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"Measuring" the Erosion of Academic Freedom as an International Human Right

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“Measuring” the Erosion of Academic Freedom as an International Human Right: A Report on the Legal Protection of Academic Freedom in Europe

Klaus D. Beiter*
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ABSTRACT

This Article reports and comments on the results of an assessment of the legal protection of the right to academic freedom (an examination of its factual protection to be undertaken at a future point) in EU member states, having examined these countries' constitutions, laws on higher education, and other relevant legislation. The assessment relied on a standard scorecard, developed by utilizing indicators of protection of academic freedom, notably as reflected in UNESCO's Recommendation concerning the Status of Higher-Education Teaching Personnel, a document of 1997 that is not legally, but “politically” binding, and which concretizes international human rights requirements in respect of academic freedom—a right under international human rights law. The results for the various countries have been quantified, and the countries have been ranked in accordance with “their

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performance." Overall, the state of the legal protection of the right to academic freedom in Europe appears to be one of "ill-health." Increasingly, European countries are merely paying lip service to this important right. While the concept of institutional autonomy is being misconstrued, self-governance in higher education institutions and employment security are being subjected to rigorous processes of erosion.

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I. INTRODUCTION

This Article builds on earlier research that undertook a preliminary comparative analysis of the right to academic freedom in Europe. At the time, Terence Karran had analyzed whether twenty-three member states of the European Union provided a high, medium, or low level of protection of the right;¹ alternatively, he analyzed whether they complied fully, partially, or not at all with parameters² of measurement based on UNESCO's Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997. In the meantime, there have been significant changes in the

1. Terence Karran, *Academic Freedom in Europe: A Preliminary Comparative Analysis*, 20 HIGH. EDUC. POL'Y 289 (2007).

2. Terence Karran, *Academic Freedom in Europe: Reviewing UNESCO's Recommendation*, 57 BRIT. J. EDUC. STUD. 191 (2009).

legislation on higher education (HE) in many European countries, which have enhanced levels of autonomy (or, what policymakers consider to constitute autonomy) of HE institutions and have limited the extent to which academic staff are involved in the administration (or “management,” as it has come to be called) of institutions, which has reduced the scope of their participation in strategic decision-making, while, simultaneously increasing that of rectors or rectorates, deans and heads of departments, and external “experts.” Moreover, the law regulating conditions of employment of academic staff in HE is more and more guided by notions of “flexibilization,” which legitimizes the conclusion of fixed-term contracts of service (without long-term perspectives) even at post-entry levels of the academic career and assures that contracts of service can be terminated on operational grounds “without undue restraints.” It appears paradoxical, therefore, that national constitutions and HE laws all the same continue emphasizing the importance of the right to academic freedom. In light of these circumstances, it is meaningful to undertake a renewed assessment of the state of health of the right to academic freedom in Europe, relying essentially on the standards of UNESCO’s Recommendation.³

Karran considered his assessment to be a preliminary one.⁴ This Article relies on the parameters of the right to academic freedom used by Karran (the protection of “academic freedom” in the constitution or other legislation, the autonomy of institutions of HE, academic self-governance, and academic tenure) and adds a fifth: the ratification of international agreements relevant to the protection of the right to academic freedom. Furthermore, this Article refines the analysis by defining thirty-seven specific indicators to measure compliance by individual states. The focus, naturally, has been on defining *human rights* indicators (i.e., indicators operationalizing the requirements of the right to academic freedom as protected under international human rights law). The indicators chosen will thus purposively not measure whether HE reforms in the countries concerned comply with requirements of economic or managerial efficiency, as such criteria

3. Similar assessments of the state of HE, including that concerning the right to academic freedom at the national level in the light of UNESCO’s Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997, have, for example, been undertaken with regard to Australia and Israel, the West Bank and Gaza. See James S. Page, *Australian Universities and International Standards: Compliance with the 1997 UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel*, 29 J. HIGH. EDUC. POLY & MGMT. 95 (2007); DAVID ROBINSON, *THE STATUS OF HIGHER EDUCATION TEACHING PERSONNEL IN ISRAEL, THE WEST BANK AND GAZA* (Education International & Canadian Association of University Teachers, 2010), [http://download.ei-ie.org/Docs/WebDepot/The Status of Higher Education Teaching Personnel in Israel, the West Bank and Gaza.pdf](http://download.ei-ie.org/Docs/WebDepot/The%20Status%20of%20Higher%20Education%20Teaching%20Personnel%20in%20Israel,%20the%20West%20Bank%20and%20Gaza.pdf) [<https://perma.cc/SM8E-Y87C>] (archived Mar. 22, 2016).

4. See Karran, *supra* note 1, at 289 (“[The article] is preliminary . . . , thereby establishing the basis for subsequent . . . work.”).

are irrelevant in—and, in any event, subordinate to—a human rights approach that is binding on all the states considered in this assessment. The approach has been to accord a numeric value to each indicator in accordance with its relative weight as adjudged under international human rights law. Adding up the scores of states for each of these values not only makes it possible to rank states regarding the five core aspects but also to rank them overall in their protection of the right to academic freedom.

This Article is written in the context of a larger project on the right to academic freedom conducted at the University of Lincoln, United Kingdom, examining the doctrinal basis of the right to academic freedom in terms of international human rights law and further assessing the level of protection of that right in various regional contexts, concentrating on the European and African contexts for the moment. The Article looks at the *legal* protection of the right to academic freedom in Europe (i.e., its protection in the legislation of twenty-eight EU member states).⁵ It presents an overview of the findings and some observations on the purport of these for the state of health of the legal protection of the right to academic freedom in Europe. The *factual* protection of the right—inter alia as a result of institutional, faculty and/or departmental regulations, policies, and customs—will be analyzed in subsequent publications, relying primarily on the results of an online survey on academic freedom carried out in Europe in 2015.⁶ An overall picture of the situation of the right to academic freedom in Europe, to be sure, will have to take account of the findings with regard to *both* its legal and factual protection.

II. THE RIGHT TO ACADEMIC FREEDOM UNDER INTERNATIONAL HUMAN RIGHTS LAW AND UNESCO'S RECOMMENDATION CONCERNING THE STATUS OF HIGHER-EDUCATION TEACHING PERSONNEL OF 1997

With higher-education teaching personnel in mind, “academic freedom” has been described as:

[T]he right [of such personnel], without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and

5. It may well be asked why this Article does not focus on states in their capacity as member states of the Council of Europe, which, as a regional organization, focuses on the promotion of human rights as one of its primary tasks, the EU's role being to facilitate the economic and, to a more limited extent, the political integration of its members. The reason simply is that it would have exceeded available resources to study the legal situation in forty-seven states at very different stages of development as opposed to that in twenty-eight more or less homogeneous states.

6. The survey is accessible at <https://www.surveymonkey.com/s/AcademicFreedomSurvey>.

disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source.⁷

Apart from such freedom of teaching, freedom in carrying out research, etc., “academic freedom” in HE—in a comprehensive sense—covers at least three additional aspects, namely self-governance in HE by the academic community, employment security (including “tenure”), and the autonomy of institutions of HE, all of which will be described more fully in the discussion that follows. The various rights thus entailed by “academic freedom” must, however, be interpreted in the light of special duties and responsibilities for staff and students as well as the fact that a proper balance between the level of autonomy enjoyed by HE institutions and their systems of accountability should be ensured.⁸

In his chapter on the right to education in the first major textbook on economic, social, and cultural rights in international law, Manfred Nowak in 1995 still had to concede that international law largely neglected the topic of academic freedom and institutional autonomy.⁹ This remains true today to the extent that international “hard” law (treaties legally binding on states parties thereto) is concerned. The right to academic freedom, as such, is not protected in the two UN human rights covenants—the International Covenant on Civil and Political Rights (ICCPR)¹⁰ and the International Covenant

7. General Conference (UNESCO), *Recommendation concerning the Status of Higher-Education Teaching Personnel*, ¶ 27, UNESCO Doc. 29 C/Res. 11 (1997) [hereinafter UNESCO Recommendation].

8. See, e.g., Terence Karran, *Academic Freedom in Europe: Time for a Magna Charta?* 22 HIGH. EDUC. POL'Y 163 (2009); JOGCHUM VRIELINK ET AL., *ACADEMIC FREEDOM AS A FUNDAMENTAL RIGHT* (League of European Research Universities, Advice Paper No. 6, Dec. 2010), http://www.leru.org/files/publications/AP6_Academic_final_Jan_2011.pdf (discussing the various elements—rights, duties, responsibilities—of the right to academic freedom); see also U.N., Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right of Education (Art. 13 of the ICESCR), ¶¶ 38–40, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter General Comment No. 13], http://www.bayefsky.com/general/cescr_gencomm_13.php [<https://perma.cc/TJ2F-J7TV>] (archived May 10, 2016). The UNESCO Recommendation thus contains provisions on “Institutional autonomy” (V.A.), ¶¶ 17–21, “Institutional accountability” (V.B.), ¶¶ 22–24, “Individual rights and freedoms: civil rights, academic freedom, publication rights, and the international exchange of information” (VI.A.), ¶¶ 25–30, “Self-governance and collegiality” (VI.B.), ¶¶ 31–32, “Duties and responsibilities of higher-education teaching personnel” (VII), ¶¶ 33–36 and “Security of employment” (IX.B.), ¶¶ 45–46.

9. Manfred Nowak, *The Right to Education, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 189, 209–10 (Asbjørn Eide et al. eds., 1995).

10. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

on Economic, Social and Cultural Rights (ICESCR),¹¹ both of 1966—or in any other binding instrument of international law at the global or regional level. Certain provisions of the various human rights treaties applicable globally or regionally may, however, be relied on to protect (particular aspects of) the right to academic freedom.¹² Focusing specifically on the UN human rights covenants,¹³ these include Article 7 of the ICCPR, which prohibits torture or cruel, inhuman or degrading treatment or punishment (also when this takes place because a scholar holds or expresses certain academic views); Article 9 of the ICCPR, which addresses the right to liberty and security of the person (which, for example, protects a scholar from being arbitrarily arrested, detained, or falsely prosecuted in retaliation for certain academic content); Article 12 of the ICCPR on the right to liberty of movement; Article 13 of the ICCPR on the right of aliens not to be arbitrarily expelled from a state (Articles 12 and 13 collectively guarantee the ability of members of the academic community to travel abroad, to return home, and to move freely within a state for the purposes of study, teaching, and research);¹⁴ Article 18 of the ICCPR on the right to freedom of thought, conscience, and religion (this provision probably also encompasses the right of scholars to object to teaching or carrying out research on the grounds that doing so would be contrary to their conscience, religion, or beliefs);¹⁵ Article 21 of the ICCPR on the right of peaceful assembly (affording protection, for example, to scholars organizing a conference, in which opinions critical of a government's policies in one area or another are expressed); and Article 22 of the ICCPR on the

11. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].

12. For an overview of relevant provisions in this respect in the major global and regional human rights instruments (including the non-binding Universal Declaration of Human Rights of 1948), see Robert Quinn & Jesse Levine, *Intellectual-HRDs and Claims for Academic Freedom under Human Rights Law*, 18 INT'L J. HUM. RTS. 898, 904 (2014).

13. For an analysis of the Covenant provisions referred to in the discussion that follows and their relevance to the right to academic freedom in the light of relevant international legal materials (decisions of international human rights tribunals, General Comments of UN human rights treaty monitoring bodies, reports of UN Special Rapporteurs, etc.), see *id.* at 902–12.

