

Autonomy of Universities and Judicial Review: Irreconcilable Concepts?

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Abstract

The autonomy of universities represents the main functional principle of universities in EU Member States. Is it an instrument of defence of higher education institutions from ideological, political and religious interferences and an essential middle of implementing educational right of individuals. Its role is to contribute to the improvement of higher education, to universities performance and to the developments of society. But what happens when decisions of higher education institutions, their inaction or unjustified refusal to resolve a demand are brought in front of tribunals? Is the judicial review possible, does it have limits and which are these limits? The answer assumes to establish the aim and the content of the university autonomy and to assess the judicial review both from the perspective of legality and opportunity. Our research is descriptive and explanatory and contains relevant case law. Our conclusion is in the direction of a complete judicial review made by the administrative courts, both from the perspective of the legality and of the opportunity of the act submitted to the control.

Keywords: university autonomy, academic freedom, judiciary review, legality review, opportunity review.

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1. Introduction

In the first part of the study, we will look at the legislative establishment of university autonomy and how it has been received by the doctrine (*section 1*). In the second part of the research, we will analyse the relationship of European and national courts to the concept in question during the judicial review carried out (*section 2*). The third section will contain our conclusions on the issue at hand (*section 3*).

2. The legislative enshrinement of university autonomy and the doctrinal perspective

A first source of consecration is the Romanian Constitution. In the article on the *right to learning*, the fundamental law guaranteed university autonomy, without defining the concept (art. 32 para. 6). Characteristics and sequences of the definition of university autonomy have emerged from the jurisprudence of the Constitutional Court, to which we will refer in the second section. The Romanian Constitution guarantees university autonomy in the context of the recognition of the *fundamental right to teaching*, part of the right to education, representing an *instrument* for its realisation². "With regard to higher education institutions, the Constitution guarantees university autonomy, i.e. the possibility for these institutions to set their own quality standards, of course, under the conditions and on the basis of the law".³

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² See Ion Muraru, Elena Simina Tănăsescu (coord.), *Romanian Constitution. Commentary on Articles*, 3rd edition, C. H. Beck, 2022, p. 269, 270.

³ Bianca Selejan-Guțan, in Ion Muraru, Elena Simina Tănăsescu (coord.), *op. cit.*, p. 271. For a comparative analysis see Thomas Poole, *Legitimacy, Rights and Judicial Review*, „Oxford Journal of Legal Studies”, vol. 25, no. 4, 2005, pp. 697-725.

The National Education Law No. 1/2011 has taken up the enshrinement of the principle and defined some of its effects, the relevant Article 123 of the law. On 3 September 2023, a new Higher Education Law (No. 199/2023) entered into force and Law No. 1/2011 was repealed. Both acts provided for *administrative control by the Ministry of Education* over the way in which higher education institutions exercise their university autonomy (Art. 121 of Law No. 1/2011 and Art. 6 para. 2 of Law No. 199/2023). The new law regulates university autonomy separately in Title I, Chapter III, largely repeating the provisions of Articles 123-130 of Law No. 1/2011, but also introducing new elements.

Schematically, from the legislative enshrinement of the concept, we can deduce the following observations:

- the legislator introduces the distinction between *academic autonomy* and *academic freedom* in terms of the rank of the legal rule guaranteeing them and their content;

- the law defines *academic freedom* as the right of members of the university community to express themselves freely, within and outside the university environment, in relation to their teaching, research or intellectual creative activity, as well as to any other activities concerning the higher education institution in which they work, as defined by law. Academic freedom also means the freedom to learn, teach and research, each of which implies the freedom to think, to question and to share ideas, inside and outside the higher education institution. The *right of students to choose their study programmes and subjects* is enshrined, and the *obligation for higher education institutions to adapt their educational offer to the requirements of the labour market* is established. The core of academic freedom is teaching and research⁴.

- *institutional autonomy* is defined in the annex to the law as "the degree of self-governance necessary for effective decision-making by higher education institutions regarding their academic standards, work, management and related activities".

- institutional autonomy is only one part of university autonomy, and it is regrettable that this notion has not been defined.

- *the purpose of university autonomy* is protection against ideological, political or religious interference.

