Finally: The CJEU Defends Academic Freedom

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October 6 is a sad day in Hungarian history: 13 Hungarian freedom fighters against Austrian rule were hanged on this day in 1849, following their conviction by a court martial by Austrian forces. In addition to the military leaders of the 1848 Revolution, Hungary's first prime minister, Count Lajos Batthyany was also executed in Pest, in an Austrian military garrison, on the same day. Hungary and Austria took until 1867 to settle the political relations of the dual monarchy through a historic compromise (*Ausgleich*) — which the supporters of Hungarian independence saw as an instance of liberal betrayal.

In 2020 the CJEU chose this day to hand down its long-awaited judgment on restrictions on academic freedom imposed by the Hungarian government in the spring of 2017 (C-66/18, Commission v Hungary). Inter alia, the Hungarian government made the operation of foreign accredited universities in Hungary subject to an international agreement signed by Hungary and the accrediting state and also proof that the foreign university operated in its accrediting state. These new rules applied to existing universities, including to my employer, Central European University.

The CJEU found that the Hungarian law violates WTO law, and imposes unacceptable restrictions on internal market freedoms such as freedom of establishment (Article 49 TFEU) and the free movement of services (Article 16 of Directive 2006/123/EC) and as such violates several Charter rights, among them academic freedom (Article 13 CFR) and the freedom to found such institutions (Articles 14(3) and 16 CFR). In doing so the CJEU echoed the initial concerns of the Commission when it triggered the infringement process.

The CJEU's judgment is the first major judicial pronouncement by a European court on the institutional dimension of academic freedom as a fundamental human right. The judgment is also worth a closer look, as it is a prime example of the effectiveness of infringement action against illiberal practices undermining the rule of law in the post-*Weiss* era. Finally, the judgment sheds light on the prospects of a new line of action championed by the Commission, seeking to bring more life into the Charter in the member states — to affect the daily lives of European citizens.

Meet academic freedom!

From the start the Commission was committed to making this infringement action not only about various internal market freedoms, but — as much as the legal framework permitted — about academic freedom and university autonomy. This was a particularly challenging call because academic freedom as a human right is less

developed in the European legal space than most scholars would dare to admit. After all, when and where academic freedom is threatened, constitutional democracy is under attack.

In this case the CJEU had to give life — and bite — to the Charter's words "Academic freedom shall be respected" (Article 13 CFR). The jurisprudence of the ECtHR was admittedly not of much help: in Strasbourg jurisprudence academic freedom is protected as an aspect of freedom of expression (Article 10 ECHR) and it is mostly engaged in cases concerning contributions made by individual academics in the public debate (see paras. 224-225).

Changes in the legal regulation of the terms of accreditation of universities clearly affect the institutional environment in which such individual academics work — and conversely their academic freedom. This connection, however, had never been made by a human rights court in Europe. The gap was pointed out in 2014 by Judges Sajó, Vucinic and Kuris in a joint concurring opinion in *Mustafa Erdogan v. Turkey*, emphasizing that "there can be no democratic society without free science and free scholars. This interrelationship is particularly strong in the context of social sciences and law, where scholarly discourse informs public discourse on public matters including those directly related to government and politics."

So far the Venice Commission provided the most detailed legal elaboration in its opinion on the same Hungarian law (esp. paras. 42-51), drawing on a wide range of soft law instruments on university autonomy developed in the Council of Europe as well as the UN. The CJEU relied on the same sources (para. 227), agreeing with Advocate-General Kokott that there is more to academic freedom than the freedom of expression of university lecturers (para. 226). In doing so, the CJEU gave effect to Article 13 of the Charter along lines that were previously not covered by the ECtHR.

Equally importantly, the CJEU followed the lead of the Advocate-General and confirmed the logic of its earlier judgments in infringement cases concerning illiberal constitutional engineering. In the earlier case of "foreign funded" NGOs (C-78/18, *Commission v Hungary*) the CJEU pointed out that the violation of freedom of association resulted from the *deterrent effect of the rules*, noting that the regulation created "a generalised climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatise them" (para. 118). In the current case the CJEU assessed whether the new accreditation criteria had the *potential* to undermine academic freedom (para. 228), and found that the *legal uncertainty* created by the new rules limited academic freedom (para. 229). This is exactly the kind of risk assessment that would be required under Article 7 TEU, in defense of the Union's founding values.

The CJEU found that the limitations were not justified, repeating its earlier findings (para. 240) that (i) requiring an international agreement between Hungary and the accrediting state created an opportunity for arbitrary governmental interference with the operation of educational institutions (esp. para. 136), while (ii) the foreign campus requirement is simply not suitable to prevent fraudulent practices in the member state, despite claims of the Hungarian government to the contrary (esp. para. 155).

Human rights lawyers are likely to argue that the CJEU should have set out its reasons in detail under the Charter, instead of just making a technical reference to earlier findings. The approach followed by the CJEU, however, is consistent with the overall manner in which the CJEU is comfortable with applying the Charter to the actions of the member states in the infringement setting.