14. See Klaus Beiter, *The Protection of the Right to Academic Mobility under International Human Rights Law*, in *ACADEMIC MOBILITY* 243 (Malcolm Tight & Nina Maadad eds., 2014) (discussing the aspect of the right to freedom of movement of scholars as one aspect of the right to academic freedom and how to rely on provisions of the Covenants to construct a right to academic mobility as a constituent element of the right to academic freedom).

15. It is not entirely clear whether Article 18 of the ICCPR covers a general right of "conscientious objection." See MANFRED NOWAK, *Article 18: Freedom of Thought, Conscience, Religion and Belief*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 406, 412–13, ¶¶ 10–11, 421–25, ¶¶ 27–32 (2d rev. ed. 2005).

right to freedom of association (on which members of the academic community would rely, for instance, to protect their right to form and join trade unions¹⁶ attending to their interests).¹⁷

Three Covenant provisions provide protection for the right to academic freedom more comprehensively: Article 19 of the ICCPR on the right to freedom of opinion and expression;¹⁸ Article 15 of the ICESCR on cultural rights—notably giving expression, in Paragraph 3, to the right to respect for “the freedom indispensable for scientific research”; and Article 13 of the ICESCR on the right to education. Some commentators consider the right to freedom of opinion and expression *and* the right to education to constitute the two essential pillars of the right to academic freedom.¹⁹ Others argue that the right to freedom of opinion and expression must be viewed as the essential premise of the right to academic freedom.²⁰ Yet others hold that, whereas all the various provisions cited above should play a role in protecting relevant aspects of the right to academic freedom, Article 13 of the ICESCR on the right to education constitutes a complete locus for the right to academic freedom: “Article 13

16. Article 22 of the ICCPR “only applies to private associations.” See Human Rights Committee, *Wallmann v. Austria*, Comm. No. 1002/2001, U.N. Doc. CCPR/C/80/D/1002/2001 (Apr. 1, 2004), ¶ 9.4. It seems thus not to apply to public universities, but to, for example, trade unions or private universities.

17. In a wider sense, one could also mention Articles 7, 8, 9, 11 and 12 of the ICESCR on the right to just and favorable conditions of work, the right to form and join trade unions, the right to social security, the right to an adequate standard of living and the right to the highest attainable standard of physical and mental health, respectively. Ultimately, academic freedom can only be enjoyed if the terms and conditions of employment are conducive for effective teaching and research. See UNESCO Recommendation, *supra* note 7, ¶ 40 (calling upon the employers of higher-education teaching personnel to establish terms and conditions of employment of the nature contemplated).

18. Article 19 of the ICCPR needs to be read in conjunction with Article 20 of the Covenant, which “limits” the right to freedom of opinion and expression in that it prohibits “[a]ny propaganda for war” and “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

19. See, e.g., Quinn & Levine, *supra* note 12, at 903–05; Balakrishnan Rajagopal, *Academic Freedom as a Human Right: An Internationalist Perspective*, 89 *ACADEME*, May–June 2003, at 25, 27–28 (“Academic freedom can be asserted as a human right in two ways. One is to defend it as a human right to free expression; the other is to defend it as a human right to education.”). Similarly, the Belgian Court of Arbitration in a decision of 2005 held that the right to academic freedom represented an aspect of freedom of expression (BELGIAN CONSTITUTION, art. 19) and was also a part of the freedom of education (BELGIAN CONSTITUTION, art. 24, § 1). See Judgment of Nov. 23, 2005 (No. 167/2005), Cour d’arbitrage, *MONITEUR BELGE*, Dec. 2, 2005, ¶ B.18.1. For a discussion of the decision, see Michel Pâques, *Liberté académique et Cour d’Arbitrage*, in *LIBER AMICORUM PAUL MARTENS, L’HUMANISME DANS LA RÉOLUTION DES CONFLITS: UTOPIE OU RÉALITÉ?* 399 (2007).

20. See, e.g., Kwadwo Appiagyei-Atua, *A Theoretical Review of the Origins of Academic Freedom*, SCHOLARS AT RISK NETWORK (July 3, 2014, 2:20 PM), http://salsa4.salsalabs.com/o/50943/p/salsa/web/blog/public/?blog_entry_KEY=33 [<https://perma.cc/SJ3C-AUN6>] (archived Mar. 1, 2016) (arguing that there has been a progression from freedom of expression to the right to education to academic freedom).

ICESCR . . . constitutes the provision which concurrently assembles all aspects of academic freedom under 'a single roof' and whose normative context provides the proper framework for interpretation."²¹ There are writers who agree that all the various provisions cited should play a role as described but maintain that "Article 13 ICESCR alone is too weak a basis to support academic freedom."²²

21. See, e.g., KLAUS D. BEITER, THE DOCTRINAL PLACE OF THE RIGHT TO ACADEMIC FREEDOM UNDER THE UN COVENANTS ON HUMAN RIGHTS, U. VALUES: BULL. ON INT'L ACAD. FREED'M, AUTONOMY & RESP. (July 2011), http://scholarsatrisk.nyu.edu/documents/UV_JULY_2011.pdf [<https://perma.cc/6APS-UG32>] (archived Mar. 1, 2016); KLAUS D. BEITER, THE DOCTRINAL PLACE OF THE RIGHT TO ACADEMIC FREEDOM UNDER THE UN COVENANTS ON HUMAN RIGHTS: A REJOINDER TO ANTOON DE BAETS, U. VALUES: BULL. ON INT'L ACAD. FREED'M, AUTONOMY & RESP. (Dec. 2013), http://scholarsatrisk.nyu.edu/documents/UV_DEC_2013.pdf [<https://perma.cc/69V2-SRMJ>] (archived Mar. 1, 2016).

22. See, e.g., ANTOON DE BAETS, THE DOCTRINAL PLACE OF THE RIGHT TO ACADEMIC FREEDOM UNDER THE UN COVENANTS ON HUMAN RIGHTS: A REJOINDER, U. VALUES: BULL. ON INT'L ACAD. FREED'M, AUTONOMY & RESP. (May 2012), http://scholarsatrisk.nyu.edu/documents/UV_MAY_2012.pdf [<https://perma.cc/M2GF-JSP7>] (archived Mar. 1, 2016); Antoon de Baets, *Some Puzzles of Academic Freedom (Part 1)*, SCHOLARS AT RISK NETWORK (July 3, 2014, 2:30 PM), http://salsa4.salsalabs.com/o/50943/p/salsa/web/blog/public/?blog_entry_KEY=32&killorg=True [<https://perma.cc/J4WG-CK7E>] (archived Mar. 2, 2016) (stating that "Article 13 is essential but incomplete."); Antoon de Baets, *Some Puzzles of Academic Freedom (Parts 2 and 3)*, SCHOLARS AT RISK NETWORK (Jan. 9, 2015, 3:00 PM), http://salsa4.salsalabs.com/o/50943/p/salsa/web/blog/public/?blog_entry_KEY=46&killorg=True [<https://perma.cc/4EST-H27G>] (archived Mar. 2, 2016) (discussing the degree to which various human rights determine academic freedom). Problems associated with considering the right to freedom of opinion and expression as the basis of the right to academic freedom are, firstly, the fact that academic freedom entails much more than "free speech" rights, namely, also rights of "free action" (e.g. conducting an experiment), and, secondly, the fact that the free speech rights covered are, in fact, *special* speech rights, circumscribed by the requirements of learning, teaching and research. See ERIC BARENDT, ACADEMIC FREEDOM AND THE LAW: A COMPARATIVE STUDY 17–21 (2010). Regarding the right to respect for "the freedom indispensable for scientific research" in Article 15(3) of the ICESCR, it should be noted that this is a general right belonging to all persons undertaking scientific research (including, for example, researchers in private industry or those in public or private specialist institutes). It may be rendered as what is termed "*Wissenschaftsfreiheit*" in German constitutional theory, perhaps best translated as "the right to free scholarship." The right to academic freedom, on the other hand, accrues to a smaller group of right-holders—namely academic staff in HE institutions (or research institutions "close" to the educational milieu)—but it entails entitlements which are more far-reaching in their scope. As has been pointed out by a commentator, "[a]cademic freedom as it is understood in the United Kingdom and the United States is, in contrast [to "*Wissenschaftsfreiheit*"], a special right to which only those engaged in teaching and research at universities and other comparable institutions are entitled." The freedom of those not working at the latter institutions "may be narrower than it is for university professors." The right to academic freedom is, however, also enjoyed by students in HE, but the scope of their right is reduced when compared to that of academic staff. See *id.* at 37–38. For a detailed account of the doctrinal place of the right to academic freedom under the UN human rights covenants, see Klaus D. Beiter, Terence Karran & Kwadwo Appiagyei-Atua, *Yearning to Belong—Finding a "Home" for the Right to Academic Freedom in the U.N. Human Rights Covenants*, 11 INTERCULTURAL HUM. L. REV. (forthcoming 2016).

There have been noteworthy developments at the international level pertaining to the right to academic freedom. Three of these should briefly be referred to. *Firstly*, the Committee on Economic, Social and Cultural Rights, the body of independent human rights experts supervising the implementation of—and “authoritatively interpreting”—the ICESCR, has, in its General Comment No. 13 on the Right to Education, made some interesting observations regarding “academic freedom and institutional autonomy.” It states, for example, that it “has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students” and that “[a]ccordingly, even though the issue is not explicitly mentioned in Article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom.”²³

Secondly, the European Court of Human Rights, deciding on applications alleging violations of the rights set out in the European Convention on Human Rights (ECHR) of 1950,²⁴ as amended and supplemented, has recently begun commenting on certain aspects of the right to academic freedom. It has resolved cases turning on issues of free speech in an academic context on the basis of Article 10 of the Convention, which protects the right to freedom of expression. The first judgment that expressly referred to academic freedom was *Sorguç v. Turkey*.²⁵ In this case, the Court “underline[d] the importance of academic freedom, which comprises the academics’ freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction.”²⁶ It found an award of damages for

23. General Comment No. 13, *supra* note 8, ¶ 38. The Committee then goes on to provide a definition of “academic freedom,” essentially resembling that cited at note 7 above, and to describe the concept of “institutional autonomy.” *Id.* ¶¶ 39, 40. Finally, the Committee stresses that, although “staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom,” “staff and students throughout the education sector are entitled to academic freedom.” *Id.* ¶ 38. General Comments are interpretative tools. The Committee generates them in an attempt to clarify Covenant provisions. Though not legally binding, they do have considerable legal weight.

24. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. 5 (*entered into force* Sept. 3, 1953) [hereinafter ECHR].

25. *Sorguç v. Turkey*, App. No. 17089/03, Eur. Ct. H.R., 2nd Sec. (2009), <http://hudoc.echr.coe.int/eng?i=001-93161> [<https://perma.cc/8F4D-VFZ8?type=image>] (archived Mar. 2, 2016).