- universities determine autonomously their mission, institutional strategy, structure, activities, organisation and functioning, management of material and human resources.

- the exercise of the prerogatives offered by university autonomy is subject to *public accountability*, which obliges universities to respect the legislation in force, the quality requirements of higher education; equity and university ethics; managerial efficiency, use of resources and spending of public funds; transparency of decisions and activities; academic freedom, students' rights and freedoms.

Higher education institutions may establish, alone or by association, as the case may be, companies, foundations, associations, pre-university education units, consortia for dual education, university hospitals, university pharmacies, ambulatory medical units, including dental units, and specialist surgeries, including dental surgeries, with the approval of the university senate and on condition (provided for by Law No. 199/2023) that *the object of activity of the companies, associations and/or foundations is related to the mission of the higher education institution*. Article 16 of Law No. 199/2023 further regulates the right of higher education institutions to set up research structures, consortia and to make joint investments within a university consortium.

More detailed provisions also concern the right of higher education institutions to set up pre-university educational establishments (also enshrined in Law No. 1/2011). The latter may be state, private, denominational, with legal personality or without legal personality, but are invariably state educational establishments, financed from the state budget through institutional contracts concluded by higher education institutions with the Ministry of Education⁵.

⁴ Liviu Andreescu, *Academic freedom: between theory and university policies*, European Institute, 2020, p. 50 ff.

⁵ Internationally, discussions are older and began in the USA about combining disciplinary methods with a critical perspective to investigate issues important to teachers, administrators and program managers. See John S. Brubacher, *The Autonomy of the University: How Independent Is the Republic of Scholars?*, „The Journal of Higher Education”, vol. 38, no. 5, 1967, pp. 237-49. <https://doi.org/>

Law No. 199/2023 provides for the adoption of a *Framework Code of University Ethics and Deontology* by Government Decision, in accordance with which each higher education institution adopts its own Code of University Ethics and Deontology, which is part of the University Charter. The legislator has extended the categories of issues to be covered by the code of ethics, compared to the previous regulation. The categories of work for which the code must include measures to ensure originality are more numerous, in relation to Article 1 letter c) of Law No. 1/2011 (i.e. projects, productions, works of artistic creation, research projects, inventions, patents, articles, books and works published by publishing houses operating within the structure/subordination of higher education institutions, other such works). The Code should include "the definition of what constitutes unacceptable conduct by members of the academic community; the measures necessary to strengthen or, where appropriate, develop an organisational culture of a moral nature, involving all categories of members of the academic community; the internal framework necessary to prevent deviations from national or internal rules on academic ethics and professional conduct; guidelines for seeking advice and/or reporting unethical behaviour, principles for managing ethical risks, i.e. methods for training and assisting members of the academic community; establishing mechanisms for reporting and protecting victims".

The report that the Rector submits annually includes, after the entry into force of Law 199/2023, a chapter on the analysis of the implementation of the annual operational plan for the previous calendar year.

The principle of university autonomy applies to military, intelligence, public order and national security higher education institutions (Article 84(3)), as well as to private and denominational higher education institutions (Article 97(2)). The latter also enjoy economic and financial autonomy, based on private property. The persons holding management positions⁶ and the university senate are obliged to respect and guarantee university autonomy.

Higher education institutions can use their own income to achieve their objectives. Funds allocated to institutions for the funding of scientific research are considered as their own revenue and are used to achieve the objectives of scientific research, including investment expenditure. The University Senate, on the basis of university autonomy, may, by regulation, increase the minimum weekly teaching load, *subject to compliance with quality assurance standards*, without exceeding the maximum limit.

