
12. Using EU citizenship to protect academic freedom: an alternative method¹

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1. RISING AUTHORITARIANISM AND ACADEMIC FREEDOM

This chapter highlights a dynamic interpretation of the institution of EU citizenship, which could enable us to defend, at least partially, academic freedom Europe-wide. It is based on the fact that EU citizenship has evolved greatly in its history, and this process could probably continue. The topic has special relevance because of two problems. First is the marketization of academia,² which has a strong effect on academic freedom.³ Second, in Hungary and Poland issues related to the authoritarian turn of their governments and the techniques of autocratic legalism⁴ have resulted in a systemic limitation of academic freedom. In response, the EU could find itself competency to act in these cases through interpreting academic citizens as EU citizens with fundamental rights in the higher education sector.

In Hungary, the changes made between 2010 and 2018 led to a nationalistic palingenesis (complete rebirth) of the legal system: all of the crucial laws were replaced.⁵ As the new governmental system is based on strong anti-Enlightenment sentiment,⁶ it disrespects pluralism,

¹ I would like to thank Anna Unger, Balázs Majtényi and Zsolt Körtvélyesi for their observations regarding the first draft of this article.

² Michael A Olivas, 'The Growing Role of Immigration Law in Universal Higher Education: Case Studies of the United States and the EU' (2015) 37 *Houston Journal of International Law* 401; Les Levidow, 'Marketizing Higher Education: Neoliberal Strategies and Counter-strategies' in Kevin Robins and Frank Webster (eds), *The Virtual University? Knowledge, Markets and Management* (OUP 2002) 227–48.

³ Elise S Brezis and Joël Hellier, 'Social Mobility at the Top and the Higher Education System' (2018) 52 *EJ Pol Econ* 37; Craig Brandist, 'The Risks of Soviet-Style Managerialism in UK Universities' www.timeshighereducation.com/comment/the-risks-of-soviet-style-managerialism-in-united-kingdom-universities; Kathleen Lynch and Mariya Ivancheva, 'Academic Freedom and the Commercialisation of Universities: A Critical Ethical Analysis' (2015) 15 *Ethics in Science and Environmental Politics*; Luke Martell, 'The Marketisation of Our Universities Is Fragmenting the Academic Workforce at the Students' Expense' <http://blogs.lse.ac.uk/impactofsocialsciences/2013/12/04/the-marketisation-of-our-universities/>.

⁴ Roger Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52 *Government and Opposition*, Special Issue 2 (Democracy without Solidarity: Political Dysfunction in Hard Times) 211–38; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3–47.

⁵ To mention only a few major examples, see the new constitution (Fundamental law), Act C. of 2012 on the new Penal Code, Act V. of 2013 on the new Civil Code, Act XXXVI. of 2013 on the Electoral Procedure; Act CCIII. of 2011 on the Elections of the Members of the Parliament; Act CLXII of 2011 on the legal status and remuneration of judges; Act CIV of 2010 on the freedom of the press and the fundamental rules on media content; Act CLXXXV. of 2010 on media services and mass media.

⁶ Zeev Sternhell, *The Anti-Enlightenment Tradition* (Yale UP 2010).

attacks those who criticize governmental actions and tries to extort a uniform worldview by dividing society into ‘friends and enemies’, in a Schmittian manner. As a side effect of this tendency, dozens of regulations have been introduced that limit academic freedom either directly or indirectly. The Sargentini Report adopted by the European Parliament in September 2018 called on the Council to use the Art. 7 TEU procedure and determine that a clear risk of fundamental rights breaches had occurred in Hungary.⁷ In its separate part on ‘academic freedom’ (Points 33–36), it mentioned certain recent government actions such as the expulsion of the Central European University (CEU), the government ban on gender studies and discrimination against Roma students in primary and secondary schools. However, it did not follow a more holistic approach and did not analyse deeper changes in education governance.

In Poland, several major laws have been repealed or modified.⁸ At the end of 2017 the European Commission triggered the Art. 7 TEU procedure against Poland,⁹ and the European Parliament supported this action in March 2018.¹⁰ In 2018 a new law on higher education was adopted, which prompted widespread protests demanding ‘democratic universities’, ‘autonomy’ and ‘sovereign academia’.¹¹

⁷ Report (4 July 2018) on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded. PE 620.837v02-00 A8-0250/2018.

⁸ The scope of these changes was not as wide as in Hungary. However, changes were made to the 1984 Polish Press Law; see also Law of 30 December 2015 amending the Broadcasting Law, published in Official Journal on 7 January 2016, item 25; Law of 30 December 2015 amending the Law on Civil Service and certain other acts, published in Official Journal on 8 January 2016, item 34; Law of 15 January 2016 amending the Law on Police and other laws, published in Official Journal on 4 February 2016, item 147; Law of 28 January 2016 on the Prosecutor’s Office, published in Official Journal on 15 February 2016, item 177; Law of 28 January 2016 – Regulations implementing the Act – Law on the Prosecutor’s Office, published in Official Journal on 15 February 2016, item 178; Law of 18 March 2016 on the Ombudsman and amending certain other laws. For their background see Commission Recommendation of 21.12.2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374. Com(2016) 8950 final; a law on the Public Prosecution Office; a law on the role of police; and a law on the judiciary. At the centre of the disputes was the restructuring of institutions such as the Constitutional Tribunal and the Supreme Court. ‘European Commission Refers Poland to the European Court of Justice to Protect the Independence of the Polish Supreme Court’, European Commission Press Release, Brussels, 24 September 2018, IP 18 5830.

⁹ Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law (COM [2017] 835 final).

¹⁰ European Parliament Resolution of 1 March 2018 on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541[RSP]); Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Maciej Taborowski and Matthias Schmidt, ‘A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines’ (2018) 55 CML Rev 1–14.

¹¹ Jack Grove, ‘Student Protests in Poland Delay “Authoritarian” Law’ www.timeshighereducation.com/news/student-protests-poland-delay-authoritarian-law; Marysia Ciupka, ‘This Is Our Space: Students at Polish Universities Unite in Protest against New Higher Education Reform’ <http://politicalcritique.org/cee/poland/2018/polish-reform-higher-education-gowin-protest/>; ‘Protesting Polish Students Stall Controversial Bill That Would Clamp Down on Academic Freedom’ <https://globalvoices.org/2018/06/26/protesting-polish-students-stall-controversial-bill-that-would-clamp-down-on-academic-freedom/>.