26. *Id.* ¶ 35. When making its comments on academic freedom, the Court referred to Recom. 1762 (2006) on Academic Freedom and University Autonomy of the Parliamentary Assembly of the Council of Europe, COUNCIL OF EUROPE, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en> [<https://perma.cc/D2KC-FQC2>] (archived May 10, 2016). *Id.* ¶ 21. It may be mentioned that the Committee of Ministers of the Council of Europe has recently adopted another document on the subject, Committee of Ministers, Recom. CM/Rec(2012)7 on the

defamation against a professor to have violated the latter's right to freedom of expression. In a paper, the professor had criticized procedures for recruiting and promoting academics in his discipline. An assistant professor, who felt the criticism to have been directed at his person (although he had not expressly been mentioned), subsequently had successfully claimed damages for defamation.²⁷

Thirdly, in 1997, UNESCO—the United Nations' specialized agency with primary responsibility for international cooperation in the fields of education, the natural, social and human sciences, culture, and communication—adopted the Recommendation concerning the Status of Higher-Education Teaching Personnel. The Recommendation “applies to all higher-education teaching personnel.”²⁸ This means “all those persons in institutions or programmes of higher education who are engaged to teach and/or to undertake scholarship and/or to undertake research and/or to provide educational services to students or to the community at large.”²⁹ The following matters are covered by the Recommendation:

- guiding principles (regarding HE and teaching personnel in HE) (part III, ¶¶ 3–9);
- educational objectives and policies (in the sphere of HE) (part IV, ¶¶ 10–16);
- institutional rights, duties and responsibilities (institutional autonomy and institutional accountability) (part V, ¶¶ 17–24);

Responsibility of Public Authorities for Academic Freedom and Institutional Autonomy, COUNCIL OF EUROPE, <https://wcd.coe.int/ViewDoc.jsp?id=1954741&Site=CM> [<https://perma.cc/7C3U-NRQ3>] (archived Mar. 2, 2016).

27. Other cases dealing with academic freedom include *Lombardi Vallauri v. Italy*, App. No. 39128/05, Eur. Ct. H.R., 2nd Sec. (2009), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-95150"\]}](http://hudoc.echr.coe.int/eng#{) [<https://perma.cc/GA5W-H4V6>] (archived Mar. 2, 2016); *Sapan v. Turkey*, App. No. 44102/04, Eur. Ct. H.R., 2nd Sec. (2010), [http://hudoc.echr.coe.int/eng?i=001-99160#{"itemid":\["001-99160"\]}](http://hudoc.echr.coe.int/eng?i=001-99160#{) [<https://perma.cc/FUK9-MAY8>] (archived Mar. 2, 2016); *Aksu v. Turkey*, App. Nos. 4149/04, 41029/04, Eur. Ct. H.R., Grand Chamber (2012), <http://hudoc.echr.coe.int/eng?i=001-109577> [<https://perma.cc/SQ8Z-Q3Z7>] (archived Mar. 2, 2016); *Hasan Yazıcı v. Turkey*, App. No. 40877/07, Eur. Ct. H.R., 2nd Sec. (2014), <http://hudoc.echr.coe.int/eng?i=001-142637> [<https://perma.cc/KB2K-VSZR>] (archived Mar. 2, 2016); *Mustafa Erdoğan and Others v. Turkey*, App. Nos. 346/04, 39779/04, Eur. Ct. H.R., 2nd Sec. (2014), <http://hudoc.echr.coe.int/eng?i=001-144129> [<https://perma.cc/Y9RP-7T6N>] (archived Mar. 2, 2016). In the last case, see also the interesting Joint Concurring Opinion of Judges Sajó, Vučinić and Kūris, developing criteria for the protection of “extramural” speech of academics.

28. UNESCO Recommendation, *supra* note 7, ¶ 2.

29. *Id.* ¶ 1(f). Predating this Recommendation is another Recommendation adopted by UNESCO: The Recommendation on the Status of Scientific Researchers of 1974. This instrument, applicable, as it is, to scientific researchers, and protecting, amongst others, their freedom of research, covers a wider group of researchers than only those in HE. The Recommendation defines “scientific researchers” as “those persons responsible for investigating a specific domain in science or technology”—“sciences” meaning the sciences concerned with social facts and phenomena, to the extent that theoretical elements are capable of being validated—irrespective of the type of establishment in which such researchers work, the motivation underlying the research, and the kind of application to which it relates most immediately. *Id.* ¶ 1.

- rights and freedoms of higher-education teaching personnel (individual rights and freedoms, including civil rights, academic freedom, publication rights, and the international exchange of information, as well as self-governance and collegiality) (part VI, ¶¶ 25–32);
- duties and responsibilities of higher-education teaching personnel (part VII, ¶¶ 33–36);
- preparation for the profession (part VIII, ¶¶ 37–39);
- terms and conditions of employment (entry into the academic profession; security of employment; appraisal; discipline and dismissal; negotiation of terms and conditions of employment; salaries, workload, social security benefits, health and safety; study and research leave and annual holidays; terms and conditions of employment of women, disabled and part-time higher-education teaching personnel) (part IX, ¶¶ 40–72);
- utilization and implementation (part X, ¶¶ 73–76); and
- final provision (providing that the Recommendation may not be invoked to diminish a more favorable status already granted to higher-education teaching personnel) (part XI, ¶ 77).

The Recommendation is more than a mere code regulating the profession of HE teaching. Apart from improving the professional, material, and social position of higher-education teaching personnel, it is also, as a result of improvements in that position, aimed at enhancing the quality of the HE system.³⁰ It is appreciated that HE is “instrumental in the pursuit, advancement and transfer of knowledge” in enabling students to fully satisfy their higher educational needs in accordance with their right to education and for industry to be able to rely on a well-qualified workforce, but that these goals can only be accomplished if there exists a HE system of high quality.³¹ Recognizing the decisive role that higher education teaching personnel has towards reaching the stated goals, such personnel “[must] enjoy the status commensurate with this role.”³² Although the Recommendation is not, as such, “an international instrument on academic freedom,” guaranteeing academic freedom in HE is a fundamental concern of the document. Already the Preamble to the Recommendation, in Recitals 8 and 9,

[e]xpress[es] concern regarding the vulnerability of the academic community to untoward political pressures which could undermine academic freedom, [and]

30. See KLAUS D. BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW: INCLUDING A SYSTEMATIC ANALYSIS OF ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 280 (2006).

31. UNESCO Recommendation, *supra* note 7, at pmbl. (recitals 3, 4).

32. *Id.* recitals 5, 10.

[c]onsider[s] that the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education and that the open communication of findings, hypotheses and opinions lies at the very heart of higher education and provides the strongest guarantee of the accuracy and objectivity of scholarship and research.

It thus recognizes the importance of ensuring academic freedom and institutional autonomy if HE is to achieve the objectives identified above. Various provisions of the Recommendation address aspects of academic freedom. As these constitute the most current expression of agreed upon international standards on the topic, they will be used as the basis for assessing compliance with the right to academic freedom in Europe in the discussion that follows.

UNESCO's Recommendations are not legally binding. However, it would be wrong to hold them to be legally irrelevant. They "bind" as soft law. Appreciating that Recommendations have been adopted by the General Conference of UNESCO, they must be considered to reflect an international consensus on their specific subject matter. Recommendations "have a normative character in their intent and effects and the States concerned regard them as political or moral commitments."³³ Of note is Paragraph 74 of the Recommendation of 1997, which calls upon "Member States and higher education institutions [to] take all feasible steps to apply the provisions [of the Recommendation] to give effect, within their respective territories, to the principles set forth in [the] Recommendation." Moreover, under UNESCO's Constitution, UNESCO's members are obliged to submit the various recommendations adopted to their competent authorities so that the latter may take cognizance of their provisions and are further obliged to report on the measures taken towards and the progress made in implementing recommendations.³⁴ As the 1997 Recommendation deals with international labor *and* international education law, a Joint ILO/UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART) supervises its implementation by UNESCO member

33. YVES DAUDET & KISHORE SINGH, *THE RIGHT TO EDUCATION: AN ANALYSIS OF UNESCO'S STANDARD-SETTING INSTRUMENTS* 45 (2001), <http://unesdoc.unesco.org/images/0012/001238/123817e.pdf> [<https://perma.cc/VFQ7-4CYR>] (archived Mar. 1, 2016). Examples of other UNESCO Recommendations are the Recommendation against Discrimination in Education (1960), the Recommendation concerning the Status of Teachers (1966), and the Recommendation on the Status of Scientific Researchers (1974).

34. UNESCO, Constitution of the United Nations Educational, Scientific, and Cultural Organization, art. IV(4), (6), *opened for signature* Nov. 16, 1945, 4 U.N.T.S. 275 (*entered into force* Nov. 4, 1946), http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html [<https://perma.cc/N8T6-NHDV>] (archived Mar. 1, 2016).

states.³⁵ The Committee is composed of twelve independent experts—six appointed by UNESCO and six by the ILO. It holds sessions every three years. The Committee essentially performs two tasks: it examines relevant data, including the reports referred to, to adjudge application of the Recommendation, and it examines allegations received from teachers' organizations on the non-observance of provisions of the Recommendation in member states.³⁶

III. DEVELOPING A STANDARD SCORECARD "TO MEASURE" THE RIGHT TO ACADEMIC FREEDOM IN EUROPE

A. *The "Legal" Protection of the Right to Academic Freedom: The Requirement of Legislation*

The Human Rights Committee, the body of independent human rights experts supervising implementation of the ICCPR, has stressed, in one of its General Comments, that "unless Covenant rights are already protected by . . . domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant."³⁷ Likewise, the Committee on Economic, Social and Cultural Rights entertains the view that, in realizing rights under the ICESCR, "in many instances legislation is highly desirable and in

35. Already in 1966, UNESCO adopted a Recommendation concerning the Status of Teachers, applicable to teachers in schools from the pre-primary up to completion of the secondary level of education.

36. For more information on the supervision of the relevant Recommendations, see BEITER, *supra* note 30, at 282–84. See also Rep. of the Joint ILO/UNESCO Comm. of Experts on the Application of the Recommendations concerning Teaching Personnel on Its Tenth Session, ILO/UNESCO Doc. CEART/10/2009 (2009); Rep. of the Joint ILO/UNESCO Comm. of Experts on the Application of the Recommendations concerning Teaching Personnel on Its Eleventh Session, ILO/UNESCO Doc. CEART/11/2012/9 (2012); Rep. of the Joint ILO/UNESCO Comm. of Experts on the Application of the Recommendations concerning Teaching Personnel on Its Twelfth Session, ILO/UNESCO Doc. CEART/12/2015/14 (2015).

37. General Comment No. 31 of the United Nations Human Rights Committee, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 13, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). In fact, Article 2(2) of the ICCPR provides that "[w]here not already provided for by existing legislative or other measures, each State Party to the . . . Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the . . . Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the . . . Covenant." (emphasis added); see also MANFRED NOWAK, *Article 2: Domestic Implementation and Prohibition of Discrimination*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 27, 59–60, ¶ 56 (2d rev. ed. 2005) (stating that "the formulation 'legislative or other measures' demonstrates the priority of legislative measures.").

some cases may even be indispensable."³⁸ Although the Covenants do not *unequivocally* make the adoption of legislation mandatory, these Committee statements, it is submitted, suggest that—to secure the effective realization of human rights and to respect fundamental principles of democracy—all salient elements in the definition of the various human rights, the general framework authorizing measures aimed at fulfilling them, and possible limitations of those rights be contained in legislation adopted by national parliaments.³⁹ Such legislation will increase the visibility of the rights to those entitled to claim them, bind organs of government to respect, protect and fulfill them, and enable right-holders to enforce them before competent administrative or judicial tribunals. Subordinate legislation as adopted by executive/administrative organs of state may then “add flesh to the bones” and operationalize the norms contained in primary legislation, but cannot substitute the latter where it is mandatory. Ultimately, the functionaries/organs adopting subordinate legislation are (usually) not directly legitimated by and accountable to the electorate. Protective standards contained in subordinate legislation may, moreover, easily be changed or abrogated again.⁴⁰

The present assessment of compliance with the criteria of UNESCO's Recommendation of 1997 will essentially examine whether states have complied with the requirement of adopting legislation protecting the different aspects of the right to academic freedom, as described in the Recommendation. It will apply the standards in respect of “legislation” as just described with regard to

38. General Comment No. 3 of the United Nations Committee on Economic, Social and Cultural Rights, *The Nature of States Parties' Obligations* (Article 2(1) of the ICESCR), ¶ 3, U.N. Doc. E/1991/23, Annex III, 86 (1991). Article 2(1) of the ICESCR provides that “[e]ach State Party to the . . . Covenant undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant by all appropriate means, *including particularly the adoption of legislative measures*.” (emphasis added); see also MATTHEW C. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 125 (1995) (stating that “it has commonly been asserted that the enactment of legislation is essential to the implementation of economic, social, and cultural rights on the domestic plane.”); MANISULI SSENYONJO, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW* 55, ¶ 2.14 (2009) (remarking that “[l]egislative measures are indispensable in the protection of all human rights including ESC rights.”).