Another source on university autonomy is found in *European Union law*. According to Art. 124 para. 1 letter d) of Law No. 1/2011 and Art. 12 para. 1 letter a) of Law No. 199/2023, higher education institutions must respect European education policies. The European Union does not have legislative competence in the field of education, but only competence to coordinate and support national policies. According to Art. 165 para. 1 of the Treaty on the Functioning of the European Union, the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. Although the acts adopted by the Union in this area are of a *soft law* nature, they become binding on the Romanian State by virtue of the rules of national law set out above. Given the impact on the internal market, the European Union has also adopted binding legal acts in the field of vocational training, namely directives on the mutual recognition of diplomas (in particular Directive 2005/36/EC of the European

10.2307/1980049. In the mirror, the latest trends are based on sustaining a level of autonomy that allows for extensive development, a kind of transformation of universities into multi-universities. See details in some new scholarly works such as Cristina Elena Popa Tache, *Le dynamisme du droit international public contemporain et la transdisciplinarité*, préface de Florent Pasquier, Ed. L'Harmattan Paris, the collection "Le droit aujourd'hui", 2023, pp. 12-26. Moreover, UNESCO encourages these developments by even extending its own competences, creating relatively new functions such as that of responsible for global citizenship and peace education at UNESCO, which is currently held by Karel Fracapane.

⁶ Rector, pro-rectors, administrative director general, administrative deputy director general, at the level of the higher education institution; dean, pro-deans, at the faculty level; department director, at the department level; CSUD director, position assimilated to that of pro-rector; branch director at the level of the branch of the higher education institution, function assimilated to that of pro-rector; director of university extension, at the level of university extension, function assimilated to that of department director; director of doctoral school, function assimilated to that of department director.

Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications⁷.

We are now witnessing the emergence of a *European Education Area*, including higher education. Law No. 199/2023 defines the European Higher Education Area as "the framework for international collaboration developed within the Bologna Process with the aim of *improving the compatibility of higher education systems* with a view to increasing the mobility of students, staff and researchers and enhancing the employability of graduates, through the implementation of structural reforms and the use of common tools, strengthening quality assurance mechanisms and respecting the fundamental values of higher education: *autonomy, academic freedom* and integrity, student and staff participation in the governance of higher education institutions, public accountability for higher education".

Several legal acts have so far been adopted by the European Council, the European Commission and the Council of the European Union within the European Education Area. The most recent of these are set out in the annex to the *Council Conclusions on a European strategy for empowering higher education institutions for Europe's future (2022/C167/03)*⁸. According to this document, institutional (as opposed to academic) autonomy is a fundamental principle of international cooperation in this field, but no definition has been specified.

The EU Charter of Fundamental Rights stipulates the freedom of the arts and scientific research and the principle of *academic freedom* (Art. 13). Academic freedom implies, inter alia, "freedom of expression and action, freedom to impart information, and freedom to seek and impart knowledge and truth without constraint, it being made clear - that this freedom is not confined to academic or scientific research, but also extends to the freedom of academics to - freely express their views and opinions. (...) Paragraph 18 of the Recommendation concerning the Status of Higher-Education Teaching Personnel, adopted on 11 November 1997 by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), meeting in Paris from 21 October to 12 November 1997 at its 29th session, is also relevant, according to which "autonomy is the institutional expression of academic freedom and a necessary condition for teachers and higher education institutions to carry out their duties"⁹.

According to Recommendation No. 1762 (2006) adopted by the Parliamentary Assembly of the Council of Europe on 30 June 2006, entitled "University freedom and university autonomy"¹⁰, university autonomy should be understood in relation to their intellectual role, good governance, effective management, capacity to adapt to social needs and contribution to solving social problems. Universities should not isolate themselves from society in veritable "ivory towers", according to the same document¹¹.

Doctrine has noted that the term "autonomy" is always accompanied by the notion "academic", so that, first and foremost, academic autonomy concerns *academic independence*, i.e. freedom of thought, expression, teaching, research, setting the content of study programmes¹². "University autonomy is not a kind of *noli me tangere*, but it is an autonomy of thought, *imperium et studium*, a spirit of order, unique in its kind from an organisational and administrative point of view. In other words, the university is the classic home of scholastic autonomy seen in terms of academic freedom (of teaching and scientific research) and in terms of freedom of internal and external organisation and administration"¹³.

⁷ OJ L 255, 30.9.2005.

⁸ Published in Official Journal C 167, 21.4.2022, p. 9-17 ([https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52022XG0421\(02\)](https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52022XG0421(02))), last consulted on 7. 09. 2023).

⁹ Commission v. Hungary, paras 225, 227.

