Restoring Academic Freedom in Hungary

Renáta Uitz

17.06.2026 doi: 10.59704/f462cbab8393d26f

Hungary's experience with illiberal democracy exposed several uncomfortable truths about constitutional democracy, including vulnerabilities at the foundations. Higher education is a case in point. On the one hand, it is widely believed that knowledge institutions (encompassing universities, research institutions, think tanks, libraries, archives, museums and publishers, among others) are essential for the daily operation and long-term resilience of constitutional democracy as a form of self-government. On the other hand, constitutional scripts tend to be rather thin on academic freedom (at times presenting it as a public good or pure state obligation), leaving ample room for illiberal knowledge politics and practices to flourish.

Shortly after his landslide victory, Magyar mentioned the restoration of university autonomy as one of his four top priorities. The Magyar government's future actions regarding knowledge institutions are under close European Union (EU) scrutiny. It is too early to tell whether the Magyar government will do more in the higher education space than required by EU conditionality to access frozen funds. Restoring the status quo ante is not an option. If the Magyar government chooses to engage in constitution making, it will face a robust architecture created by illiberal knowledge politics and nestled in transnational networks. It may decide to seize a historic opportunity to set a constitutional script that provides protection for academic freedom – (including research freedom) as an autonomous right – and safeguards university autonomy (in the public as well as the private sector) for a post-illiberal constitutional democracy.

State of Play

The Orbán government has been active in dismantling the knowledge institutions it inherited, while it was also busy with building the epistemic infrastructure of illiberal Christian democracy, with special attention to its transnational embedding.

In the higher education space first came some financial management measures. This was prepared by the Fourth Amendment to the Fundamental Law (adopted in March 2013) that deliberately removed financial autonomy from the realm of university autonomy (Article X(3)); at the time the government reassured the Venice Commission (VC) this revision "does not affect the predominance of the freedom of research and education (9(a)). The VC noted but did not appear to mind that the amendment directly overruled an earlier decision of the Constitutional Court (Decision 62/2009 (VI. 16.) AB). It remarked that the regulation of university finances belongs in ordinary legislation, as constitutionalising such matters would prevent constitutional judicial review (para 57).

Budget cuts (triggering dismissals) were followed by the introduction of university chancellors in 2014, sidelining rectors and putting government appointees in charge of university finances. Control over the curriculum caused the removal of gender studies from the roster of accreditable subjects in 2018. Structural reforms included legislation in 2017 to change the accreditation of foreign private universities (resulting in the relocation of Central European University's degree granting programs to Austria) and detaching research centers from the Hungarian Academy of Sciences in 2019. In the same year, the reform started to transform the funding mechanism of public universities into a unique private trust structure ("public interest asset management foundations") that superimposes a government-friendly board of trustees onto the university self-governance, essentially extinguishing university autonomy. Sectoral reforms also included plans for a performance-based funding system of research. Structural reforms meant that Hungary has been removed from the European Univer-

sity Association's Autonomy score card for 2023. Meanwhile, critical academics were put on notice – usually via disciplinary proceedings – at public and private universities alike. Courts did not stand in the way of institutional changes or disciplinary dismissals. Public protests, professional objections by key stakeholders, courageous civic opposition and global academic solidarity campaigns did not make the government change the course.

At the same time, the Orbán government was building an alternative epistemic infrastructure. The new National University of Public Administration, established in 2012 received a proper new identity when its central campus was built – a signature construction project realized in multiple phases across a diverse site with heritage buildings (Ludovika). The restructuring of the Academy of Sciences (and the creation of the HUN-REN research network) also involved decisions about the ownership of research sites, comprised in part of heritage buildings in the Buda Castle. Institutional innovation also meant experimentation with alternative formats of knowledge production. The flagship institution, Mathias Corvinus Collegium (MCC), is part talent incubator for high school and university students, part research center in the best tradition of institutes of advanced studies (with a generous fellowship scheme welcoming international scholars) and part think tank actively engaging in policy advocacy, with satellite sites in Brussels and Vienna. In 2021, MCC was among the first institutions to be transformed into a public interest trust, with a generous initial capitalization that with further transfers reached 505 billion HUF (1.4 billion EUR) by 2024.

The illiberal epistemic network blurs the line between education, research, advocacy and policy, while also fudging the divide between public and private funding. It includes government-funded think tanks like the Danube Institute or the Centre for Fundamental Rights (CFR) that has organized CPAC Hungary (with public funds). Rod Dreher, a columnist at the European Conservative (a magazine and online platform financed indirectly by the Hungarian government) is based at the Danube Institute in Budapest and was also a visiting fellow at MCC in 2022. Gladden Pappin (the cofounder and deputy editor of the conservative public policy journal *American Affairs* and cofounder of the substack *Postliberal Order*) is the president of the Hungarian Institute of International Affairs (a government research and policy institute) and has also been a visiting fellow at MCC. These connections brought Hungarian influences to the drafting of Project 2025 to the Heritage Foundation.

Changes to the terms of accrediting foreign private universities lead to the CJEU's landmark judgment on academic freedom (C-66/18 Commission v Hungary (November 13, 2020)). EU conditionality primarily targets the public interest trust constructions, used to fund knowledge institutions. In the spirit of compliance with EU conditionality, the Magyar government has already introduced a constitutional amendment and follow up legislation to reverse some of the structural changes (focusing on the controversial public interest trusts). These measures will enable the affected Hungarian universities to rejoin the Erasmus+ program. Constitutional reform will require further engagement with academic freedom's conceptual underpinnings in the current Hungarian, European and global context.