39. In fact, for limitations of rights, this is confirmed in the various general and specific limitation provisions of the ICCPR and the ICESCR.

40. Where essential aspects of the right to academic freedom have been provided for in government regulations or directives, or university statutes (but not in parliamentary legislation), this ordinarily does not therefore satisfy (or fully satisfy) requirements for adequate “legal” protection. The same holds true with regard to collective agreements, which, as such, constitute neither primary nor secondary legislation. The assessment undertaken in this article has borne out that a number of the states analyzed regulate essential aspects of the right to academic freedom only at the level of secondary legislation (e.g. Denmark, Portugal, Sweden or the UK) or collective agreements (e.g. Austria or the Netherlands).

the UN Covenants. Clearly, parliamentary legislation on its own does not suffice to realize human rights. Other means (governmental policies, regulations and directives, university statutes, financial resources, infrastructure, personnel, information, etc.) will additionally have to be relied on. The large-scale absence of primary legislation on the topic, as the case of the United Kingdom demonstrates, does not necessarily mean that academic freedom may not, all the same, enjoy protection in practice. However, the chances of academic freedom enjoying such protection are greatly enhanced where an adequate legislative framework is provided for.

*B. The Provisions on Academic Freedom in UNESCO's
Recommendation Concerning the Status of Higher-Education
Teaching Personnel of 1997*

The relevant provisions of UNESCO's Recommendation may, for purposes of the assessment of the legal protection of the right to academic freedom in Europe undertaken here, be divided into four groups:⁴¹

- There are provisions on individual rights and freedoms in Paragraphs 25 to 30. These include all "internationally recognized civil, political, social and cultural rights applicable to all citizens" (Paragraph 26) and further "the principle of *academic freedom*" (Paragraph 27)⁴² (the latter constituting academic freedom *stricto sensu*, academic freedom *lato sensu* encompassing all claims relevant to sustaining academic freedom, including the three below).
- There are provisions on *institutional autonomy* in Paragraphs 17 to 21, institutional autonomy being "that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights" (Paragraph 17).
- There are provisions on self-governance and on collegiality in Paragraphs 31 and 32. *Self-governance* means the right of higher-education teaching personnel "to take part in the governing bodies and to criticize the functioning of higher education institutions, including their own," and "the right to elect a majority of representatives to academic bodies within the higher education institution" (Paragraph 31).

41. See Karran, *supra* note 2, at 195-96.

42. The UNESCO Recommendation's definition of "academic freedom" has been cited at note 7 above.

- There are provisions to the effect that higher-education teaching personnel should enjoy security of employment, including "tenure or its functional equivalent, where applicable," in Paragraphs 45 and 46.

A few words should be said with regard to each of the aspects protected, starting with "the principle of *academic freedom*."⁴³ Scholars have been described as "dangerous" minds.⁴⁴ As one of the Recommendation's guiding principles articulates, "[i]nstitutions of higher education . . . are communities of scholars preserving, disseminating and expressing freely their opinions on traditional knowledge and culture, and pursuing new knowledge without constriction by prescribed doctrines."⁴⁵ Challenging orthodox ideas and beliefs and creating new knowledge means that, "because of the nature of their work, academics are more naturally led in to conflict with governments and other seats of authority."⁴⁶

For this reason, advances in HE not only depend on infrastructure and resources but also need to be underpinned by academic freedom.⁴⁷ Higher-education teaching personnel thus "have a right to carry out research work without any interference, or any suppression, . . . subject to . . . recognized professional principles of intellectual rigour, scientific inquiry and research ethics."⁴⁸ They "should also have the right to publish and communicate the conclusions of the research of which they are authors or co-authors."⁴⁹ They further "have the right to teach without any interference, subject to accepted professional principles," "should not be forced to instruct against their own best knowledge and conscience," and "should play a significant role in determining the curriculum."⁵⁰ Academic freedom is subject to important duties and responsibilities, as described in Paragraphs 33 to 36. There is, for example, a duty of higher-education teaching personnel "to teach students effectively," as there is a duty "to base . . . research and

43. UNESCO Recommendation, *supra* note 7, ¶ 27; for analyses of academic freedom as an individual right, see, e.g., Karran, *supra* note 8, at 170–75; André Prüm & Rusen Ergeç, *La liberté académique*, No. 1 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER [RDP] 1, 13–17 (2010), https://orbilu.uni.lu/bitstream/10993/11016/1/RDP_2010_AP_RE_liberte-academique.pdf [<https://perma.cc/4BLS-W8MX>] (archived Mar. 1, 2016); VRIELINK ET AL., *supra* note 8, at 9–18, ¶¶ 27–59.

44. Robert Quinn, *Defending "Dangerous" Minds: Reflections on the Work of the Scholars at Risk Network*, 5 ITEMS & ISSUES 1, 1 (2004).

45. UNESCO Recommendation, *supra* note 7, ¶ 4.

46. Karran, *supra* note 2, at 191.

47. See UNESCO Recommendation, *supra* note 7, ¶ 5 (one of the Recommendation's guiding principles).

48. *Id.* ¶ 29.

49. *Id.*

50. *Id.* ¶ 28.

scholarship on an honest search for knowledge with due respect for evidence, impartial reasoning and honesty in reporting.”⁵¹

UNESCO member states are obliged “to protect higher education institutions from threats to their autonomy coming from any source.”⁵² Threats need not, therefore, necessarily emanate from the state, but they may, for example, originate with private actors such as private companies commissioning research. As has been indicated, *institutional autonomy* is “that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities”⁵³ It is important to appreciate that there is no automatic link between institutional autonomy and individual academic freedom: “[A] highly autonomous institution may offer its members only a limited degree of academic freedom. In other words, in today’s relationship between university autonomy and the state, university autonomy does not subsume academic freedom.” In fact, “[a]s certain responsibilities move gradually from public authorities to higher education institutions, academic freedom could be endangered. Even if the rationale for institutional autonomy were specifically to ensure academic freedom, one does not produce the other.”⁵⁴ It is for this reason that the UNESCO Recommendation stresses that a proper interpretation of institutional autonomy needs to render that term as autonomy “consistent with . . . respect for academic freedom.”⁵⁵ As it were, the Recommendation understands autonomy to be “the institutional form of academic freedom.”⁵⁶ Autonomy should further “not be used by higher education institutions as a pretext to limit the rights of higher-education teaching personnel provided for in [the] Recommendation.”⁵⁷

Autonomy must go hand in hand with public accountability. The Recommendation requires “Member States and higher education institutions [to] ensure a proper balance between the level of

51. *Id.* ¶ 34(a), (c); see, e.g., DONALD KENNEDY, *ACADEMIC DUTY* (1997) (arguing in support of rigorous standards of academic responsibility).

52. UNESCO Recommendation, *supra* note 7, ¶ 19. For analyses of institutional autonomy as an aspect of the right to academic freedom, see, e.g., Prüm & Ergec, *supra* note 43, at 18–21; VRIELINK ET AL., *supra* note 8, at 18–22, ¶¶ 60–76.

53. UNESCO Recommendation, *supra* note 7, ¶ 17.

54. Pavel Zgaga, *Reconsidering University Autonomy and Governance: From Academic Freedom to Institutional Autonomy*, in *UNIVERSITY GOVERNANCE AND REFORM: POLICY, FADS, AND EXPERIENCE IN INTERNATIONAL PERSPECTIVE* 11, 19 (Hans G. Schuetze et al. eds., 2012).

55. UNESCO Recommendation, ¶ 17.

56. *Id.* ¶ 18; see Walter Berka, *Die Quadratur des Kreises: Universitätsautonomie und Wissenschaftsfreiheit*, 7 *ZEITSCHRIFT FÜR HOCHSCHULRECHT, HOCHSCHULMANAGEMENT UND HOCHSCHULPOLITIK* 37 (2008) (describing the general difficulty of reconciling institutional autonomy and academic freedom, emphasizing the Austrian context).

57. UNESCO Recommendation, *supra* note 7, ¶ 20.

autonomy enjoyed by higher education institutions and their systems of accountability."⁵⁸ HE institutions are thus accountable for a commitment to quality and excellence in teaching and research, ensuring high quality education, the creation of codes of ethics to guide teaching and research, honest and open accounting, and an efficient use of resources.⁵⁹ They are also accountable for "assistance in the fulfilment of economic, social, cultural and political rights," "ensuring that they address themselves to the contemporary problems facing society" and "[playing] an important role in enhancing the labour market opportunities of their graduates."⁶⁰ Very importantly, HE institutions are accountable for "effective support of academic freedom and fundamental human rights."⁶¹

Academics pursue their scholarly activities within an institutional setting. The institutions in which they work will have to organize themselves—their structures, governance, and activities—in one way or another. Respect for academic freedom implies that the organization be such as will ensure that free teaching and research can take place in the institutions. This will be the case if a specific HE institution organizes itself in a way that guarantees persons/organs make decisions that are "in the best interest of science and scholarship" ("*wissenschaftsadäquat*"). This, in turn, will only be the case if academics as those entitled to claim academic freedom can *sufficiently participate* in the taking of these decisions. Clearly, by virtue of their training and competence, their long-lasting professional occupation with certain subject matter, as well as the fact that such decisions will have a long-term effect on their scholarly work, academics are best qualified to ensure that decisions taken are "in the best interest of science and scholarship" and support academic freedom.⁶²

UNESCO's Recommendation contains provisions on self-governance and collegiality. As already indicated, *self-governance*

58. *Id.* ¶ 22 (caput).

59. *See id.* ¶ 22(b), (d), (k), (i), (j).

60. *Id.* ¶ 22(l), (m).

61. *Id.* ¶ 22(c).