¹⁰ Available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en> (last consulted 8. 09. 2023).

¹¹ On the other hand, a good understanding of the limits of these new concepts is essential for the respect of fundamental rights and attention must be directed towards avoiding any abuses. See M. Stachowiak-Kudła, *Academic freedom as a source of rights' violations: a European perspective*. High Educ 82, pp. 1031-1048 (2021). <https://doi.org/10.1007/s10734-021-00718-3>.

¹² See Vuokko Kohtamäki, Elisabeth Balbachevsky (2018), *University autonomy: From past to present* in E. Pekkola, J. Kivistö, V. Kohtamäki, C. Yuzhuo, & A. Lyytinen (Eds.), *Theoretical and Methodological Perspectives on Higher Education Management and Transformation: An advanced reader for PhD students* (pp. 179-194), Tampere University Press. <http://urn.fi/URN:ISBN:978-952-03-0843-8> (last accessed 4. 08. 2023).

¹³ Claudia-Ana Moarcăș, *Despre universități și autonomia universitară*, „Revista de Drept Public” no. 3/2017, p. 39.

The principle is a component of the right to education and a means of defending higher education institutions against ideological, political or religious interference, as well as a guarantee of freedom of the arts and sciences. Its role is to contribute to the improvement of higher education, the performance of universities and the development of the communities in which they operate. Institutional autonomy enables universities to fulfil their mission in the best possible way, by being able to introduce training programmes or attract additional funding¹⁴. According to the Bologna Declaration (1999), university autonomy is freedom of teaching and learning, freedom of research and evaluation, freedom of selection of teaching staff, which ensures that higher education and the research system adapt to the changing needs, demands of society and advanced scientific knowledge¹⁵.

Although there are many variables across the EU Member States, university autonomy generally involves four basic elements: institutional (or organisational), financial, personnel and academic¹⁶. *Institutional autonomy* allows universities to establish their internal structures (leadership, management, etc.), the statutory rules relating to them, to elect/release from office persons within them, to adopt legal rules. The principle allows the internal organisation of universities through the adoption of administrative acts and internal measures. *Financial autonomy* includes the management of funds received from the state budget, the possibility to attract additional funds, to borrow money, to own property, to establish tuition fees. In terms of *staffing*, autonomy allows universities to decide on staff recruitment, termination of employment, promotion criteria and procedures, and salary determination. *Academic autonomy* includes the ability to determine the number of students, the procedures for selecting students, the introduction or elimination of study programmes and the content of these programmes. "Universities must and do enjoy autonomy, but with full accountability, being full within the limits of the law and in addressing the state-university relationship *sine ira et studio*"¹⁷.

3. Jurisprudential approach to university autonomy

The European Court of Human Rights has stressed that university autonomy is not absolute and its exercise must respect the law. Following this reasoning, when higher education institutions issue decisions that do not respect the law, administrative and judicial review is necessary and legitimate. In *Mihăescu v. Romania*, the European Court of Human Rights ruled: „inter alia, while it is true that under the Education Act and according to its own regulations, UMF is autonomous in the selection of teaching staff, this autonomy is not absolute and is subject to the Constitution and the laws of the State. The UMF's own regulation reminds that the decisions of the university commission must respect the law and that, in case of conflict, the university must resort to legal means of action” (para. 41).

According to the case law of the Court of Justice of the European Union, university studies, in their vocational training dimension, have an impact on the internal market because they promote the free movement of persons within the Union (Case 293/83). The organisation, for remuneration, of higher education courses is an economic activity covered by the right of establishment (Article 49 TFEU) when it is carried out by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State¹⁸. *Consequently, decisions of public authorities and higher education institutions must comply with Union law on the internal market when a European cross-border element arises.*

The Constitutional Court has reiterated the absence of absolute character and has made important clarifications, which are still relevant in the context of Law No. 199/2023. According to

¹⁴ Enora Bennetot Pruvot, Thomas Estermann, Nino Popkhadze, *University Autonomy in Europe* (IV), The Scorecard 2023, p. 19 ff. The paper is available at <https://eua.eu/downloads/publications/eua%20autonomy%20scorecard.pdf> (last accessed 29. 08. 2023). Lisbon Declaration of the European University Association (2007).