2. THE FRAGMENTS OF EU COMPETENCY

If we unravel the EU's role in academia, we can see that its exercise of power can be separated into three major areas. First, it does not have the competency to adopt decisions on certain matters, such as the financing of universities, as they fall into exclusive member state competencies. Second, it has the power to help member states to cooperate (supporting competency). A good example of this is the framework of the Erasmus cooperation. Third, in a number of cases, a clear EU competency exists to adopt laws. This is the case, for example, regarding the recognition of diplomas.¹²

The legal background also shows this fragmentation. Art. 6 TFEU states that the Union only has the competence to support, coordinate or supplement the actions of the member states in education. Art. 165 of the TFEU also explains this power.¹³ Moreover, Art. 166 of the TFEU provides a detailed list of jobs, such as the strengthening of the 'European dimension' in education, encouraging the mobility of students and professors and promoting cooperation between educational establishments. The list seems to be exhaustive, narrowing down actions in other fields.¹⁴ It is worth keeping in mind that this cooperation does not necessarily mean the adoption of EU legislation. For example, the Bologna cooperation is based on a simple declaration by the member states, which is not even published in the *Official Journal*.¹⁵ This can cause problems as students do not necessarily receive enforceable rights, because a declaration is not a legal act and has no direct effect.¹⁶ In other cases (such as the European Qualifications Network), this competency has been practised through recommendations.¹⁷

Contrary to the above, we find acts that were adopted based on certain provisions of the TFEU, which clearly give the EU the competency to govern certain areas. For example, Art. 53 TFEU states that the EU has the right to govern the mutual recognition of diplomas, certificates and other qualifications.¹⁸ Beyond this, the directive on the free movement of students has also been adopted with a competency background rooted in the free movement of citizens.¹⁹ Furthermore, decisions of the Court of Justice have developed certain fields, such

¹² Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255, 30 September, 22–142; Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, Materials* (PUP 2011) 809 et seq.

¹³ Sacha Garben, *EU Higher Education Law* (Kluwer Law International 2011) 55–97.

¹⁴ Marion Simm, 'AEUV Artikel 165, 166' in Jürgen Schwarze, Ulrich Becker, Armin Hatje and Johann Schoo (eds), *EU-Kommentar* (Nomos 2012) 1734.

¹⁵ The Bologna Declaration of 19 June 1999 – Joint declaration of the European Ministers of Education www.magna-charta.org/resources/files/BOLOGNA_DECLARATION.pdf.

¹⁶ Sacha Garben, 'The Bologna Process: From a European Law Perspective' (2010) 16 *European Law Journal* 208.

¹⁷ Recommendation of the European Parliament and of the Council of 15 February 2006 on further European cooperation in quality assurance in higher education [2006] OJ L64/60; Sacha Garben, *EU Higher Education Law* (n13) 152.

¹⁸ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

¹⁹ Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L180/30, repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC (text with EEA relevance) [2004] OJ L158/77.

as access to higher education, support and grants²⁰ or the free movement of services of private educational institutions.²¹ In addition, in the field of justice and home affairs, some rules also govern the member states' relationship with third-country nationals.²²

While one could find implied powers for the EU to broaden the scope of its actions,²³ until now there have only been deliberate actions to do so. One could also argue that university titles (such as habilitation or MCF) pose great obstacles to the free movement of EU citizens, but this interpretation is not supported by the present stage of EU law. As a result of the fragmented background, certain issues, such as avoiding discrimination against students or students' right to access grants, are addressed, while others, such as students' and professors' fundamental rights in public universities, are not.²⁴ Moreover, EU law handles education and research separately. Regarding the latter, Art. 4(3) and Art. 179(2) TFEU say that the EU shall only encourage and support research cooperation, and should not interfere with member state power. As a result, in this field we have the same competency problem as in the case of higher education.

Finally, EU citizenship and academic citizenship are not connected in EU legislation at all, and the idea that the two could be connected is missing completely from the legal sources.

²⁰ Case C-147/03 *Commission of the European Communities v Republic of Austria* EU:C:2005:427 [2005] ECR I-05969; Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan v Bezirksregierung Köln (C-11/06) and Iris Bucher v Landrat des Kreises Düren (C-12/06)* EU:C:2007:626 [2007] ECR I-09161; Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* EU:C:2010:181 [2010] ECR I-02735; Case C-293/83 *Françoise Gravier v City of Liège* EU:C:1985:69 [1985] ECR 593; Case C-209/03 *Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* EU:C:2005:169 [2005] ECR I-2119; Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630 [2008] ECR I-8507; Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458 [2001] ECR I-06193; Koen Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 *Jurisprudencija – Jurisprudence* 405 et seq.; Susann Bartels, 'Students as Subject of EU Law' https://essay.utwente.nl/60302/1/BSc_S_Bartels.pdf.

²¹ Case C-9/74 *Donato Casagrande v Landeshauptstadt München* EU:C:1974:74 [1974] ECR 77; Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* EU:C:2007:492.

²² Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing [2016] OJ L132/21; Case C-491/13 *Mohamed Ali Ben Alaya v Bundesrepublik Deutschland* EU:C:2014:2187.

²³ Koen Lenaerts, 'Education in European Community Law after Maastricht' (1994) 31 *CML Rev* 11.

²⁴ Sacha Garben, 'The Failure to Protect Education as an Inalienable Policy Domain of EU Member States: A Critical Assessment of Article 165 TFEU on Education and Suggestions for Reform' in Thomas Giegerich, Oskar J Gstrein and Sebastian Zeitmann (eds), *The EU between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (Nomos 2014) 528; Paul P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 *European Law Review* 323. See also Paul P Craig, 'Competence and Member State Autonomy' in Hans-W Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 11–34.

3. ACADEMIC FREEDOM OF EU CITIZENS AND ACTIONS LIMITING THIS FREEDOM

Contrary to the above, this article argues that academic freedom should not be viewed as a policy matter, but as an issue related to fundamental rights. Art. 13 of the Charter of Fundamental Rights of the EU (in the section on ‘Freedom of the arts and sciences’) says that ‘the arts and scientific research shall be free of constraint. Academic freedom shall be respected.’

In Art. 14 the Charter also adds several other rights, such as the right to receive free compulsory education, the freedom to found educational establishments with respect for democratic principles and the right of parents to ensure their own religious, philosophical and pedagogical convictions in education. These are ‘in accordance with the national laws governing the exercise of such freedom and right’. This last phrase is especially important as, unlike Art. 51 of the Charter, it seems to suggest that national laws must also conform with these rights. The rights mentioned in the Charter are universal, in the sense that they do not differentiate between EU citizens and third-country nationals. However, if taken seriously, they can be used as a shield to protect EU citizens.