62. *See* Hamburgisches Hochschulgesetz, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] [Federal Constitutional Court] July 20, 2010, BVerfGE 127, 87, at 114–18, ¶¶ 88–95 (Ger.) (the court, relying on important earlier case law, proposed this line of reasoning in justification of the right of self-governance, observing that the goal here had to be to ensure that relevant decisions were "in the best interest of science and scholarship" ("*wissenschaftsadäquat*")); Ralf Müller-Terpitz, *Neue Leistungsstrukturen als Gefährdung der Wissenschaftsfreiheit?*, 44 WISSENSCHAFTSRECHT 236 (2011) (discussing when governance arrangements of HE institutions may be considered to be consistent with academic freedom; although the article deals with the situation in Germany, most of its statements are equally applicable in a more general sense); for analyses of self-governance as an aspect of the right to academic freedom, see, e.g., Karran, *supra* note 8, at 175–76; Prüm & Ergenc, *supra* note 43, at 21–25; VRIELINK ET AL., *supra* note 8, at 19–20, ¶¶ 65–66.

entails that higher-education teaching personnel should have the right, "without discrimination of any kind, according to their abilities, to take part in the governing bodies and to criticize the functioning of higher education institutions, including their own, while respecting the right of other sections of the academic community to participate" and the right further "to elect a majority of representatives to academic bodies within the higher education institution."⁶³ The closely related principles of collegiality that are to apply in terms of the Recommendation "include academic freedom, shared responsibility, the policy of participation of all concerned in internal decision-making structures and practices, and the development of consultative mechanisms."⁶⁴ It is pointed out that "[c]ollegial decision-making should encompass decisions regarding the administration and determination of policies of higher education, curricula, research, extension work, the allocation of resources and other related activities, in order to improve academic excellence and quality for the benefit of society at large."⁶⁵ If it has been explained above that institutional autonomy should be interpreted so as to be consistent with academic freedom, it should be added that "[s]elf-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education."⁶⁶ Consequently, a HE institution that enjoys substantial autonomy, but in which higher-education teaching personnel cannot *sufficiently participate* in the taking of decisions having a bearing—whether in a wider or a narrower sense—on science and scholarship fails to comply with the requirement of institutional autonomy as understood by the Recommendation.

Finally, UNESCO's Recommendation emphasizes that higher-education teaching personnel should enjoy *security of employment, including "tenure or its functional equivalent, where applicable."*⁶⁷ In the Recommendation's perception, tenure (or its equivalent) "constitutes one of the major procedural safeguards of academic freedom and against arbitrary decisions."⁶⁸ Tenure may seem anomalous in the modern working environment, characterized by

63. UNESCO Recommendation, *supra* note 7, ¶ 31.

64. *Id.* ¶ 32.

65. *Id.*

66. *Id.* ¶ 21.

67. *Id.* ¶¶ 45, 46.

68. *Id.* ¶ 45; for analyses of "tenure" as an aspect of the right to academic freedom, see, e.g., Karran, *supra* note 8, at 177–85; Prüm & Ergec, *supra* note 43, at 26; cf. Margherita Rendel, *Human Rights and Academic Freedom*, in *ACADEMIC FREEDOM AND RESPONSIBILITY* 74, 87 (Malcolm Tight ed., 1988) (explaining that tenure also protects institutional autonomy, remarking that it "is important because it can defend not only the individual academic but also the institution from ideological and managerial pressures, by helping them to continue to teach unfashionable or unpopular subjects, to research inconvenient topics and to provide more centres of initiative than hierarchical management can.")

high employment mobility, regular retraining for new jobs, previous ones becoming obsolete, fixed-term contracts awarded in respect of projects rather than "life-time jobs," and contracts of service that may easily be terminated on operational grounds. Yet, it is important to remember that tenure is not granted to academics as "a mere proprietary benefit," as it were.

In its caput, the 1940 Statement of Principles on Academic Freedom and Tenure, adopted by the American Association of University Professors and the Association of American Colleges (today the Association of American Colleges and Universities), underlines that "[i]nstitutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole," "[t]he common good depend[ing] upon the free search for truth and its free exposition."⁶⁹ Likewise, the U.S. Supreme Court, in its landmark decision in *Keyishian v. Board of Regents*, solemnly declared that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendental value to all of us, and not merely to the teachers concerned."⁷⁰ Hence, tenure—and academic freedom, which it protects by ensuring that academics can engage in a free search for the truth without having to fear losing their jobs because of the views expressed⁷¹—are closely linked to scholars' responsibility for promoting the interests of society as a whole through their teaching and research.⁷²

Paragraph 46 of UNESCO's Recommendation envisages tenure (or its equivalent) to be granted "after a reasonable period of probation"⁷³—"following rigorous evaluation"⁷⁴—"to those who meet stated objective criteria in teaching . . . [and] research to the

69. American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, caput, first paragraph.

70. 385 U.S. 589, 603 (1967).

71. See CONRAD RUSSELL, *ACADEMIC FREEDOM* 23 (1993) (stating that "[t]he point is not that academics may not be dismissed for their opinions: it is that they need freedom from fear that they might be so dismissed. Without it, they cannot be counted on to do their work well.").

72. The justification for safeguarding academic freedom and tenure is, in fact, two-fold: first, to ensure that scholars can engage in a free search for the truth for the benefit of society as a whole and, second, to advance "ethical individualism" (values of intellectual independence). See Ronald Dworkin, *We Need a New Interpretation of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 181, 185–89 (Louis Menand ed., 1996) (describing both the instrumental and ethical bases of protection for academic freedom in this context).

73. UNESCO Recommendation, *supra* note 7, ¶ 46; see also *id.* ¶ 42 (stipulating that the duration of probation should be known in advance and conditions for its satisfactory completion strictly related to professional competence, that reasons should be provided in the event a candidate fails to complete the probation satisfactorily, and that there should be a right to appeal).

74. *Id.* ¶ 46.

satisfaction of an academic body.”⁷⁵ Tenure (or its equivalent) entails “continuing employment” and potential dismissal “on professional grounds and in accordance with due process” only.⁷⁶ The Recommendation allows release “for *bona fide* financial reasons, provided that all the financial accounts are open to public inspection, that the institution has taken all reasonable alternative steps to prevent termination of employment, and that there are legal safeguards against bias in any termination of employment procedure.”⁷⁷ Moreover, tenure (or its equivalent) “should be safeguarded as far as possible even when changes in the organization of or within a higher education institution or system are made.”⁷⁸

C. *The Scorecard*

There is no reason why the four parameters of the right to academic freedom, as defined above, should not, in an assessment of the protection of the right to academic freedom in Europe, be given equal weight. Academic freedom (individual freedom to teach and carry out research) is as important as are each of institutional autonomy, self-governance, and tenure to buttress academic freedom.⁷⁹ The standard scorecard used “to measure” the right to academic freedom in each country examined will, therefore, accord the four parameters equal weight—20 percent each. The final 20 percent to arrive at an overall percentage score for each country assessed is accorded to the parameter “ratification of international agreements and constitutional protection.” Altogether, thirty-seven specific indicators measuring state compliance, concretizing the main parameters, have been identified. These are *human rights* indicators—indicators essentially operationalizing the requirements of the right to academic freedom as protected under international human rights law. A numeric value has been assigned to each indicator, mirroring its relative weight as adjudged in terms of international human rights law. When adding up the scores of states in respect of each of these values, it is possible to rank states for each of the five parameters, as well as to give them overall rankings. To eliminate subjectivity in “giving marks,” the approach with regard to each indicator—following Karran’s earlier method in this respect—has been to determine whether there is “full compliance” (full mark), “qualified compliance” (half of the mark), or “non-compliance” (no

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. See Karran, *supra* note 1, at 291–92 (“[I]n the absence of data as to the relative importance of various parameters of academic freedom, [it may be] assume[d] that all such parameters are equally important.”).

mark).⁸⁰ Hence, a three-point scale is generally applied. In three instances, it was found expedient to apply a five-point scale, to highlight positions "between full and partial compliance" and "between partial and non-compliance" (see B., D.2.3. and E.3. of the scorecard shown below). A two-point scale ("full compliance" or "non-compliance") is used for indicators in A.1. on the ratification of international agreements.

Some detail on the scorecard, its parameters, and the various indicators will now be provided—for purposes of illustration, the example of the scorecard (with the results for Austria), reproduced at the end of this subpart, should be referred to. The *first column (A)* reflects whether the states at issue accept obligations of "superior normative force" (in the sense of obligations not "merely" originating under ordinary legislation) relevant to the right to academic freedom (i.e., whether states have ratified relevant international agreements (10 percent) and whether their constitutions provide appropriate protection (10 percent)). Regarding *international agreements*, the inquiry is whether states have ratified the following four global agreements: the ICCPR of 1966 (with its Article 19 on the right to freedom of expression); the Optional Protocol to the ICCPR of 1966 (setting up a procedure in terms of which allegations of violations of Covenant rights may be brought before the Human Rights Committee); the ICESCR of 1966 (with its Article 13 on the right to education); and the Optional Protocol to the ICESCR of 2008 (setting up a procedure in terms of which allegations of violations of Covenant rights may be brought before the Committee on Economic, Social and Cultural Rights); and the following regional agreement: the ECHR of 1950, as amended and supplemented (with its Article 10 on the right to freedom of expression).⁸¹ In view of their universal character, slightly more weight has been accorded to the global instruments (60 percent). A state that has ratified a treaty but has expressed a reservation to, notably, the right to freedom of expression or the right to education problematic from the perspective of the right to academic freedom will be considered "non-compliant." Regarding *constitutional*

80. See Karran, *supra* note 2, at 198 ("For these reasons, . . . each nation was adjudged to be in compliance, qualified compliance, or non-compliance with the UNESCO Recommendation.").

81. Although the ECHR also protects the right to education in Article 2 of its Protocol No. 1, it does so negatively, stating that "[n]o person shall be denied the right to education." It has convincingly been argued that "[t]he right to university education is a human right" under the ECHR. See *Tarantino v. Italy*, 2013-II Eur. Ct. H.R. 397, 416 (Pinto de Albuquerque, J., partly dissenting). The nature and scope of any such right remain contentious, however. See BEITER, *supra* note 30, at 162-66 (commenting on the nature and scope of the right to education in the first sentence of Article 2, in particular the nature of state obligations). The European Social Charter (*opened for signature* Oct. 18, 1961, E.T.S. 35 (*entered into force* Feb. 26, 1965)) does not, also not in its revised version (*opened for signature* May 3, 1996, E.T.S. 163 (*entered into force* July 1, 1999)), contain a right to *higher* education.

protection, it will be assessed whether there are adequate, problematic, or seriously deficient/no provisions in the constitutions of states in respect of each of the following: (1) the right to freedom of expression; (2) the right to academic freedom; and, as aspects of the latter, (3) institutional autonomy; and (4) academic self-governance (60 percent).⁸² It will further be assessed whether the normative context of constitutions (for example, values reflected by relevant provisions and specific or general limitations clauses) fully supports the effective protection of the rights concerned (40 percent).

The second to fifth columns consider whether states have complied with the requirement of adopting legislation providing expressly that academic freedom is to be protected (column B), and legislation satisfactorily concretizing institutional autonomy (column C), self-governance (column D), and job security (including “tenure”) (column E) in HE. Under *column B*, there is only one indicator that inquires whether HE legislation contains *express provisions on academic freedom* (primarily in the sense of individual freedom to teach and carry out research). Do these comply notably with the Recommendation’s criteria on academic freedom, and do they show that academic freedom should serve as a guiding principle for activity within HE (full compliance)? Or is there a mere reference to academic freedom, alternatively, are there more elaborate provisions on academic freedom, which, however, reveal various deficits (partial compliance)? Or is there no reference to academic freedom at all (non-compliance)? Or is there, in fact, a situation that may be described as being “between full and partial compliance” or “between partial and non-compliance?” The indicator of column B thus applies a five-point scale to assess compliance.