Infringement action as a tool against illiberal constitutional engineering?

In response the Hungarian Minister of Justice Judit Varga repeated her earlier point and accused the CJEU of applying double standards to Hungary (again), but promised to "duly implement the judgment of the Court of Justice of the European Union in accordance with the best interests of the Hungarian people."

Infringement action has become the surprise weapon in the Commission's rule of law toolbox. Former Hungarian justice minister, Tibor Navracsics admitted recently that the Hungarian government was caught by surprise when the Commission first used infringement to this effect. The initial surprise is a thing of the past: over the years the Hungarian government has built some defenses of its own, using familiar components of the European constitutional architecture in service of illiberal democracy.

To start, note how the Minister's turn of phrase (in the translation quoted from the Hungarian government's website) is reminiscent of the language of a footnote to GATS Article XIV invoked by the government: "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." The CJEU found that the Hungarian government did not offer concrete and detailed arguments to substantiate such a defense (para. 131).

Recall that as soon as the infringement action reached the CJEU in 2018, the Hungarian Constitutional Court suspended its proceedings in two pending cases challenging the constitutionality of the Hungarian rules (3199/2018 (VI. 21.) AB ruling –a petition by a group of MPs – and 3200/2018 (VI. 21.) AB ruling – a constitutional complaint by CEU). The Hungarian Constitutional Court did so in the spirit of European constitutional dialogue. As a concurring opinion by Justices Marosi and Schanda makes clear: the Hungarian Constitutional Court will decide about the constitutionality of challenged legal rules, irrespective of their compatibility with EU law; in its assessment the Constitutional Court will be on the lookout to protect Hungary's constitutional identity (see 3199/2018 (VI. 21.) AB ruling, para. 18, and 3200/2018 (VI. 21.) AB ruling, para. 18).

Thus, following the judgment of the CJEU the Hungarian Constitutional Court will have ample opportunity to assess the impact of these rules from a different perspective, potentially taking into consideration factors concerning the 'interests of the Hungarian people' that were not offered with sufficient precision and detail before the CJEU. Academic freedom, as defined by the CJEU, will have to stand the test of constitutional identity review by a packed constitutional court of an illiberal

member state. With encouragement from the German Constitutional Court in *Weiss*, the Hungarian response to the CJEU is likely to be another step towards unraveling the European legal order.

Next step: Making the Charter matter in citizens' daily lives

On October 5, 2020 Vice-President Jourova announced in the European Parliament that later this year the Commission will unveil a new strategy regarding the application of the Charter of Fundamental Rights in the member states, with special attention on the impact of the Charter in citizens' daily lives.

Article 51 CFR has long been regarded as a major limitation on the application of the Charter. In its more recent case law the CJEU confirmed that it will inquire into the violation of Charter rights "where a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the FEU Treaty is justified on the basis of that Treaty or by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing Union law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter" (C-78/18, Commission v. Hungary, para. 101 with further references; also C-66/18: para. 214).

Thus, the CJEU's approach requires the finding of an additional violation of EU law (e.g. the unjustified limitation of a fundamental freedom) to activate the protection of the Charter against the actions of a member state. In her recent speech Vice President Jourova did not provide details on how the Commission plans to navigate the terms set by the Court. The Fundamental Rights Agency has monitored the domestic application of the Charter for years. More recently, the Commission commissioned a study on strategic litigation under the Charter – a report that appears to be the first in a dedicated series.

Until we hear further from the Commission, a few words on what the violation of Charter rights feels like in a citizen's daily life. A year and a half into the saga I admitted to feeling betrayed. Three and a half years later little has changed: justice will be done, pending implementation of the CJEU's landmark judgment by an illiberal government.

So far the passage of time has benefitted the Hungarian government.

It provided room for delaying the entry into force of the new rules by a full year. It also permitted them to sign international agreements regarding several foreign universities, to be able to make the point before the CJEU that the new conditions were not impossible to meet. In all this time, the Hungarian government did not actually enforce the new rules once they entered into force: it did not revoke the operating license of universities that did not meet the new rules (such as Central European University). Thus, the university directly affected by the new rules did not have direct legal recourse against government action — or a voice in the legal proceedings that potentially determined its fate. For all this time government

representatives could argue that “CEU was not pushed out of Hungary, it decided to move away” and to find a new home in Vienna. The Hungarian government could even present itself as a victim of unfounded criticism and liberal persecution: after all, all they did was wait for the outcome of the infringement proceedings before the CJEU.

Few victims of Charter rights violations can afford to wait several years to see justice done, even fewer have the determination and funds to restart their life in a different country — benefitting from freedom of movement and freedom of establishment within the EU. The jury is still out on whether these freedoms will be enjoyed in a constitutional democracy (in the ordinary sense of the word) in the Europe of illiberal democrats.

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