¹⁵ The statement is available at <http://vechi.cnfis.ro/fd/bologna/documente/bologna.pdf> (last consulted on 4. 08. 2023).

¹⁶ See Enora Bennetot Pruvot, Thomas Estermann, Nino Popkhadze, *op. cit.*

¹⁷ Claudia-Ana Moarcas, *op. cit.*, p. 40.

¹⁸ Commission v. Hungary, Case C66/18, judgment of 6 October 2020, paragraph 160.

the jurisprudence of the Constitutional Court of Romania (Decision CCR no. 719/2008 published in the Official Gazette of Romania, Part I, no. 588 of 5 August 2008; Decision no. 1646 of 16 December 2010, published in the Official Gazette of Romania, Part I, no. 119 of 16 February 2011 and Decision no. 2/2011 published in the Official Gazette of Romania, Part I, no. 136 of 23 February 2011, Decision no. 80/2014 published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014)¹⁹:

- university autonomy *is not an absolute right*, but implies respect for the limits resulting mainly from public accountability.

- university autonomy *does not mean the independence of higher education institutions*, nor does it imply the existence of regulatory and decision-making autonomy outside the generally binding legal framework²⁰.

- university autonomy covers the areas of management, structuring and functioning of the institution, teaching and scientific research, administration and funding and is achieved mainly by establishing the internal structure of the higher education institution according to the law and by planning, organizing, conducting and improving the educational process.

- university autonomy can only be exercised under the condition of public accountability, which obliges any higher education institution to ensure managerial efficiency and requires compliance with legal quality standards.

- the general conditions for the admission of students and the filling of teaching posts are laid down by law.

- the state exercises quality control over the education provided by universities to ensure compliance with agreements within the European Education Area.

- the Rector is confirmed, can be suspended and dismissed by the Minister of Education.

- the Ministry of Education checks how universities exercise their autonomy.

The High Court of Cassation and Justice confirmed the judicial review of legality of administrative acts issued by higher education institutions. According to Decision no. 776/1 March 2017, "it is within the competence of the administrative court to analyse the unjustified nature of the refusal to grant the title of university lecturer, given that this analysis concerns the interpretation and application by the competent bodies of the legal provisions, and not the analysis of the scientific performance of the applicant. In such a situation, it cannot be held that the court has substituted its functions for those of the specialist committee".

In another decision, the Supreme Court ruled that "higher education institutions, whether state or private, have university autonomy under the conditions laid down by Law No. 84/1995 (the legislation in force at the time of the applicant's completion of his course of study), but this does not place them at the top of the organisational hierarchy of the national education system. That regulation provided that, at national level, university autonomy was manifested by the direct relationship of the rector of the higher education institution with the M.E. which, among other things, had the power to confirm by order the act of election of the rector and to suspend him from office"²¹.

The case law of the Courts of Appeal confirms the legality review and allows, more or less conditionally, the opportunity review.

The Court of Appeal of Suceava ruled that "a rule which does not allow a competition test to be contested irreparably affects the individual's interest, i.e. that of the person wishing to have recourse to an administrative review procedure and ultimately to legal action in order to enforce his subjective rights and interests. As a result, it is a limitation of access to justice which can be upheld

¹⁹ See also Camelia Florentina Stoica, Marieta Safta, *University autonomy and academic freedom - meaning and legal basis*, „Perspective of Business Law Journal”, vol. 2, issue 1, November 2013, p. 192-198.

²⁰ University autonomy is not the same as independence. In this regard, the Court, in its Decision No. 2 of 4 January 2011, published in the Official Journal of Romania, Part I, No 136 of 23 February 2011, analysing the situation at European level, stated that university autonomy does not equate with independence and that "the State or local public administration bodies have sufficient competences to ensure that universities meet the quality standards necessary for the realisation of the European Higher Education Area. In these circumstances, the Court holds that the definition given to university autonomy is inappropriate and thus gives rise to an absolute independence of higher education institutions both in the management of their assets and in the appointment of management structures and functions, which leads to the suppression of a guarantee of the right to education conferred by university autonomy" (JRC Decision No. 80/2014, paras. 126, 127).