Column C covers indicators on *institutional autonomy*. The European University Association (EUA) monitors, on an ongoing basis, the extent to which HE institutions in the various European states enjoy autonomy. As part of these efforts, it has produced two reports⁸³ and administers an online platform,⁸⁴ which may usefully

82. Provisions on the right to education have not been taken into account. Full-fledged provisions on the right to education are found in only some European constitutions. The notion of protecting economic, social, and cultural rights as entailing extensive positive obligations for states is still foreign to constitutional theory in most parts of Europe. Also tenure has not been considered separately here because “tenure” as a technical concept is unknown in many European countries.

83. THOMAS ESTERMANN & TERHI NOKKALA, UNIVERSITY AUTONOMY IN EUROPE I: EXPLORATORY STUDY (European University Association, 2009), http://www.eua.be/typo3conf/ext/bzb_securelink/pushFile.php?cuid=3040&file=fileadmin/user_upload/files/Publications/University_Autonomy_in_Europe.pdf; THOMAS ESTERMANN, TERHI NOKKALA & MONIKA STEINEL, UNIVERSITY AUTONOMY IN EUROPE II: THE SCORECARD (European University Association, 2011) [hereinafter ESTERMANN ET AL., SCORECARD], http://www.eua.be/Libraries/Publications/University_Autonomy_in_Europe_II_-_The_Scorecard.pdf [<http://perma.cc/3E3W-FLY3>] (archived Feb. 26, 2016).

be consulted in establishing the elements encompassed by institutional autonomy. UNESCO's Recommendation does not provide detail in this respect and only remarks that "the nature of institutional autonomy may differ according to the type of establishment involved."⁸⁵ The EUA thus distinguishes between organizational, financial, staffing, and academic autonomy and, for each of these, applies various indicators to measure compliance. Some of these may usefully be applied in establishing to what extent HE institutions in the European states enjoy autonomy for purposes of this study. At the same time, it needs to be emphasized that the work of the EUA reveals flaws when adjudged from a human rights perspective.

Although the reports quote literature on academic freedom, academic freedom has in many ways been sacrificed on the altar of a notion of institutional autonomy misconceived in various respects. To mention but a few examples: the EUA considers autonomy to cover the ability to charge tuition fees,⁸⁶ without mentioning that, under Article 13(2)(c) of the ICESCR, fees in higher education should principally be reduced and eventually be abolished.⁸⁷ It considers autonomy to cover the capacity to generally decide on dismissals, without mentioning that, in accordance with criteria on tenure—as has been and will be further explained—dismissals may occur in defined cases only.⁸⁸ It considers autonomy to cover the freedom to include external members in governing bodies, without mentioning that academic self-governance, by its very nature, would require there to be restrictions on the inclusion of such members in the governing bodies.⁸⁹ Furthermore, the EUA does not—as it should—take account of threats to university autonomy emanating from actors other than governments, for example, private companies

84. See University Autonomy in Europe, EUROPEAN UNIVERSITY ASSOCIATION (2012), <http://www.university-autonomy.eu> [<http://perma.cc/2A87-BVC9>] (archived Feb. 26, 2016) (showing scorecards on university autonomy for twenty-nine European countries).

85. UNESCO Recommendation, *supra* note 7, ¶ 17.

86. See ESTERMANN ET AL., SCORECARD, *supra* note 83, at 34–36 (stating that "[u]niversities' ability to set fees and decide on their level is often essential to ensuring their financial capacity.").

87. See BEITER, *supra* note 30, at 387–88, 400–01, 458, 526, 572–73, 594, 651 (stressing that, by introducing or increasing study fees in HE, states parties to the ICESCR, unless they can present sound reasons for doing so, violate the Covenant).

88. See ESTERMANN ET AL., SCORECARD, *supra* note 83, at 42 (revealing that the EUA considers the level of institutional autonomy to be higher, the easier it is for HE institutions to be able "to fire" academic staff).

89. *Id.* at 27–28 (stating that "[t]he inclusion and appointment of external members is an important aspect of a university's governing structure," clearly supporting the notion that the management of HE institutions should have a free hand in including and appointing external members).

commissioning research.⁹⁰ In the light of these observations, the indicators chosen inquire: whether there is a satisfactory, problematic, or seriously deficient/no provision in HE legislation expressly protecting institutional autonomy (C.1.) (20 percent); how each of organizational, financial, staffing, and academic autonomy is realized by reference to one or two legitimate key indicators in each instance, with each aspect of autonomy weighted equally (C.2.) (40 percent);⁹¹ overall, how wide or narrow the extent of governmental powers are (C.3.) (20 percent);⁹² and, finally, as to the extent to which institutional independence is protected against private interests (C.4.) (20 percent).⁹³

Column D covers indicators on *self-governance*. The first indicator ascertains whether there is a satisfactory, problematic, or seriously deficient/no provision in HE legislation expressly protecting self-governance (D.1.) (10 percent). This is followed by a group of indicators examining the state of self-governance at the level of the HE institution (D.2.), and another set of indicators measuring this at the faculty/departmental level (D.3.). As institutional decisions usually bind those adopting decisions at the faculty/departmental level, self-governance at the institutional level has been accorded double the weight assigned to self-governance at the faculty/departmental level (60 percent to 30 percent). The indicators seek to ascertain whether HE legislation safeguards the right of academic staff to *sufficiently participate* in the taking of decisions directly or indirectly related to science and scholarship.

UNESCO's Recommendation requires academic staff to be able "to elect a majority of representatives to academic bodies within the

90. *Id.* at 8 (it is thus merely stated that "[u]niversity governance and the relationship between *the state* and higher education institutions are issues that have generated intense debate in recent years." (emphasis added)).

91. The indicators are organizational autonomy (autonomy to determine the rector, and autonomy to decide on the internal structure (faculties, departments, etc.)), financial autonomy (block grants with/without restrictions or line-item budgets, and express competence to perform commissioned research), staffing autonomy (right to define academic positions and their requirements, and to recruit and promote academic staff), and academic autonomy (capacity to determine the selection criteria for bachelor students and to select the latter, and whether or not bachelor programs need not be accredited).

92. This covers the aspect of the form state supervision takes, i.e., the question whether, in addition to supervising whether legal requirements have been complied with (German: "*Rechtsaufsicht*"), the state is also required to review decisions on their merits (German: "*Fachaufsicht*"). The former should always be an obligation of the state, but the latter constitutes a diminution of institutional autonomy.

93. For example, is there a clear statement in HE legislation emphasizing that private funding should not compromise the independence of teaching and research in HE institutions? Is there a requirement to the effect that HE institutions reveal the sources and scope of private funding? Is there a clear restriction of undue influence exercised by the representatives of private interests on the HE institution's governing bodies?

higher education institution."⁹⁴ Countries will earn half the mark where they provide that 50 to 59 percent of the members of the senate (or its equivalent) are to be representatives of academic staff (D.2.1.). The same applies with regard to the composition of collegial bodies at faculty/departmental level (D.3.1.). A higher percentage, ideally between 60 and 70 percent, will earn them the full mark.⁹⁵

Whereas the taking of *decisions on essentially academic matters* constitutes the core competence of the senate (or its equivalent) or a faculty/departmental representative body, the primary responsibility of *directing the institution/faculty/department* accrues to the rector/dean/head of department, who is the institution's/faculty's/department's chief executive officer. The UNESCO Recommendation does not comment on these positions separately. It does, however, state that academic staff should have the right "to take part in the governing bodies"⁹⁶ and further enshrines the principle of collegiality, remarking that this includes shared responsibility, the participation of all in internal decision-making and consultative mechanisms.⁹⁷ Clearly, this is closest to the *primus inter pares* model, in terms of which academic staff are to decide on "their leaders" themselves, choosing them from among themselves, for a certain period of time, after which they become ordinary members of staff again. Under this model, academic staff should also be able to express a lack of confidence in their leaders' ability to lead, where appropriate.⁹⁸ Specifically with regard to the rector, Karran has pointed out that, if these arrangements apply, the rector "is unlikely to take decisions that undermine the academic freedom of the staff, as [he/she] knows that at the end [of his/her] term of office, someone else could be elected as Rector and take retaliatory actions against [him/her]."⁹⁹ Indicators on the rector (D.2.2.) or dean/head of department (D.3.2.) (accorded the same

94. UNESCO Recommendation, *supra* note 7, ¶ 31.

95. The assessment also takes into account whether the provisions on the composition of the senate (or its equivalent) or collegial bodies at the faculty/departmental level also comply in all other respects with accepted requirements of academic self-governance (for example, all categories of academic staff should take part in the election of representatives).

96. UNESCO Recommendation, *supra* note 7, ¶ 31.

97. *Id.* ¶ 32.

98. The Latin phrase "*primus inter pares*" signifies that the rector or dean/head of department under this model is considered to be "first among equals," as it were, that he or she is not an unelected professional manager with far-reaching executive powers under what has been described as a management model. See Egbert de Weert, *Pressures and Prospects Facing the Academic Profession in the Netherlands*, in *THE CHANGING ACADEMIC WORKPLACE: COMPARATIVE PERSPECTIVES* 116, 118 (Philip G. Altbach ed., 2000) ("These managers have increased budgetary responsibilities and . . . authority for staffing matters—including appointments, personnel assessments, and so on.").

99. Karran, *supra* note 1, at 303–04.

weight as indicators on the senate (or its equivalent) or faculty/departmental representative body, respectively) will thus ascertain, firstly, whether these officers come from within the institution and hold a PhD or are a professor; secondly, whether academic staff can exercise “control” over who is chosen as the rector or dean/head of department; and thirdly, whether they can exercise “control” over the dismissal of the rector or dean/head of department by virtue of a vote of no-confidence.

Apart from questions related to *how purely academic matters should be dealt with* and *how HE institutions/faculties/departments should be directed*, a final issue relates to *the particular way strategic decision-making takes place*. Also, in this respect, academic staff should have a right to take part in the relevant governing bodies (i.e., those bodies responsible for strategic planning, general teaching and research policy, overall institutional development, preparing the budget, and adopting the HE institution’s statutes).¹⁰⁰ Strategic decision-making—only considering that which occurs at the institutional level here¹⁰¹—would customarily be the task of the rector (rectorate) and/or the senate (or its equivalent) and/or, notably and increasingly nowadays, a separate board to which academic staff, external experts, and other stakeholders are elected/appointed.¹⁰² In view of the increased importance of the latter boards in the governance of HE institutions and as the extent to which science and scholarship can flourish within a HE institution significantly depends on how “strategic issues” have been resolved, indicator D.2.3., which focuses on the composition of the body/bodies taking strategic decisions, has been assigned the same weight as indicators under D.2.1. and D.2.2. *together*. It is submitted that academic staff should ideally have at least 50 percent representation on any such body/bodies.¹⁰³

100. Ultimately, Paragraph 32 of the UNESCO Recommendation highlights that “[c]ollegial decision-making should encompass decisions regarding the administration and determination of policies of higher education, curricula, research, extension work, the allocation of resources and other related activities.”

101. At faculty/departmental level, these questions should be resolved by the dean/head of department and/or staff (representative body).

102. See EURYDICE, THE INFORMATION NETWORK ON EDUCATION IN EUROPE, HIGHER EDUCATION GOVERNANCE IN EUROPE: POLICIES, STRUCTURES, FUNDING AND ACADEMIC STAFF 33–42 (2008), http://eacea.ec.europa.eu/education/eurydice/documents/thematic_reports/091EN.pdf [<https://perma.cc/A5D7-YH3K>] (archived Mar. 10, 2016) (discussing the typical governance bodies encountered in (European) HE institutions).

