.

[32] Articles 70/F and 70/G of the Hungarian Constitution.

[33] 62/2009. (VI. 16.) AB of the HCC.

[34] E.g. 51/2004. (XII. 8.) AB of the HCC 41/2005. (X. 27.) AB of the HCC.

[35] Decision 62/2009. (VI. 16.) AB of the HCC, Statement of reasons III. 1.

The HCC concluded that not only institutional protection, but also specific fundamental rights derive from the Constitution,[36] and then analysed in detail the limits of university autonomy with regard to the aspects raised in the petitions, namely the cases of infringement of rights that can be referred to the HCC for protection. The HCC, referring to its previous practice, held that autonomy may be exercised by the elected representative bodies and self-governments of universities, of which university teachers, lecturers, researchers and students are part. It is not possible to create an autonomous representative body from which one group is excluded.

With its many decisions, the Court stated that institutes of higher education institutions are (and shall be) independent from the government and the central state administration, and the purpose of their autonomy is the protection of the right to culture and the neutrality of the state in scientific matters, as well as this should not only be an institutional protection, but also specific fundamental rights protection derives from it.

To summarise the above, the *autonomy concept*, which also arises in the context of the right of local municipalities to petition, is most evident in practice regarding the state-maintained, public institutes of higher education. The Act on higher education explicitly allowed universities to file a constitutional complaint to the HCC in Hungary when their autonomy has been violated. The HCC, in addition to explicit statutory provisions, has explicitly derived the possibility of constitutional protection of self-government from the Constitution itself, and has therefore accepted and examined the petitions of universities, even after the amendment of the statutory provision, and has even analysed the provisions of the Higher Education Act itself and examined whether they infringe the autonomy of universities. The HCC deduced in its argument that this right of the universities directly originates from the Constitution, from academic freedom itself. It was therefore irrelevant whether it is stated in the legislation as well; universities have a constitutional right to file a petition to the HCC. This resulted in successful filing of constitutional complaints by universities, even state universities. The practice of the HCC provides a detailed outline of the framework of university self-government and the cases in which an autonomous public body operating as an institute of higher education is entitled to constitutional protection. This approach of the HCC originates from the German approach, where the state universities are one of the few exceptions from the strict prohibition of state entities to apply for fundamental rights protection, thus where the *autonomy concept* enters.

3 Local Municipalities

The other group of petitioners, where we should discuss the *autonomy concept*, even if we can speak of a much limited right of petition, are local municipalities.

[36] Decision 62/2009. (VI. 16.) AB of the HCC, Statement of reasons III. 2.1.1.

In Germany, local municipalities can file a complaint with the Federal Constitutional Court, a right enshrined in the *Grundgesetz* itself. However, this right is rather a matter of competence and not an entitlement to fundamental rights, so local municipalities are not to be viewed as having the same type of exemption as state universities. As a historical approach, it is possible to talk about the fundamental legal idea of self-government, but it does not exist anymore. The 'fundamental right' of self-government is rather an institutional guarantee of self-government.[37] Article 93 of the *Grundgesetz* provides for the jurisdiction of the Federal Constitutional Court. Paragraph 4b of this article states that

> The Federal Constitutional Court shall rule on *constitutional complaints filed by municipalities or associations of municipalities* on the ground that their *right to self-government* under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land…

In the Grundgesetz, local authorities have the right of self-government 'in accordance with the laws, within the limits prescribed by the laws and within the limits of their functions designated by a law'[38]. The German Federal Constitutional Court 'has ruled that legislation by the member states or the federal government cannot infringe on the core areas *(Kernbereiche)* of self-government; in other words, legislation cannot have the effect of emptying the principle of self-government'[39]. The constitutional complaint that can be filed by local municipalities is very different from those filed by individuals, since it has less connection to fundamental rights and more to the conflict of competence. The local municipalities are also able to file a constitutional complaint *(Kommunalverfassungsbeschwerde)*, although it is a sui generis complaint, that needs to be distinguished from the constitutional complaint filed by natural persons.

The German practice and legislation are reflected in the Hungarian versions in this regard too. The HCC, in its examination of the so-called fundamental rights of local governments, has also concluded that the act of the legislator cannot lead to emptying them, and that local governments can therefore also enjoy protection. However, the practice of the HCC regarding the right of local municipalities to petition is not so clear.

In a much cited decision,[40] the HCC rejected the petition of a local municipality, but the court did not challenge that a state body cannot be subject to a fundamental right guaranteed by the Fundamental Law. Instead, it recognised that local governments are *autonomous* bodies within the system of public power of the state, regulated by the Fundamental Law, and that the so-called fundamental rights of local governments are 'groups of powers

[37] Bethge (n 20).