In the following, this article recaps the changes in higher education in Poland and Hungary. It tries to cover open or clandestine measures that limit individual or institutional freedom of EU citizens.²⁵ Institutional freedom is important, as institutional autonomy and individuals’ academic freedom are closely connected. Placing a government limit on an institution’s teaching, research or financial autonomy can have a negative effect on individual academic freedom, and as such limits EU citizens’ academic freedom as well.²⁶ This can occur if an EU citizen works in the academic environment outside his or her home country, but also in purely domestic situations, where the state acts against the established domestic academic elite. Academic freedom can be understood as a collection of rights ‘granted to academic (non-administrative) teaching and research staff in Universities to enable them to undertake their teaching and research activities to the highest possible professional standards’.²⁷ This also applies to institutions. In their case, it may be defined as the right to ‘decide freely and independently how to perform their tasks’.²⁸

3.1 Distorting Pluralism: Denying Equality of Universities

In both Hungary and Poland, some governmental actions have selected certain universities and put them in monopoly positions. In Hungary this is especially problematic, as the state diverts

²⁵ James D Gordon, ‘Individual and Institutional Academic Freedom’ (2010) 49 *Brigham Young University Studies* 43–7.

²⁶ Jogchum Vrieling, Paul Lemmens and Stephan Parmentier, ‘Academic Freedom as a Fundamental Right and the LERU Working Group on Human Rights’ (2011) 13 *Procedia Social and Behavioral Sciences* 117–41; Earl Hunt, ‘The Rights and Responsibilities Implied by Academic Freedom’ (2010) 49 *Personality and Individual Differences* 264–71; Terence Karran, ‘Academic Freedom in Europe: Time for a Magna Charta?’ (2009) 22 *Higher Education Policy* 163–189.

²⁷ Terence Karran (n 26) 170.

²⁸ Terence Karran (n 26) 169.

support from other institutions.²⁹ For example, the National University of Public Service (governed by the Prime Minister's Office) was cut out of the higher education system and received four times as much financial support for students per capita as other universities³⁰ (interestingly, EU funding allocated through the government even boosts this exceptional position). Furthermore, only graduates of this university may work for (central and local) government, and certain programmes (for example, international public administration) can be taught only at this university.³¹ While Corvinus University, the foremost university of economics, was recently privatized (it must work as a private fund in the future), the Hungarian National Bank founded a university (Pallasz Athéné University, later renamed János Neumann University) because its head (a former government minister) was unsatisfied with the way 'orthodox liberal' economists teach. This university also receives extensive state support. In 2020–1, around half of the public universities were privatized.³²

The landscape of research institutions also changed in Hungary: the government cut out the research institutes of the most important research institution of the country, the Hungarian Academy of Sciences, thereby affecting the research of thousands of scholars. A new research centre was created with a name borrowed (or stolen) from Eötvös Loránd University, one of Hungary's leading universities: the Eötvös Loránd Research Network (ELKH), governed by a commission in which government delegates have a majority. The president of the new structure is Miklós Maróth, a supporter of PM Viktor Orbán, who made a name for himself in the Hungarian press recently for jokingly claiming at a conference that Muslims should be tied into pig skin in order to integrate into European societies. Moreover, many GoNGOs and think tanks have been founded with the purpose of spreading government propaganda.

In Poland, a wider restructuring happened in the Act adopted in 2018 on higher education (called Bill 2.0 in the media). According to the new bill, funding for universities and the power to award degrees will depend on the scores they receive for their research performance, and additional funding will be available only for the top universities. For smaller regional universities, this change could remove their right to offer PhD programmes and reduce their student

²⁹ Public spending on education dropped to 3.8 per cent of GDP, which is one of the lowest percentages among the OECD countries (the OECD average is 5 per cent; the EU average is 4.5 per cent). Only three OECD countries spent proportionately less (Russia, Luxembourg and Ireland). The country spends 0.9 per cent of its GDP on tertiary education, which is approximately half of the OECD average. The number of people holding university degrees dropped: there are 8.8 per cent fewer in Hungary than the European average. The number of students also drastically dropped, from 370,000 in 2010 to 287,000 in 2016. Extensive tuition fees were introduced in 2011, even though, in a national referendum in 2008, 82.2 per cent of voters opposed their introduction. The decline of Hungarian universities in international rankings (many of them lost hundreds of places) also shows the effect of these policies; see 'Education at a Glance – 2018 OECD Indicators' http://webexchanges.oecdcode.org/F0w3Shjh/EAG2018_final_embargo.pdf 258; <https://qubit.hu/2018/09/11/magyarorszag-kulonosen-keveset-kolt-oktatasra-a-tanarok-fizetese-toredeke-az-oecd-atlagnak>; Márton Gerő, 'Radical Changes in Higher Education' www.eurofound.europa.eu/sr/publications/article/2012/radical-changes-in-higher-education; <https://444.hu/2017/05/13/tobb-evtizedes-melyponton-a-magyar-felsooktatásban-hallgatók-száma>.

³⁰ György Unyatyinszki, 'Ömlik a pénz a közszolgálati egyetemnek' [Money flows to the National University of Public Service] <https://mno.hu/belfold/omlik-a-penz-a-kozszolgalmati-egyetemnek-2418324>.

³¹ Moreover, state-financed studies here do not count in the 12-semester limit on state-funded studies in the general higher education system.

³² Erudera College News, 'Half of Hungarian Universities Privatized by Government' <https://collegenews.org/half-of-hungarian-universities-privatized-by-government/>.

numbers, which could have a devastating effect on them.³³ This divide will be strengthened by the fact that only the largest universities have the right to call themselves universities; others receive the title of ‘professional academies’.

In both countries, the changes have produced a kind of academic oligarchization and existential insecurity for those working in the academic sector.³⁴ Apart from domestic (EU) citizens’ rights, this can also limit the rights of EU citizens living and working in the academic sector in other countries: as a result of oligarchization, after a while it will become harder to find academic partners in these countries.

3.2 Intrusion into Universities’ Decision Making: The Change of Governance

In Hungary, financial directors were appointed by the government to control university finances. Later, so-called university consistories were established, which have a crucial role in accepting the budget of the university and approving its development plans. The majority of its members are delegated by the responsible minister. Furthermore, a new institution, the chancellor, was introduced (which, just like the rector, is also delegated by the responsible minister), and many of the rector’s powers were transferred to it. Chancellors control spending, the usage of university facilities, recruitment, promotions and salaries.³⁵ Furthermore, after the privatization of Corvinus University, faculties were turned into ‘institutes’ as of 1 February 2020. As a consequence, autonomous faculty boards were abolished. Furthermore, at the universities freshly privatized in 2020–1, the members of the new foundations’ supervising bodies were delegated solely by the government. Many include former and present high-ranking government politicians.³⁶ The biggest outcry resulted from the structural changes at the University of Theatre and Film Arts: protesting students occupied university buildings and teaching ceased for a period.³⁷ The changes resulted in Hungarian higher education dropping from ‘sixth position to 28th (one from bottom) on the European University

³³ Matthew Reisz, ‘Higher Education “Turned Upside-Down” by Polish Reforms’

www.timeshighereducation.com/news/higher-education-turned-upside-down-polish-reforms/; Marysia Ciupka, ‘This is Our Space. Students at Polish Universities Unite in Protest against New Higher Education Reform’ <http://politicalcritique.org/cee/poland/2018/polish-reform-higher-education-gowin-protest/>.