²¹ Decision No. 2406/2016 of 4 October 2016, unpublished.

only to the extent that it is proportionate to the purpose pursued by the issuer"²². In the present case, the annulment of Article 19 para. 1 of the Order of the Ministry of National Education and Scientific Research no. 5080/2016 for the approval of the Methodology for the organisation and conduct of the competition for the positions of director and deputy director of pre-university educational establishments, according to which the competition tests ("written test" and "curriculum vitae analysis") could not be contested. The Court found that **there was no reasonable relationship of proportionality between the interest of the public authority and the protection of the applicant's fundamental rights**, since the restriction imposed (that of prohibiting the right to an administrative appeal) irretrievably affects the individual interest, that is to say, that of the person wishing to have recourse to an administrative review procedure and ultimately to legal proceedings in order to realise his subjective rights and interests.

The Bucharest Court of Appeal ruled in favour of *reviewing the merits of the administrative act issued*²³. The court held that "the criticisms concerning the university autonomy, the interpretation of Art. 6 lit. g and Art. 211 para. 1 and art. 213 para. 1 of Law no. 1/2011, given that the principle of legality also governs university autonomy by virtue of the provisions of Art. 1 para. 5 of the Romanian Constitution, so that although the appellant-respondent enjoys university autonomy under the legal provisions, it is subject to the principle of legality of the issuance of administrative acts, and from this perspective the right of appreciation of the public authority is to be exercised within the conditions of legality of form and substance of the administrative acts, aspects that are subject to review by the court of administrative jurisdiction, without violating the principle of university autonomy (page 54)".

The Iasi Court of Appeal, in the context of the annulment of a competition procedure for the filling of a teaching post, has inclined in favour of a legality review, but, *exceptionally and implicitly, has also agreed to carry out an opportunity review*. "The administrative court seised of an action for annulment of a competition procedure has jurisdiction to review the legality of the competition procedure and is obliged to confine itself to verifying whether or not the contested acts were issued in accordance with the legal procedures and whether or not they satisfy the conditions of legality required by the legal rule governing the matter. It is not competent to determine the specific marks to be awarded to the applicant or her opponent, since it cannot substitute itself for the selection board, which alone has the legal power and competence to assess candidates... It is specific to public authorities and institutions in administrative matters that a margin of discretion is recognised, which means that, in the absence of any grounds of illegality being raised and proven in relation to the procedure for the conduct of the competition or in relation to aspects *which reveal conduct by the administrative authority contrary to the purpose of the law or the principle of proportionality between the public and private interest*, a reassessment of the aspects relating to the evaluation of candidates carried out in the administrative dispute procedure would constitute an impermissible interference in the powers of the court and a serious violation of the principle of the separation of powers in the State"²⁴. **The basis that would justify the review of expediency in this view is the violation of the law or of the principle of proportionality between public and private interest**²⁵.

In another decision, the Court of Appeal of Suceava implicitly accepts that the opportunity test should be carried out, invoking the *principles of fairness, non-discrimination and equal opportunities*. The court concluded that "the university autonomy guaranteed by the Romanian Constitution in Article 32 para. (6) and Art. 123 of Law 1/2011 does not entitle any educational institution to violate the legislation in force and to establish limitations of rights, which can only be done by law, according to Art. 53 of the Constitution, and only by Parliament. With regard to the powers of the governing and executive bodies of a university under the provisions of Law No 1/2011, we are clearly faced with an overstepping of the legal powers of the University "Ștefan cel Mare"

²² Decision No. 52/27 March 2018 published in the Jurisprudence of the Court of Appeal Suceava.

²³ Decision No. 1535/15. 07. 2021, unpublished.

²⁴ Decision No. 1059/17 July 2019, Jurisprudence of the Iasi Court of Appeal.

²⁵ For a similar idea see Berthold Rittberger, Jeremy Richardson, *What happens when we do not defend academic freedom*, in „Journal of European Public Policy”, 26:3, 2019, p. 324, DOI: 10.1080/13501763.2017.1316946 or Philippe Aghion, Mathias Dewatripont, Caroline Hoxby, Andreu Mas-Colell and Andru Sapir, *The Governance and Performance of Universities: Evidence from Europe and the US*, Economic Policy 25 (61), January 2010, pp. 7-59.