Conceptual Underpinnings: A Very Short Overview

Attacks on the university driven by populist-illiberal anti-intellectualism and anti-elitism made academic freedom appear like an outdated status privilege – until they were unmasked as just another instance of illiberal-authoritarian takeover on a global scale. Hence, defending academic freedom has become a genuinely global challenge – with very high stakes for the European Union.

Academic freedom is invariably described as an ideal, an aspiration, or a principle in connection with a variety of claims on behalf of individuals and institutions. Constitutional expressions tend to remain vague, if aspirational. Article 13 of the EU Charter is a good illustration providing that "[t]he arts and scientific research shall be free of constraint. Academic freedom shall be respected." Theoretical defences of academic freedom around the world (from Australia to

the US) are also highly context – and crisis – dependent; arguments revert to freedom of expression as the "mother right", with adding professional expertise (collegiality) and institutional dimensions (university autonomy) to the mix.

The free speech-based defence captures the pursuit of truth wherever it leads ("science as a vocation"), though it also sets limits – as the protection usually kicks in at the point when knowledge is shared with a wider audience, in the public discourse. The free speech-based defence also highlights a tension at the heart of the debate: those who defend universities are in the (conservative) business of preserving the status quo, while those who defend academic freedom as an individual right tend to defend the right to question, critique, dissent and resist (ie they defend a "rebel right"). Freedom of research is central for the Humboldtian ideal of the university, as the concept of *Bildung* places the search for truth and understanding (not professional training) at the centre of liberal education. Its rebellious qualities of academic freedom make universities police speech (think speech codes) even in the best of times. Recently the case based on freedom of expression has been complicated by political protests on campus, triggering further thinking on the pedagogical case for encampments on university property.

The human rights-based defence of academic freedom continues to be rooted in freedom of expression, with a strong emphasis on enabling state action (positive obligations). The CJEU's landmark judgment situated academic freedom protected by the EU Charter (Article 13) to internal market freedoms (especially the freedom of establishment (Article 49 TFEU) and the free movement of services (Article 16 of Directive 2006/123/EC). Taking inspiration, inter alia, from the Inter-American Principles on Academic Freedom and University Autonomy (2021), in forthcoming work with András Sajó we argue that there is sufficient grounding in the European human rights acquis to afford protection to academic freedom as a *sui generis* human right. As an individual right, academic freedom encompasses the freedom of research and teaching informed by such research, while its institutional dimension includes a degree of institutional autonomy (encompassing governance with procedures of collegiate self-government, transparency and accountability).

Pointers for Next Steps

The existing Hungarian constitutional script is elaborate. It has to be handled with utmost care, as it provided constitutional scaffolding for the illiberal resettlement of Hungary's knowledge institutions.

Article X(1) of the Fundamental Law guarantees the freedom of scientific research, although the freedom of teaching is caveated by a clawback clause ("within the framework laid down in an Act"). Moreover, Article X(2) provides that "[t]he State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research." Finally, Article X(3) affords constitutional protection to the Academy of Sciences. It also provides that "[h]igher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act."

Scientific freedom (the functional equivalent of academic freedom in the Hungarian context) is not defined as an individual right; arguably, it is set forth as a public good guaranteed (ie provided) by the state. This approach leaves academic freedom at the whims of the government of the day. Article X(2) is hardly a safeguard against state interference, as the experience of the last 15 years attests. The demand for such safeguards is as old as the concept of academic freedom: Weber's concept of "science as vocation" was meant to ward off state and religious interference with academic freedom at a time when universities were not only meant to serve public goods but also to stand as institutions of national pride.

The thorniest issues, on which the Fundamental Law is (mostly) silent, are funding and control over the governance of knowledge institutions (especially university autonomy) through funding, financial management and accountability rules. The revision of Article X(3) that removed funding from the scope of university autonomy is a clear reminder that without constitutional protection of their financial autonomy,

universities are particularly vulnerable to political power plays. A decade of demonization of "foreign funding" calls for express safeguards that also apply to knowledge institutions (including private universities). This will be a tense issue, as any such safeguard will also apply to illiberal knowledge institutions and their foreign funding.

Distinctions between public and private universities need to be revisited, with adequate constitutional safeguards against arbitrary differentiation. The presidential power to appoint university professors is an odd feature of the Hungarian constitutional order; the presidential appointment of rectors of public universities may be warranted by the public funding, but should clearly be aligned with the protection of university autonomy.

Any discussion on the constitutional outlines of the protection of academic freedom and university autonomy shall involve knowledge institutions (defined broadly) in meaningful manner. This is not only required for constitutional resettlement, but is also a rule of law requirement, as the Venice Commission reminded the Hungarian government when it embarked on the journey of passing lex CEU (para 120).

ABOUT THE AUTHOR

Renáta Uitz

Renata Uitz is a senior fellow at the CEU Democracy Insitute and professor of law and government at Royal Holloway, University of London.

SUGGESTED CITATION

Uitz, Renáta: Restoring Academic Freedom in Hungary, Verfassungsblog, 17.06.2026, doi: 10.59704/f462cbab8393d26f.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260617-190734-0.