³⁴ Dorota Dakowska, ‘Higher Education in Poland: Budgetary Constraints and International Aspirations’ in Jon Nixon (ed.), *Higher Education in Austerity Europe* (Bloomsbury 2017) 79–91.

³⁵ ‘[I]n a number of European states, however, universities have decision-making bodies that partially or even pre-dominantly are made up of external representatives and not by academic staff [...] It is clear that in such situations there is a need for counterbalancing safeguards.’ Paul Lemmens, Stephan Parmentier, Jogchum Vrieling and Laura Keustermans, ‘Academic Freedom as a Fundamental Right’, *League of European Research Universities’ Advice Paper* No. 6 (December 2010) 19 fn. 50; Terence Karran, ‘Academic Freedom in Europe: Reviewing UNESCO’s Recommendation’ (2009) 57 *British Journal of Educational Studies* 204. See also decisions No. 41/2005 and No. 39/2006 of the Hungarian Constitutional Court.

³⁶ Inotai Edit, ‘FIDESZ Makes Hungary’s Universities An Offer They Can’t Refuse’ <https://balkaninsight.com/2021/02/23/fidesz-makes-hungarys-universities-an-offer-they-cant-refuse/>; Tímea Drinóczi, ‘Loyalty, Opportunism and Fear: The Forced Privatization of Hungarian Universities’, *VerfBlog*, 2021/2/05 <https://verfassungsblog.de/loyalty-opportunism-and-fear>.

³⁷ Lydia Gal, ‘Hungary Continues Attacks on Academic Freedom’ www.hrw.org/news/2020/09/03/hungary-continues-attacks-academic-freedom.

Association's financial autonomy scorecard between 2011 and 2017'.³⁸ A possible effect of the new rules is that some university decisions may be the result of political demands. Perfect examples of this are the University of Debrecen giving Vladimir Putin a special distinction³⁹ and Abdel Fattah el-Sisi receiving the title *doctor honoris causa* from the National University of Public Service.

In Poland, Bill 2.0 tried to

diminish the power of university senates made up of students and staff in favour of new university councils whose membership would have had a majority of individuals from outside the institution. These would have the power to set the university's strategy and appoint the rector, with critics warning that appointees to the panels were likely to be 'corporate representatives and politicians'.⁴⁰

Later, an amended version of the changes was adopted, which limited the council's rights concerning university strategy and the election of university rectors. However, the new law gave more power to rectors, who control funding and will have extensive rights to reshape universities' scientific organization. Moreover, faculty boards representing the interests of academic staff were abolished.⁴¹

3.3 Attacking Freedom of Thought: Banning Academic Programmes

In a number of cases, the direct influence of politics can be even more easily traced regarding the list of university programmes.⁴² A perfect example of this is the Hungarian government banning (erased from the list of programmes available to accredit and start) some BA programmes, such as communication and media studies, social studies and cultural anthropology. In 2018 it also banned gender studies,⁴³ and the start of a 'family studies counter course' was

³⁸ David Matthews, 'The State of Higher Education in Hungary' www.timeshighereducation.com/features/the-state-of-higher-education-in-hungary; Enora B Pruvot and Thomas Estermann, 'University Autonomy in Europe III: The Scorecard 2017' <https://eua.eu/resources/publications/350:university-autonomy%C2%A0in-europe-iii-%C2%A0the-scorecard-2017.html>.

³⁹ In this case, the rector warned the university community that he would start disciplinary proceedings if they protested against the decision.

⁴⁰ 'Higher Education "Turned Upside-Down" by Polish Reforms' www.timeshighereducation.com/news/higher-education-turned-upside-down-polish-reforms.

⁴¹ 'The Nerds' Turn: Battling for a Democratic Academia in Poland' <http://allegralaboratory.net/the-nerds-turn-battling-for-a-democratic-academia-in-poland/>.

⁴² In a number of cases, attacks against NGOs also affected academia; see 'CEU Suspends Programs for Refugees, Asylum Seekers' https://bbj.hu/news/ceu-suspends-programs-for-refugees-asylum-seekers_154078.

⁴³ See Government Decree 188 of 2018 amending Government Decree 283 of 2012 on teachers' education, specialization, and the list of teachers' education and amending Government Decree 283 of 2012 on the list of obtainable degrees in higher education and the transcription of new programs; Andrea Pető, 'Report from the Trenches: The Debate around Teaching Gender Studies in Hungary' www.boell.de/en/2017/04/10/report-trenches-debate-around-teaching-gender-studies-hungary.

announced by the Ministry of Human Resources.⁴⁴ Furthermore, universities must receive prior permission from the minister if they want to start teaching a programme.⁴⁵

3.4 Limitation of Free Speech through Direct Attacks against Professors

Both countries have experienced different forms of direct attacks against university professors. In Hungary, professors are regularly sought out individually or collectively in the media. A good example of this is the case of *Figyelő*, a pro-government weekly that published the names of hundreds of intellectuals, including academics and even university students, who were the ‘agents of George Soros’.⁴⁶ Moreover, government-critical scholars were expelled in dramatic ways,⁴⁷ it became easier to revoke leadership roles in academia⁴⁸ and students were recruited by a government-friendly website to report whether their professors were critical towards the government.⁴⁹ In this milieu, several conference programmes about ‘sensitive questions’, such as gender equality or migration, were cancelled.⁵⁰

Freedom of thought and free speech were also limited in Poland when the country banned academic discussion of the Polish people’s participation in the Holocaust. As a result, there were plans to strip Jan T. Gross, a professor at Princeton University, of the Knight’s Cross of the Order of Merit of Poland.⁵¹ Later, the bill was changed and the criminal sanctions were erased from it, but Polish researchers were still attacked in Paris at a conference in 2019.⁵² Furthermore, Bill 2.0 regulates retirement ages differently between men (65) and women (60). Beside limiting academic freedom, this provision discriminates between people based on their sex, thereby also violating EU citizens’ rights.⁵³

⁴⁴ ‘Hungary’s University Ban on Gender Studies Heats up Culture War’ www.dw.com/en/hungarys-university-ban-on-gender-studies-heats-up-culture-war/a-45944422; Sargentini Report, Point (36); ‘EUA Condemns Hungarian Government Plan to Ban Gender Studies’ <https://eua.eu/news/130:eua-condemns-hungarian-government-plan-to-ban-gender-studies.html>.

⁴⁵ See Art. § 71/B of Act No. CCIV of 2011 on higher education.