[38] Article 28 of the *Grundgesetz*.

[39] The meaning of the core areas *(Kernbereiche)* of the right to self-governance was stated by the landmark decision of the Federal Constitutional Court no. BVerfGE 79, 127.

[40] Decision 3381/2012. (XII. 30.) AB of the HCC.

which constitute constitutional guarantees of the autonomy granted to local governments in the field of local self-government'. However, the Courts stated that this autonomy is not absolute and unlimited, but limits the legislator to the extent that his acts cannot lead to the emptying of a fundamental right of local government. The Court was of the opinion that, since the petitioner municipality is a public body, it can only file a constitutional complaint based on a violation of the fundamental rights of the municipality as guaranteed by the Fundamental Law, and therefore petitioner is not entitled to the fundamental rights to which it had referred to (such as non-discrimination and children's rights). Thus, in this decision, the HCC examined the petitioner's eligibility on the basis of the autonomy of the municipality.

Later, in another well-known case, the HCC further nuanced its standpoint on the right of local municipalities to petition.[41] The decision of the HCC reveals that it considers local governments to be special state bodies which, although they are part of the system of public administration, have certain functions and powers protected by constitutional law. The HCC found that the Fundamental Law does not provide local government with fundamental rights, only for categories of powers and functions, and that the Court did not even address the question of autonomy. The decision ended with a rejection, with the reasoning that the petitioner had not invoked in its petition a right guaranteed to local municipalities by the Fundamental Law. Although the HCC's decision implies that there are fundamental rights granted to local municipalities by the Fundamental Law, the decision led many to believe that the HCC had definitively excluded local municipalities from the scope of petitioners of constitutional complaints, since 'although it is formally possible to file a constitutional complaint, the specific status of local municipalities as public bodies means that the substantive requirements for the substantive admissibility of a constitutional complaint cannot be met'[42].

In conclusion, the Court agreed that local municipalities/governments have special autonomy from the central state organs. Municipal liberties, or municipal constitutional rights, are widely recognised. however it is very different from any fundamental right. They are rather groups of competences, powers that constitute constitutional guarantees of the autonomy granted to local municipalities.[43] However this autonomy is neither unconditional nor limitless. However. the interference of the state and its restrictions must not lead to the emptying of a municipal liberty. The autonomy concept has been used in practice very rarely and rather strictly, and the academic discussions lead to a path that said it is only

[41] Decision 3105/2014. (IV. 17.) AB of the HCC.

[42] István Hoffman, 'Local Self-Government in Hungary' in Bostjan Brezovnik, István Hoffman, Jarosław Kostrubiec, Borut Holcman, Gorazd Trpin (eds), *Local Self-Government in Europe* (Lex Localis 2021, Maribor) 207–243, 215.

[43] This interpretation of the HCC roots in its early decisions. Eg. in the decision 64/1993. (XII. 22.) AB of the HCC it is stated that the fundamental rights of the municipalities included in the Constitution are in fact a set of powers for the autonomy of local authorities.

a theoretical opportunity for local municipalities and in practice they are excluded from constitutional protection.

IV Conclusion

The axiom remains: the function of fundamental rights is to protect the individual from state interference. While the fundamental legal personality of private legal entities is rather easily supported, without the natural persons behind an organisation, state entities lack the entitlement to fundamental rights and their protection. However, the different fundamental rights protection forums apply different approaches in this regard and their practice also develops with time.

One of the possible responses is to completely shut the way to fundamental protection in for the state entities, even if they are subject to private law or if they have a strong connection with a fundamental right. The other, rather unique approach is what we see in the current Hungarian legislation and legal practice, where even the government can file a constitutional complaint to protect its *fundamental rights*, without considering the obvious contradiction between the function of fundamental rights and the role of the state in a fundamental right relationship.

In between those two viewpoints, a possible compromise exists. The *autonomy concept,* while respecting the axiom by recognising the special consideration when talking about the possibility of granting fundamental rights protection to state entities also reflects on the heterogenous characteristics of public organs and state entities. Organisations, like state entities, public broadcast or local municipalities have a special – atypical – status within the public administration system, which should be reflected in the fundamental rights protection processes. With a well-argumented and consistent legal practice, the fundamental legal protection bodies could benefit from the autonomy concept when facing difficult cases regarding the fundamental legal status of certain entities connected to the state.