103. A five-point scale is applied to measure compliance with regard to indicator D.2.3.: at least 50 percent representation = full compliance; 40–49 percent representation = between full and partial compliance; 30–39 percent representation = partial compliance; less than 30 percent, but some form of representation = between partial and non-compliance; and no noteworthy representation = non-compliance. Where there is a board consisting of external members, and academic staff may determine at least 50 percent of its members, this is considered to constitute partial

Finally, *Column E* covers indicators on *security of employment, including "tenure or its functional equivalent, where applicable."* Indicators concern three topics: duration of contract of service (40 percent) (E.1.), termination of contract of service on operational grounds (30 percent) (E.2.), and prospect of advancement based on objective assessment of competence (30 percent) (E.3.). Regarding *the first topic*—UNESCO's Recommendation referring to "continuing employment following rigorous evaluation"¹⁰⁴—it is to be assessed whether the legal framework of the states concerned envisages permanent contracts for academic staff, or, alternatively, commencement on a tenure-track (i.e., during a first phase,¹⁰⁵ a probationary period or fixed-term contracts with long-term prospects). A lowering of the standards of protection may take on various forms: permanent contracts or commencement on a tenure-track at the level of senior positions (for example, that of associate professor) only (partial compliance), leaving the conclusion of permanent contracts generally to the discretion of the employer (partial or non-compliance),¹⁰⁶ or expressly providing for fixed-term contracts without long-term prospects at even senior levels (non-compliance).¹⁰⁷

Indicators on *the second topic*, the termination of contracts of service on operational grounds, relate to requirements in UNESCO's Recommendation to the effect that potential dismissal of "tenured" staff should occur "on professional grounds and in accordance with due process" only.¹⁰⁸ Dismissals on grounds of serious misconduct, a flagrant violation of scholarly duties (for example, fabrication of research results or plagiarism), or two or more consecutive negative appraisals of work quality will be permissible, if due process rules are observed.¹⁰⁹ Dismissals on operational grounds (i.e., restructuring,

compliance. Where they are not in a position to determine at least 50 percent of those members, this is considered to constitute non-compliance.

104. UNESCO Recommendation, *supra* note 7, ¶ 46.

105. This would normally be the phase following the award of a doctoral degree. It has been held that this phase typically (and legitimately) is between five to seven years. See Karran, *supra* note 8, at 178.

106. Much will depend on whether fixed-term contracts are subject to strict or lax requirements as regards legitimate cases of use, maximum number of successive contracts, and maximum cumulated duration.

107. Indicator E.1.1. on the *legal* framework is supplemented by indicator E.1.2. on the situation *in practice*. This has been included in light of the fact that the legal criteria existing in this context are multi-layered and complex, and often containing loopholes or having unexpected effects in practice, so that only a look at the situation in practice explains the true purport of legal provisions: 66.7 percent or more of academic staff at post-entry levels (i.e. following any stage of doctoral employment) having permanent contracts of service or on a tenure-track = full compliance; 50–66.6 percent = partial compliance; and less than 50 percent = non-compliance.

108. UNESCO Recommendation, *supra* note 7, ¶ 46.

109. Note should be taken of Paragraph 47 of the UNESCO Recommendation on "Appraisal", Subparagraph (e) stating that the results of appraisal may legitimately be taken into account when "considering the renewal of employment," and of

down-sizing, reorganization or economic difficulties), however, should ideally not take place. They will only be justifiable exceptionally and provided all alternatives have been considered, appropriate priority criteria observed, a formalized procedure followed, and procedural safeguards respected.¹¹⁰ A first indicator (E.2.1.) ascertains whether there is an adequate, problematic, or seriously deficient/no provision in HE legislation expressly prohibiting dismissals of specifically (but not solely) academic staff with permanent contracts on operational grounds, alternatively, providing strict protection in cases of such dismissals.¹¹¹ A second indicator of equal weight (E.2.2.) inquires as to the level of protection afforded to academic staff, as defined, in cases of dismissals on operational grounds under "ordinary" civil service and/or labor law.

Finally, regarding *the topic* of a prospect of advancement based on an objective assessment of competence, since academic freedom is to be protected by restricting dismissal, it follows, by way of implication, that academic freedom should also not be infringed by preventing advancement in the academic career where it should take place. There should be procedures in place (also capable of being initiated by the academic concerned) in terms of which promotion is granted, provided defined scholarly criteria have been met as objectively assessed, without the need for the academic having to newly apply for a higher position within his/her institution on a competitive basis. Indicator E.3. thus assesses whether legislation makes adequate provision (including, for example, through a tenure-track system) for advancement to a higher position based on an objective assessment of competence.¹¹²

Paragraphs 48–51 on "Discipline and dismissal", specifically Paragraph 50 on "dismissal as a disciplinary measure." For a description of due process rules in this context; see Karran, *supra* note 8, at 181–85 (figs. 7, 8).

110. For a description of due process rules in this context, see Karran, *supra* note 8, at 179–81, 184–85 (figs. 5, 6, 8).

111. Such a provision may largely be dispensed with where academic staff are civil servants whose discharge on very limited grounds, notably serious misconduct, is strictly regulated in civil service legislation.

112. This indicator applies a five-point scale: adequate legislation = full compliance; legislation with certain deficits = between full and partial compliance; legislation with more serious deficits = partial compliance; legislation with substantial deficits = between partial and non-compliance; and no legislation = non-compliance. Where relevant procedures are provided for in a prominent and sector-wide collective agreement, in government regulations or in the statutes of HE institutions generally, these will, depending on their specific nature, be rated to be "in partial compliance" or "between partial and non-compliance."

Standard Scorecard “to Measure” the Right to Academic Freedom

Country	A. The Ratification of International Agreements and Constitutional Protection (20%)
Austria 62.5 ^a .	<p>1. The Ratification of International Agreements (10) 8.5</p> <p>1.1. Global Level (6)</p> <p>1.1.1. <i>International Covenant on Civil and Political Rights</i> (Art. 19, Right to Freedom of Expression) [0–1.5] 1.5</p> <p>1.1.2. <i>Optional Protocol to the International Covenant on Civil and Political Rights</i> (International Petition Procedure) [0–1.5] 1.5</p> <p>1.1.3. <i>International Covenant on Economic, Social and Cultural Rights</i> (Art. 13, Right to Education) [0–1.5] 1.5</p> <p>1.1.4. <i>Optional Protocol to the International Covenant on Economic, Social and Cultural Rights</i> (International Petition Procedure) [0–1.5] 0</p> <p>1.2. Regional Level (4)</p> <p><i>European Convention on Human Rights</i> (Art. 10, Right to Freedom of Expression) [0–4] 4</p> <p>2. Constitutional Protection (10) 9</p> <p>2.1. Provision on Right to Freedom of Expression [0–1–2] 2</p> <p>2.2. Provision on Right to Academic Freedom [0–1–2] 2</p> <p>2.3. Reference to Institutional Autonomy [0–0.5–1] 1</p> <p>2.4. Reference to Academic Self-Governance [0–0.5–1] 0</p> <p>2.5. Robustness of Provisions [0–2–4] 4</p> <p><u>Total: 17.5</u></p>

**Standard Scorecard “to Measure” the Right to Academic
Freedom (cont.)**

B. The Express Protection of Academic Freedom in HE Legislation (20%)

[0–2.5–5–7.5–10 (x2)] 10

- 0 – No Reference to Academic Freedom at All (Non-Compliance)
- 2.5 – Provision(s) Seriously Falling Short of Defined Standards (Between Partial and Non-Compliance)
- 5 – Mere Reference to Academic Freedom/Provisions Revealing Various Deficits (Partial Compliance)
- 7.5 – Some or Other Deficit in Otherwise Commendable Provisions (Between Full and Partial Compliance)
- 10 – Academic Freedom Serves as Guiding Principle for Activity within HE (Full Compliance)

Total: 10x2=20

Standard Scorecard "to Measure" the Right to Academic Freedom (cont.)

C. The Protection of Institutional Autonomy in HE Legislation (20%)

1. Provision on Institutional Autonomy [0-2-4] 2

2. Autonomy in Detail (8) 6

2.1. Organizational (2)

2.1.1. Autonomy to Determine Rector [0-0.5-1] 1

2.1.2. Autonomy to Determine Internal Structures [0-0.5-1] 1

2.2. Financial (2)

2.2.1. State Grant as Block Grant [0-0.5-1] 1

2.2.2. Express Competence to Perform Commissioned Research [0-0.5-1] 1

2.3. Staffing (2)

Right to Define Academic Positions in HE Institutions and their Requirements, and to Recruit and Promote Academic Staff [0-1-2] 1

2.4. Academic (2)

2.4.1. Capacity to Determine Selection Criteria for Bachelor Students and to Select the Latter [0-0.5-1] 0

2.4.2. Whether or Not Bachelor Programs Need to be Accredited [0-0.5-1] 1

3. Extent of Governmental Powers [0-2-4] 2

4. Institutional Independence vis-à-vis Private Interests [0-2-4] 2

Total: 12

Standard Scorecard “to Measure” the Right to Academic Freedom (cont.)

D. The Protection of Self-Governance in HE Legislation (20%)	
1. <u>Provision on Academic Self-Governance [0-1-2]</u>	1
2. <u>Academic Self-Governance at Institutional Level (12)</u>	7
2.1. Senate (or its Equivalent) – Composition [0-1.5-3]	3
2.2. Rector (3)	
2.2.1. Academic Position/Qualification of Rector [0-0.5-1]	0
2.2.2. Determining the Rector [0-0.5-1]	0.5
2.2.3. Dismissing the Rector [0-0.5-1]	0.5
2.3. Participation in Strategic Decision-Making (through Senate or its Equivalent, or Otherwise) [0-1.5-3-4.5-6]	3
3. <u>Academic Self-Governance at Faculty/Departmental Level (6)</u>	1
3.1. Collegial Bodies (3)	
3.1.1. Existence of Collegial Bodies [0-0.5-1]	0
3.1.2. Composition of Collegial Bodies [0-1-2]	0
3.2. Dean/Head of Department (3)	
3.2.1. Academic Position/Qualification of Dean/Head of Department [0-0.5-1]	0.5
3.2.2. Determining the Dean/Head of Department [0-0.5-1]	0.5
3.2.3. Dismissing the Dean/Head of Department [0-0.5-1]	0
<u>Total:</u>	9

Standard Scorecard "to Measure" the Right to Academic Freedom (cont.)