⁴⁶ ‘Hungary’s Viktor Orban Targets Critics with “Soros Mercenaries” Blacklist’ www.dw.com/en/hungarys-viktor-orban-targets-critics-with-soros-mercenaries-blacklist/a-43381963.

⁴⁷ ‘Policy Solutions: Political Discrimination in Hungary’ www.policysolutions.hu/userfiles/elemzes/265/political_discrimination_in_hungary.pdf 26.

⁴⁸ See Act CLXXV of 2010 on the modification of Act XXXIII of 1992 on public servants.

⁴⁹ ‘Recruiting Student Informers against Disloyal Professors’. Hungarian Spectrum <http://hungarianspectrum.org/tag/attacks-on-faculty/>.

⁵⁰ ‘Hungarian Academy of Sciences Rejects Conference Proposals on Political Grounds’ hungarianfreepress.com/2018/10/02/hungarian-academy-of-sciences-rejects-conference-proposals-on-political-grounds/.

⁵¹ Hank Reichmann, ‘Academic Freedom Threatened in Poland’ <https://academeblog.org/2016/02/19/academic-freedom-threatened-in-poland/>.

⁵² Marc Santora, ‘Poland’s Holocaust Law Weakened after “Storm and Consternation”’ www.nytimes.com/2018/06/27/world/europe/poland-holocaust-law.html; ‘Katarzyna Markusz, Polish Holocaust Researchers Attacked at Paris Shoah Research Conference’, *The Jerusalem Post* (25 February 2019) www.jpost.com/Diaspora/Antisemitism/Polish-Holocaust-researchers-attacked-at-Paris-Shoah-research-conference-581687.

⁵³ Art. 157 TFEU; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204, 26 December 2006 23; Case C-43–75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* EU:C:1976:56 [1976] ECR 455; Case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale*,

3.5 The Case of Scholarship Contracts in Hungary

In a small number of cases, EU infringement procedures have been started against Hungary.

The first of such measures (a pilot procedure) was connected with the student agreements introduced in 2012.⁵⁴ According to the changes, state-funded students had to conclude a contract with the state, which stipulated that they would have to pay the entire sum of their tuition fee were they to leave the country permanently after their studies.⁵⁵ The European Commission began to investigate the case, as it violated Art. 45 of the TFEU. Later, the Hungarian Constitutional Court found the related provisions to be unconstitutional and annulled them.⁵⁶ After this, a new rule introduced similar provisions.⁵⁷ However, this time, students have to make a statement about their tuition fees and, in the future, only those who chose to be state-funded will have to pay the tuition fee if they leave the country and have not worked in Hungary for a period of time at least as long as that of their studies. This new ‘optional form’ was mistakenly found to conform to the letter of EU law by the Commission. Apart from the general ban on the limitation of freedom of movement,⁵⁸ in the *d’Hoop* case, the European Court of Justice (ECJ) ascertained that

it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.⁵⁹

In the *Graaf* case it was stressed that ‘provisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement [...] constitute an obstacle to that freedom’.⁶⁰ Even if such measures can be justified if they are intended to fulfil a legitimate aim and are proportionate – like the existence of Belgian⁶¹ and Austrian⁶² quota systems for medical

Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo EU:C:1974:140 [1974] ECR 1405; Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights* (OUP 2012) 375.

⁵⁴ Government Decree 2 of 2012 on the student contracts on state scholarship and partial scholarship.

⁵⁵ During a 20-year period, they had to work for a period at least twice as long as the time of their education in Hungary.

⁵⁶ Constitutional Court Decision No. 32 of 2012.

⁵⁷ See Section b) of Art. 48/A, Act CCIV of 2011 on national higher education.

⁵⁸ Case C-293/85 *Commission of the European Communities v Kingdom of Belgium* EU:C:1988:40 [1988] ECR 305; Case C-147/03 *Commission of the European Communities v Republic of Austria* EU:C:2005:427 [2005] ECR I-05969; Case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* EU:C:2001:458 [2001] ECR I-6193; Case C-18/95 *F.C. Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland* EU:C:1999:22 [1999] ECR I-345; Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen* EU:C:2005:187 [2005] ECR I-2421; Case C-520/04 *Pirkko Marjatta Turpeinen* EU:C:2006:703 [2006] ECR I-10685.

⁵⁹ Case C-224/98 *Marie-Nathalie D’Hoop v Office national de l’emploi* EU:C:2002:432 [2002] ECR I-06191.

⁶⁰ Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* EU:C:2000:49 [2000] ECR 2000 I-493.

⁶¹ Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* EU:C:2010:181 [2010] ECR 2010 I-2735.

⁶² ‘Commission Endorses Austria’s Quota System for Medical Studies as Necessary to Protect the Austrian Health Care System, but Asks Austria to End the Quota Imposed on Dental Studies’, European Commission Press Release IP/17/1282.

students – a holistic system like the Hungarian one is probably not in line with these general rules of EU law.

3.6 The Case of the Central European University

In 2017 the Hungarian government introduced a law making it impossible for one of the best universities in Hungary – CEU, an American–Hungarian private university – to function in the country.⁶³ The new law introduced two important provisions. First, the activity of any foreign university functioning in Hungary must be based on an agreement between the foreign country and Hungary. Second, foreign universities operating in Hungary must be ‘present and offer programs in the country in which they are accredited’.⁶⁴ The law triggered protests within and outside Hungary; it was mentioned in the Sargentini Report; and, upon request from the Commissioner of Fundamental Rights, the Constitutional Court started a procedure to review it. One of the most plausible legal arguments against governmental actions was expressed by a group of scholars (including László Sólyom, the former president of Hungary),⁶⁵ who wrote an *amicus curiae* for the Constitutional Court explaining why the new law is unconstitutional.

In response, the European Commission launched an infringement procedure against Hungary.⁶⁶ The Hungarian Constitutional Court suspended its procedure – a widely criticized move.⁶⁷ Later, a reasoned opinion was sent to Hungary.⁶⁸ In December 2017 the Commission referred the case to the Court of Justice of the EU,⁶⁹ and in October 2018 CEU announced that it would leave the country and move to Vienna, as the Hungarian government had not signed

⁶³ See Act XXV of 2017 and Art. 76 of the Law on national higher education; European Commission for Democracy through Law (Venice Commission) Hungary Preliminary Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education; Anne Corbett and Claire Gordon, ‘Academic Freedom in Europe: The Central European University Affair and the Wider Lessons’ (2018) 58 *History of Education Quarterly* 467–74; Renáta Uitz, ‘Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary’ <https://verfassungsblog.de/academic-freedom-in-an-illiberal-democracy-from-rule-of-law-through-rule-by-law-to-rule-by-men-in-hungary/>; Zsolt Enyedi, ‘Democratic Backsliding and Academic Freedom in Hungary’ (2018) 16 *Perspectives on Politics* 1067–74.