Suceava by imposing additional conditions on dormitory accommodation. (...) In addition, the decision of the university senate also violates the principle of equity - based on which access to learning is achieved without discrimination, the principle of ensuring equal opportunities, the principle of focusing education on its beneficiaries (the student), the principle of basing decisions on dialogue and consultation and the principle of respecting the student's right to opinion as a direct beneficiary of the education system, as well as the principle of transparency and university autonomy, guaranteed by the National Education Law no. 1/2011"²⁶.

4. Conclusions

In our view, when decisions of higher education institutions, their inaction or unjustified refusal to deal with a request are brought before the administrative courts, the *judicial review exercised must be one of both legality and expediency or, in other words, a full judicial review*. "(...) Autonomy must be balanced by a mechanism of accountability, supervision and sanction. When we talk about accountability, oversight and sanctioning, we have to recognise that university autonomy is a sensitive subject, which, without a set of well-developed control structures, can be shaken by the phenomena of protectionism and corruption in the university system"²⁷.

If the courts are not reluctant to carry out legality checks, the delays are quite high when it comes to the timeliness check. More often than not, the courts are called upon to carry out the latter type of control in the context of excess of power. The *principle of proportionality would seem to be the most appropriate area for the application of the proportionality test*. A cardinal principle for any legal system, proportionality helps the courts to observe administrative measures that do not pursue a legitimate aim or are not appropriate to the aim pursued; go beyond what is necessary for that purpose; lack a rational justification for the measure; restrict rights and interests without adequate justification. "The practice of the administrative courts in recent years is part of a natural course of application of the principle of proportionality in administrative law relations, a principle according to which measures ordered by the public authorities must not exceed the limits of what is necessary and appropriate to achieve the public interest, so that the inconvenience caused to the individual is not excessively burdensome in relation to the aims pursued by the action of the administration"²⁸.

By *Decision No. 604 of 7 February 2023*, the High Court of Cassation and Justice confirmed the possibility of using the principle of proportionality to sanction excess of power. "In the same way, executive bodies also apply the principle of proportionality when issuing an administrative act. Their essential objective is to avoid any restriction of citizens' rights and the obligation not to impose on them burdensome tasks, and an appropriate means of achieving this objective is the principle of proportionality. *Any violation of this principle can be verified and sanctioned by the court* (underlined n)".

On the other hand, the control of appropriateness is also about checking the *reasonable balance* between the public interest and respect for individual rights and legitimate private interests. The public interest cannot be achieved in any case, but with care that the legitimate interests of private individuals are also achieved or at least not harmed more than is necessary and proportionate to achieve the public interest.

According to the Administrative Code, the general principles applicable to public administration are legality, equality, transparency, proportionality, satisfaction of the public interest, impartiality, continuity, adaptability²⁹. Therefore, the organisation of the execution of the law and its enforcement in practice is carried out in compliance with the public interest, but also with the principles of non-discrimination, transparency of decision-making, absence of arbitrariness,

²⁶ Decision No. 50/13 January 2022, unpublished.

²⁷ Madalina Dobre, *The importance of university autonomy in the educational act*. The study is available at https://ibn.idsi.md/sites/default/files/imag_file/16-18_5.pdf (date of last consultation 8 September 2023).

²⁸ Gabriela Bogasiu, *Annotated and annotated Administrative Litigation Law*, 4th revised and added edition, Universul Juridic Publishing House, Bucharest, 2018, p. 520.

²⁹ Art. 6 - 13 of the Emergency Ordinance of the Government (GEO) No. 57/2019 on the Administrative Code.

impartiality of the administration, respect for legitimate expectations, predictability, consistency. All these rules on the execution of the law can be grounds for the control of expediency also with regard to administrative acts issued by universities.