⁶⁴ Petra Bárd, ‘The Open Society and Its Enemies: An Attack Against CEU, Academic Freedom and the Rule of Law’ CEPS Policy Insight No. 2017/14 p.2.

⁶⁵ András Jakab, Miklós Lévay, Zoltán Sente and László Sólyom, ‘Amicus Curiae az Alkotmánybírósághoz’ [http://public.mkab.hu/dev/dontesek.nsf/0/af27b40ba3b0b821c1258109003f9b19/\\$FILE/II_1036_5_2017_%C3%A1ll%C3%A1sfoglal%C3%A1s.002.pdf/II_1036_5_2017_%C3%A1ll%C3%A1sfoglal%C3%A1s.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/af27b40ba3b0b821c1258109003f9b19/$FILE/II_1036_5_2017_%C3%A1ll%C3%A1sfoglal%C3%A1s.002.pdf/II_1036_5_2017_%C3%A1ll%C3%A1sfoglal%C3%A1s.pdf).

⁶⁶ European Commission, *Daily News* (26 April 2017) http://europa.eu/rapid/press-release_MEX-17-1116_en.htm.

⁶⁷ Gábor Halmai, ‘The Hungarian Constitutional Court Betrays Academic Freedom and Freedom of Association’ <https://verfassungsblog.de/the-hungarian-constitutional-court-betrays-academic-freedom-and-freedom-of-association/>.

⁶⁸ European Commission, ‘Hungary: Commission Takes Second Step in Infringement Procedure on Higher Education Law’, Press Release IP/17/1952.

⁶⁹ European Commission, ‘Commission Refers Hungary to the European Court of Justice of the EU over the Higher Education Law’, Press Release IP/17/5004.

the necessary treaty with the US.⁷⁰ The ECJ delivered its judgment in the case in October 2020, and upheld the decision of the Commission.⁷¹

The argumentation of the Commission, and also, partly, the final judgment, deserves some attention. Based on its logic, the Commission only starts a procedure in cases that violate internal market rules or other EU law. In such cases, as a connecting factor to EU law exists, the Commission is able to use the rules of the EU Charter of Fundamental Rights. According to this scheme, for example, when judges were expelled in Hungary, the EU started a procedure not because of an attack against the judiciary but because of age discrimination.⁷² The same is true in the CEU case: here, academic freedom and university autonomy were at stake; however, to trigger the application of the Charter of Fundamental Rights, universities have to be interpreted as businesses. This approach focuses solely on internal market violations, and it leaves a wide grey zone for those programmes that are financed partly by the students and partly by the state at public universities, as well as for those that are partly financed by the state at private universities. According to the *Humbel* case, publicly funded education is not a service under EU law, so it is not possible to find grounds for actions.⁷³ This narrow interpretation could allow a complete shutdown of a public, state-funded university based on political reasons. This raises the question: how could we still resolve an obviously discriminatory, unfair situation, against all odds, with the tools of EU law? One possible answer would be to re-interpret EU citizenship as an institution that also contains fundamental rights. Through this, we could forget the fixation on competency and could re-interpret the problem of academic freedom as a fundamental rights issue rather than a policy-related problem.

4. EU CITIZENSHIP AS A CONNECTING FACTOR BETWEEN ACADEMIC CITIZENS AND FUNDAMENTAL RIGHTS

In its more than two decades of history, EU citizenship was constructed step-by-step and changed from a narrowly interpreted phenomenon into a more complex institution. As a result of ECJ judgments, more and more fundamental rights were attached to citizenship.⁷⁴ In this process, which could probably be marked by the symbolic *Ruiz Zambrano* judgment,⁷⁵ the re-interpretation extended over a strict interpretation of the black letter law, especially in

⁷⁰ ‘CEU to Open Vienna Campus for U.S. Degrees in 2019; University Determined to Uphold Academic Freedom’ www.ceu.edu/article/2018-10-25/ceu-open-vienna-campus-us-degrees-2019-university-determined-uphold-academic.

⁷¹ Case C-66/18 *European Commission v Hungary* ECLI:EU:C:2020:792

⁷² Case C-286/12 *European Commission v Hungary* EU:C:2012:687; Csongor István Nagy, ‘Do European Union Member States Have to Respect Human Rights? The Application of the European Union’s “Federal Bill of Rights” to Member States’ (2017) 27 *Indiana International & Comparative Law Review* 9 et seq. For similar critique regarding the CEU case, see Laurent Pech and Kim Lane Scheppele (n 3) 13.

⁷³ Case C-263/86 *Belgian State v René Humbel and Marie-Thérèse Edel* EU:C:1988:451 [1988] ECR 5365.

⁷⁴ Dora Kostakopoulou, *Institutional Constructivism in Social Sciences and Law* (CUP 2018) 105 et seq.

⁷⁵ Case C-34/09 Judgment of the Court (Grand Chamber) of 8 March 2011 *Gerardo Ruiz Zambrano v Office national de l’emploi* (ONEm) EU:C:2011:124 ECR 2011 I-011177.

fields such as the free movement of persons.⁷⁶ Today, however, several commentators see a decline in the fundamental rights aspects of EU citizenship (see, for example, the *McCarthy*⁷⁷ and *Dereçi*⁷⁸ cases), especially because some fundamental rights such as ‘the right to respect family life appeared to be not sufficient [alone] to bring the cases within the scope of EU law’.⁷⁹

Based on the development of EU citizenship, though, one could argue that European institutions could re-interpret EU citizenship so that it could host a broader framework of fundamental rights (a renewed ‘substance of the rights’ formula), including rules on academic freedom.⁸⁰ Through such a method, citizenship in the same way that connecting factors are used in conflict-of-laws: if an EU citizen is affected in the case, this could trigger the application of certain fundamental rights, as set in Art. 2 TEU or the Charter of Fundamental Rights. If we accept the view that EU citizenship moved from a completely supplemental institution towards a fundamental one, even if it did not reach a final, comprehensive level, one could argue that adding fundamental rights to it would be the next step in its development. This approach would have the advantages that it would not leave EU citizens without basic rights. It would refuse to accept the concept of reverse discrimination⁸¹ and it would handle the EU as a mature institution, an actual community with enforceable laws. Moreover, it could put the stress back on citizens, instead of the market and its special rationality.

However, using EU citizenship as a shield could also have disadvantages. First, just as national citizenship can have an exclusivist character, it could exclude those who are not citizens of a member state – highly unfair treatment, of, for example, university professors or students from third countries. This exclusivist aspect of (EU) citizenship is mentioned by many commentators; it is not a new phenomenon.⁸² Second, such a solution could lead to a partial protection: individual academic freedom could be granted, but whether it could cover institutional freedom as well is questionable. As we have seen above, a high number of cases were related to the curtailment of freedom of institutions, not individuals. Probably, however, under a broader interpretation, EU citizenship could also cover this area. From this perspective, institutional freedom could be interpreted as something stemming from the collective: the

⁷⁶ Case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* EU: C:2001:458 European Court Reports 2001 I-06193; Case C-300/04 *M. G. Eman and O. B. Sevinger v College van burgemeester en wethouders van Den Haag* EU:C:2006:545 ECR 2006 I-08055; Case C-135/08 *Janko Rottman v Freistaat Bayern* EU:C:2010:104 ECR 2010 I-01449.

⁷⁷ Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277, [2011] ECR I-3375.

⁷⁸ Case C-256/11 Judgment of the Court (Grand Chamber) of 15 November 2011 *Murat Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734.

⁷⁹ Chiara Raucea, ‘Fundamental Rights: The Missing Pieces of European Citizenship?’ (2013) 14 *German Law Journal* 2036; Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart 2019).

⁸⁰ Dominik Dusterhaus, ‘EU Citizenship and Fundamental Rights: Contradictory, Converging or Complementary?’ in Dimitry Kochenov (ed.), *EU Citizenship and Federalism* (CUP 2017) 651 *et seq.*; ‘Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’ Judgment in *Ruiz Zambrano*, para 42.

⁸¹ Alina Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’ (2008) 35 *Legal Issues of Economic Integration* 43–67.

⁸² Dora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008) 102.

common rights of individuals. However, in this case the connection would be slightly looser than optimal, especially from a legal perspective. On the other hand, such an approach would still enable us to proceed in most cases in which academic freedom is harmed.

5. EU FUNDAMENTAL RIGHTS AND ACADEMIC FREEDOM

If we go further, we find numerous methods that could work well to defend academic freedom. Some of them are connected to the institution of EU citizenship; others could be linked to it, but could also be used in a more universal way to include foreign nationals.

First, according to the Reverse Solange approach,⁸³ if states abolish certain universities or ban programmes for political reasons, and such actions fit among other systemic fundamental rights violations made by these states, such violations could reach an ‘essence’ of rights that must be protected. This method links fundamental rights strictly to EU citizenship. However, using it would also have disadvantages,⁸⁴ such as limiting answers to problems when systemic deficiencies occur, and it would not defend fundamental rights from all kinds of violations, only those that reach the essence of these rights.⁸⁵ Moreover, the concept of systemic violations can pick up rather shady contours.⁸⁶ Finally, narrowing down its scope to EU citizenship could also be questioned, just as we have seen above. However, it nevertheless could be a tool to defend academic freedom in Europe.

Second, through a case-by-case analysis, the European Commission could use more progressive interpretations than its widely criticized practice does today, and it could interpret damages to academic freedom as fundamental rights violations. This would be especially the case if the persons in question are European citizens. As a result, the Commission could start procedures for the violation of the values set in Art. 2. TEU and could express that the values codified there are part of the Union *acquis* and are enforceable.⁸⁷ However, in my opinion, at present not only practitioners but also the majority of scholars mistakenly prefer a narrow interpretation of Art. 2 of the TEU and believe that a breach of values should be bound to the Art. 7 TEU procedure.⁸⁸

⁸³ Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei and Maja Smrkolj, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 CML Rev 515.

⁸⁴ Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance: Reverse Solange and Systemic Infringements Analyzed’ [2014] Polish Yearbook of International Law 153–62.

⁸⁵ Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done’ (2014) 51 CML Rev 59–96.

⁸⁶ Case C-216/18 PPU *Request for a Preliminary Ruling from High Court (Ireland)* ECLI:EU:C:2018:586; Kim Lane Scheppele, ‘Rule of Law Retail and Rule of Law Wholesale: The ECJ’s (Alarming) “Celmer” Decision’ <https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/>.

⁸⁷ Dimitry Kochenov, ‘The *Acquis* and Its Principles: The Enforcement of the “Law” versus the Enforcement of “Values” in the European Union’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017) 12 *et seq.*

⁸⁸ Jürgen Schwarze, ‘EUV Artikel 2’ in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *EU Kommentar* (Beck 2012) 66; Christian Calliess, ‘Art. 2. EUV’ in Christian Calliess and Martin Ruffert (eds), *EUV/AEU* (C.H. Beck 2016) 48; Olivier De Schutter, ‘Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union’ www.opensocietyfoundations.org

Third, to solve the problem of systemic breaches, Kim Lane Scheppelle suggests that the Commission should start systemic infringement procedures. Such bulk actions would cover several procedures in the same field at once.⁸⁹ Without such an approach, in a number of cases – such as the above-mentioned systemic changes of university governance – there is a high chance that we would not be able to grasp the concatenation of problems without an overview of the whole area, and EU actions will have to be limited to the most obvious fundamental rights breaches. Dimitry Kochenov adds that, based on Art. 259 of the TFEU, member states could also start such procedures (he calls this ‘biting intergovernmentalism’).⁹⁰

Fourth, András Jakab suggests that the EU Charter of Fundamental Rights should be applied, contrary to its Art. 51(1), which excludes its application in domestic cases.⁹¹ While one might be surprised that this would be possible against the black letter of the law,⁹² this method is not as irrational as it seems. If we analyse the relationship of Art. 2 and the Charter, the latter can be interpreted as an exposition of the former. In the *Janah v Libya Benkharbouche v Sudan* case, the proceeding UK courts stressed the importance of the general principles of EU law and applied the Charter, even though, under a strict interpretation, they had to refuse to do so.⁹³ The Charter, in its Art. 13, claims that the arts and scientific research shall be free of constraints, and it stresses that academic freedom shall be respected. Its Art. 14 emphasizes that everyone has the right to education and to have access to vocational and continuing training. It also grants the freedom to found educational establishments with due respect for democratic principles (*sic!*) and parents’ right to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical worldview. Applying these rules, even if they are not codified in Title V on EU Citizens’ Rights, would be

[.org/sites/default/files/infringement-proceedings-as-tool-for-enforcement-of-fundamental-rights-in-eu-20171214.pdf](http://org/sites/default/files/infringement-proceedings-as-tool-for-enforcement-of-fundamental-rights-in-eu-20171214.pdf); Dimitry Kochenov and Laurent Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11 *European Constitutional Law Review* 519.

⁸⁹ Kim Lane Scheppelle, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 122 *et seq.*

⁹⁰ Dimitry Kochenov (n 87) 20; Laurent Pech and Kim Lane Scheppelle (n 1) 39.

⁹¹ András Jakab, ‘Supremacy of the EU Charter in National Courts in Purely Domestic Cases’ <https://verfassungsblog.de/the-eu-as-a-community-of-human-rights/>.