Finally, we report the recent considerations of the Court of Cassation and Justice of the European Communities on the control of expediency. "As regards the relationship between legality and expediency, an element of legality or otherwise of the administrative act, the administrative court has the power to censor administrative acts from the point of view of expediency in cases where the law allows it to do so, and by defining the concept of "excess of power" (art. 2 letter n) Law no. 554/2004 as "the exercise of the public authority's right of appreciation by violating the limits of the competence provided by law or by violating the rights and freedoms of citizens"), the legality versus expediency controversy has been clarified, and *administrative acts can be censured also in the case where the authority has acted with excessive power in the performance of its duties*. As the sum of all the conditions for the validity of an administrative act, *legality also implies timeliness*, which derives from the ability of the body issuing the administrative act to choose, from among several possible solutions, the one that best corresponds to the public interest to be served. From this perspective, expediency is a subsystem of the conditions of legality and the act issued with excessive power is unlawful and is sanctioned by nullity. Following all the reasoning set out above, it can be concluded that proportionality gives a measure of expediency in order to delimit excess of power and both principles are aspects of legality of the normative administrative act"³⁰.

Bibliography

1. Aghion, Philippe, Mathias Dewatripont, Caroline Hoxby, Andreu Mas-Colell & Andru Sapir, *The Governance and Performance of Universities: Evidence from Europe and the US*, „Economic Policy” 25 (61), January 2010, pp. 7-59.
2. Andreescu, Liviu, *Academic freedom: between theory and university policies*, European Institute, 2020.
3. Bennetot Pruvot, Enora, Thomas Estermann & Nino Popkhadze, *University Autonomy in Europe (IV)*, The Scorecard 2023, The paper is available at <https://eua.eu/downloads/publications/eua%20autonomy%20scorecard.pdf>
4. Berthold Rittberger, Jeremy Richardson, *What happens when we do not defend academic freedom*, „Journal of European Public Policy”, 26:3, 2019, DOI: 10.1080/13501763.2017.1316946.
5. Bogasiu, Gabriela, *Annotated and annotated Administrative Litigation Law*, 4th revised and added edition, Universul Juridic Publishing House, Bucharest, 2018.
6. Brubacher, John S., *The Autonomy of the University: How Independent Is the Republic of Scholars?*, „The Journal of Higher Education”, vol. 38, no. 5, 1967, pp. 237-49. <https://doi.org/10.2307/1980049>.
7. Dobre, Madalina, *The importance of university autonomy in the educational act*. The study is available at https://ibn.idsi.md/sites/default/files/imag_file/16-18_5.pdf.
8. Emergency Ordinance of the Government (GEO) No. 57/2019 on the Administrative Code.
9. Kohtamäki, Vuokko & Balbachevsky, Elisabeth (2018), *University autonomy: From past to present* in E. Pekola, J. Kivistö, V. Kohtamäki, C. Yuzhuo, & A. Lyytinen (Eds.), *Theoretical and Methodological Perspectives on Higher Education Management and Transformation: An advanced reader for PhD students* (pp. 179-194), Tampere University Press. <http://urn.fi/URN:ISBN:978-952-03-0843-8>.
10. Moarcăș, Claudia-Ana, *Despre universități și autonomia universitară*, „Revista de Drept Public” no. 3/2017.
11. Muraru, Ion & Tănăsescu, Elena Simina (coord.), *Romanian Constitution. Commentary on Articles*, 3rd edition, C. H. Beck, 2022.
12. Poole, Thomas, *Legitimacy, Rights and Judicial Review*, „Oxford Journal of Legal Studies”, vol. 25, no. 4, 2005, pp. 697-725.
13. Popa Tache, Cristina Elena, *Le dynamisme du droit international public contemporain et la transdisciplinarité*, préface de Florent Pasquier, Ed. L'Harmattan Paris, the collection "Le droit aujourd'hui", 2023.
14. Stachowiak-Kudła, M., *Academic freedom as a source of rights' violations: a European perspective*. High Educ 82, pp. 1031-1048 (2021). <https://doi.org/10.1007/s10734-021-00718-3>.
15. Stoica, Camelia Florentina & Safta, Marieta, *University autonomy and academic freedom - meaning and legal basis*, „Perspective of Business Law Journal”, vol. 2, issue 1, November 2013, p. 192-198.

³⁰ Decision of the Court of Cassation and Justice No. 604 of 7 February 2023.