⁹² ‘Where a legal situation does not fall within the scope of Union law, the Court has no jurisdiction to rule on it, and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction’. Case C-265/13 *Emiliano Torralbo Marcos v Korota SA and Fondo de Garantía Salarial* EU:C:2014:187; see also Case C-206/13 *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo* EU:C:2014:126; Case C-40/11 *Yoshikazu Iida v Stadt Ulm* EU:C:2012:691; Case C-87/12 *Kreshnik Ymeraga and Others v Ministre du Travail, de l’Emploi et de l’Immigration* EU:C:2013:291; Case C-198/13 *Victor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others* EU:C:2014:2055; for similar hostility concerning the application of the Strasbourg Law outside EU competency, see Joined Cases C-60 and 61/84 *Cinéthèque SA and Others v Fédération nationale des cinémas français* EU:C:1985:329 [1985] ECR 2605; Case C-299/95 *Friedrich Kremzow v Republik Österreich* EU:C:1997:254 [1997] ECR I-2629.

⁹³ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*; *Libya v Janah* [2017] UKSC 62; Joshua Rozenberg, ‘Never Mind Human Rights Law, EU Law is Much More Powerful’ www.theguardian.com/law/2013/oct/09/human-rights-eu-law-powerful; for the first instance decision, see www.scribd.com/doc/173329607/Janah-v-Libya-Benkharbouche-v-Sudan.

a great step forward. It would also solve the conundrum that while we have rules on academic freedom, they cannot be applied to most universities.

Fifth, the EU could create a Magna Carta of Academia, as proposed by Terence Karran.⁹⁴ This document could be drafted similarly to the works on a common EU private law,⁹⁵ and it could implement many different sources on academic freedom.⁹⁶ In the future, it could serve as a substratum of enforceable academic rights of EU citizens.

6. CONCLUSIONS: PSEUDO-ORIGINALISM VERSUS PROGRESSIVE APPROACHES

The preceding discussion has demonstrated that one could find many ways to defend academic freedom in the present system of EU law, including through re-interpretation of EU citizenship. However, right now, the mainstream of EU law scholarship seems to accept that this cannot be done, because enforcing human rights in the EU would be an extension of the rules on EU citizenship as well as of Art. 2 TEU and Art. 52 of the Charter of Fundamental Rights. As a result, this pseudo-originalism does not allow a more forward-looking interpretation of Art. 2 TEU, adheres to an extremely narrow interpretation of direct effect, limits the scope of the Charter and blocks the creation of a proper EU citizenship with fundamental rights. This misinterpretation relies on the political ineffectiveness (in fact: political paralysis) of the EU institutions, which is then ideologized by scholars. The impression is given that this would be the only available form of cooperation, based on some kind of ‘proper’ interpretation of EU law. As the root cause of this problem lies in intra-EU politics, new institutions (such as a new, special commission on human rights and rule of law)⁹⁷ will not be effective either, as the roots of the issues can be traced back to member state politicians, who are interested in maintaining an underperforming system.⁹⁸

⁹⁴ Terence Karran, ‘Academic Freedom in Europe: Time for a Magna Charta?’ (2009) 22 Higher Education Policy 163–89.

⁹⁵ Nils Jansen and Reinhard Zimmermann, ‘“A European Civil Code in All But Name”: Discussing the Nature and Purposes of the Draft Common Frame of Reference’ (2010) 69 Cambridge Law Journal 98–112; Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Sellier 2010).

⁹⁶ This could cover the International Covenant on Economic, Social, and Cultural Rights, the UNESCO recommendation concerning the status of higher education teaching personnel, the Magna Charta Universitatum from 1988, and decisions of the European Court of Human Rights, among others; see Tamas D Ziegler, ‘Academic Freedom in the European Union: Why the Single European Market is a Bad Reference Point’, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-03, p.25.

⁹⁷ Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ (2015) 21(2) European Law Journal 141–60.

⁹⁸ As Posner put it regarding Hungary, ‘[i]f Europeans cannot even compel a small, financially dependent country in their midst to comply with human rights, then one must infer that they do not care enough about human rights to devote substantial resources to them’. Eric Posner, *The Twilight of Human Rights* (OUP 2014) 106. To put it sharply: states deliberately undermine human rights for economic interests. See e.g. Nik Martin, Ben Knight, ‘German Arms Exports Shoot to Record High, Hungary Biggest Buyer’ Deutsche Welle (27 Dec. 2019) www.dw.com/en/german-arms-exports-shoot-to-record-high-hungary-biggest-buyer/a-51806849.

While scholars tend to argue against more progressive approaches as ‘inappropriate’, ‘unscientific’ or ‘unlawful’, it is not set in stone that Art. 2 TEU cannot be applied directly, or that EU citizens cannot have enforceable fundamental rights in academia. If we interpret Article 2 TEU as some kind of a legal text, turning a blind eye to human rights breaches seems to be in conflict with it. It is also not as obvious that concepts such as legal pluralism, multi-level constitutionalism or national identity should be allowed to be abused to support authoritarian tendencies.⁹⁹ In this regard, US constitutional reasoning, with its brave stance against injustices, could serve as a model for Europe.¹⁰⁰ There, if constitutional provisions were not re-interpreted regularly, minorities still would not have fundamental rights, black people would not be permitted to vote and schools would still be segregated. Law always developed through re-interpretations; the question is simply which direction we take. If we are serious about forming a joint European community based on common values, this cannot proceed through allowing constitutional authoritarianism, wherever it occurs in the EU. By accepting lower standards, the EU gradually empties the content of fundamental rights and rule of law, thereby weakening the institution of EU citizenship and the academic freedom of EU citizens.

⁹⁹ Kim Lane Scheppele and Gábor Halmai, ‘The Tyranny of Values or the Tyranny of One-party States?’ *VerfB* (25 Nov. 2019) <https://verfassungsblog.de/the-tyranny-of-values-or-the-tyranny-of-one-party-states/>; Julio Baquero Cruz, ‘An Area of Darkness: Three Conceptions of the Relationship between European Union Law and State Constitutional Law’ in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe’s Constitutional Mosaic* (Bloomsbury 2011) 55; Julio Baquero Cruz, ‘Another Look at Constitutional Pluralism in the European Union’ (2016) 22(3) *European Law Journal* 356–74; Julio Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’ (2008) 14(4) *European Law Journal* 389–422; Roger Daniel Kelemen, ‘The Dangers of Constitutional Pluralism’ in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishing 2018) 402; Gábor Halmai, ‘Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law’ (2018) 43 *Review of Central and East European Law* 23–42.

¹⁰⁰ Michael Rosenfeld, ‘Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court’ (2006) 4 *I CON*, 634 *et seq.*; Eric Foner, *The Story of American Freedom* (Picador 1999).