E. The Protection of Job Security (including "Tenure") in Relevant Legislation (20%)
<p><u>1. Duration of Contract of Service (8)</u> ²</p> <p>1.1. Regulatory Framework [0-2-4] ²</p> <p>1.2. Situation in Practice [0-2-4] ⁰</p> <p><u>2. Termination of Contract of Service on Operational Grounds (6)</u> ^{1.5}</p> <p>2.1. Provision on Termination on Operational Grounds in HE Legislation [0-1.5-3] ^{1.5}</p> <p>2.2. Protection in the Case of Termination on Operational Grounds in Terms of Civil Service/Labor Legislation [0-1.5-3] ⁰</p> <p><u>3. Prospect of Advancement Based on Objective Assessment of Competence [0-1.5-3-4.5-6]</u> ^{1.5}</p> <p><u>Total: 5</u></p>

IV. MODUS OPERANDI AND PRACTICAL DIFFICULTIES ENCOUNTERED IN THE ENDEAVOR

The assessment of the legal protection of the right to academic freedom in Europe undertaken here considers only public institutions of HE and, among these, only universities.¹¹³ The right to academic freedom naturally needs also to be respected in private institutions of HE, though there may be differences in the scope of that right in that context.¹¹⁴ Infringements of academic freedom further seem more prevalent in universities than, for example, polytechnics, which may not be as extensively involved in original research as universities.¹¹⁵ These restrictions in the ambit of the inquiry were necessary in the light of limited human and time resources available to examine all relevant data. The analysis entailed an examination of thirty European HE systems. States with a federal structure in the field of HE required a particular approach. In the case of Belgium, the HE systems of Flanders and Wallonia were considered separately, omitting the German-speaking region. In the case of Germany, with different HE systems in each of the sixteen *Länder*, it has been decided to study the situation in the two *Länder* with the most inhabitants, Bavaria and North Rhine-Westphalia, one-third of Germany's population living in these *Länder*. The two HE systems also reveal interesting differences, both *Länder* traditionally having been governed by conservative and social-democrat governments, respectively. As Germany's Hochschulrahmengesetz (Framework Act on Higher Education) in its version of 1999¹¹⁶ is still on the law books (its abolition lingering on the political agenda), differences among the various HE systems, though increasing, remain within bounds. Where appropriate, developments in the other *Länder* have been taken note of. Regarding Spain, certain powers in the field of HE

113. Moreover, it only considers academic freedom of academic staff, but not that of students. It also does not consider artistic freedom, which is a related, but separate concept.

114. See, e.g., *Tarantino v. Italy*, 2013-II Eur. Ct. H.R. 397, 419 (Pinto de Albuquerque, J., partly dissenting) ("States Parties' margin of appreciation is wider with regard to the regulation of State schools and narrower with regard to that of private schools. An even narrower margin of appreciation applies *à fortiori* to higher education, where institutional autonomy plays a pivotal role. (footnote omitted) Conversely, the more the State funds private schools and universities, the wider its margin of appreciation. (emphases omitted)").

115. Paragraph 1(e) of the UNESCO Recommendation states that "institutions of higher education' means universities, other educational establishments, centres and structures of higher education, and centres of research and culture associated with any of the above, public or private, that are approved as such either through recognized accreditation systems or by the competent state authorities."

116. HOCHSCHULRAHMENGESETZ in the version of Jan. 19, 1999, BGBl. I, at 18, last amended by Art. 2 of Law, Apr. 12, 2007, BGBl. I, at 506.

regulation rest with the autonomous regions. As for the United Kingdom, the situation in England has been studied primarily (more than 80 percent of the United Kingdom's population living there), giving some consideration to elements of the Scottish system.

The actual legislation of EU states constituted the primary source of information for purposes of the assessment. Legislation as in force at the beginning of 2014 has been studied.¹¹⁷ Where relevant language competencies existed (Dutch/Flemish, English, French, German, and Spanish), the original language versions of the legislation were consulted. In other cases, recourse was had to official or unofficial English-language translations that seemed reliable. In a few cases, no reliable English-language versions could be traced (Croatia, Greece, and Italy), probably because the states concerned had adopted new HE legislation relatively recently. In these cases, but also to take account of recent amendments to HE laws in the case of other states, online translation tools had to be utilized.¹¹⁸ In all instances, it has been sought to verify the correctness of information by studying relevant secondary literature (journalistic and academic texts, and information available in online databases¹¹⁹) or information provided by states themselves.¹²⁰ It will be appreciated that coping with voluminous and diverse sets of legislation in

117. Hence, attempts by the current Polish government, dominated by the right-wing national conservative Law and Justice party (PiS), directed at "undermining the constitutional order" in Poland could not yet negatively impact on "the performance" of that country in this assessment. Further, as North Rhine-Westphalia (Germany) adopted a new HOCHSCHULZUKUNFTSGESETZ (Act on the Future of Higher Education) in September 2014, this was examined for purposes of the comparison.

118. Citations from the constitutions, laws and regulations used here should not be seen to reflect official translations, but rather are own renderings of the texts in the light of all sources available.

119. In particular, these online databases were consulted: the Eurydice/Eurypedia website (maintained by the European Commission's Education, Audiovisual and Culture Executive Agency (EACEA)), Eurydice and Eurypedia providing information on European education systems and policies: https://webgate.ec.europa.eu/fpfis/mwikis/eurydice/index.php/Main_Page; the website of the Organization for Economic Co-operation and Development (OECD), making available online, *inter alia*, the OECD Programme on Institutional Management in Higher Education's journal HIGH. EDUC. MGMT. & POL'Y: http://www.oecd-ilibrary.org/education/higher-education-management-and-policy_17269822; the website of the European University Association, supplying useful information on university autonomy: <http://www.eua.be>; the website of the Center for Higher Education Policy Studies of the University of Twente (Netherlands), containing a collection of publications on HE adopting an international comparative perspective: <http://www.utwente.nl/bms/cheps>.

120. Amongst others, the websites of the ministries responsible for HE in the various EU member states were thus consulted. Furthermore, a questionnaire asking EU member states to provide information on the legislative framework in place for the protection of academic freedom was sent out to states on Oct. 3, 2013. The response rate has been rather modest, with only one third of the states having responded. Nevertheless, of the replies that were received, some, like those from Denmark, Hungary, Slovakia or Sweden, were very instructive.

different languages is a daunting task. An error margin of up to three percent is thus conceivable.

V. THE LEGAL PROTECTION OF THE RIGHT TO ACADEMIC FREEDOM IN EUROPE: THE RESULTS OF THE ASSESSMENT

The following six headings provide a brief overview of state performance with regard to each of the five columns of the scorecard and overall. Each heading provides concise information on trends identified, some examples, and a country ranking in the form of a table.¹²¹

A. *The Ratification of International Agreements and Constitutional Protection*

All twenty-eight EU member states have ratified the ICCPR and the ICESCR of 1966. The United Kingdom is the only member state not to have ratified the Optional Protocol to the ICCPR of 1966. Claims under Article 19 on the right to freedom of expression alleging that the United Kingdom has violated academic freedom thus cannot be brought before the Human Rights Committee. In view of the recentness of the adoption of the Optional Protocol to the ICESCR in 2008, only eight states so far (Belgium, Finland, France, Italy, Luxemburg, Portugal, Slovakia, and Spain) have ratified it. The Optional Protocol to the ICESCR entered into force on May 5, 2013.¹²² A number of states have expressed reservations with regard to Article 20 of the ICCPR, which prohibits “any propaganda for war” (Paragraph 1) and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (Paragraph 2). Malta and the United Kingdom reserve the right not to adopt legislation with regard to Article 20 as a whole. Belgium and Luxemburg do so as regards Article 20(1) on war propaganda. Ireland defers the right to adopt legislation on a specific criminal offense in the sphere of Article 20(1). Also Denmark,

121. Where appropriate, the footnotes include references to literature on academic freedom as protected in the states assessed, available in English, French, German or Spanish, focusing on more recent literature adopting a legal or quasi-legal approach. Regarding the three EU states with the largest populations, Germany, the UK and France, reference should, as regards Germany and the UK, be had to BARENDT, *supra* note 22 (see, specifically, the references to further literature at 316–18) and, as regards France, to OLIVIER BEAUD, *LES LIBERTÉS UNIVERSITAIRES À L'ABANDON? POUR UNE RECONNAISSANCE PLEINE ET ENTIÈRE DE LA LIBERTÉ ACADÉMIQUE* (2010) (and the references to further literature there).

122. Status of ratification as at Mar. 19, 2015 as reflected in the online databases of the U.N. Treaty Collection at <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (archived Mar. 12, 2016).

Finland, the Netherlands, and Sweden do not want to apply Article 20(1), with Finland stating that applying this provision "might endanger the freedom of expression referred [to] in article 19 of the Covenant." Reservations to Article 20 have not been considered to amount to "non-compliance" in the present analysis. As Jack Donnelly comments:

Here the issue is balancing two competing human rights, rather than a conflict between human rights and another value. Any resolution will require restricting the range of at least one of these rights. Therefore, any approach that plausibly protects the conceptual integrity of both rights must be described as controversial but defensible.¹²³

The reservations expressed, it is submitted, should perhaps be understood in this context. Malta, however, has made a problematic reservation with regard to Article 22 of the ICCPR on the right to freedom of association, stipulating that it "reserves the right not to apply article 22 to the extent that existing legislative measures may not be fully compatible with this article." All EU member states are further bound by the relevant provisions of the ECHR, as amended and supplemented.¹²⁴

The constitutions of all EU member states¹²⁵ protect *the right to freedom of expression*. Express provisions are found in the (written) constitutions of twenty-seven countries. In the United Kingdom, this right should be considered part of that country's unwritten constitution.¹²⁶ Whereas the provisions of the Greek, Irish, and Romanian Constitutions are problematic ("partial compliance"), that of the Hungarian Constitution is seriously deficient ("non-compliance"). Article 14(3) of the Greek Constitution, for example, allows the seizure of newspapers and other publications in cases of "an offence against the Christian or any other known religion" or "an insult against the person of the President of the Republic."¹²⁷ The

123. Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 302 (2007).

124. Status of ratification as at Mar. 21, 2015 as reflected on the Council of Europe's official Treaty Office website at <http://conventions.coe.int> [<https://perma.cc/2K8C-AKVA>] (archived Mar. 23, 2016). The focus regarding the ECHR has been on Article 10 on the right to freedom of expression, ignoring notably Protocol No. 12 on an "autonomous" non-discrimination provision.

125. This refers to the constitutional texts as in force on Jan. 1, 2014. It is refrained from providing full official citations of constitutions here.

126. There is some case law holding that there exists "a constitutional right to freedom of expression in England." Moreover, the Human Rights Act, 1988, ch. 42, has modified the largely "residual nature" of human rights protection available under common law. See Eric Barendt, *Freedom of Expression in the United Kingdom under the Human Rights Act 1998*, 84 IND. L.J. 851, 852–55 (2009).

127. The Constitution of Ireland forbids blasphemy. See CONSTITUTION OF IRELAND 1937, art. 40(6)(1)(i). The Romanian Constitution forbids "defamation of the country and the nation." See CONSTITUTION OF ROMANIA 1991, art. 30(7).

Hungarian Constitution substantially constrains political campaigning in non-public media and provides that freedom of speech may not violate “the dignity of the Hungarian nation” in Article IX(3) and (5), respectively.

Express provisions on *the right to academic freedom*—in the form of a right to freedom of science¹²⁸—may be found in the constitutions of eighteen countries.¹²⁹ These protect the right either as part of provisions (also) addressing the right to freedom of expression (Germany and Spain),¹³⁰ the right to education/educational rights (Austria, Finland, Greece, Italy, and Sweden),¹³¹ rights related to science, arts, culture, universities, and research institutions (Bulgaria, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia),¹³² the right to freedom of thought, conscience, and religion (Czech Republic),¹³³ or both the right to education/educational rights and rights related to science, arts, and culture (Portugal).¹³⁴ The provisions contained in the Czech, Greek, and Hungarian Constitutions may be considered to be problematic (“partial compliance”). Regarding the Czech Republic, the right to freedom of thought, conscience, and religion provides too narrow a basis as to cover all aspects of the right to academic freedom. Article 16(8) of the Greek Constitution prohibits the establishment of private universities, thereby also preventing opportunities for diversified notions of academic freedom to flourish in different contexts.¹³⁵ Although academic freedom does require regulation, the provisions of Article X(1) of the Hungarian Constitution—also in the light of the

128. Although, as has been explained at note 22 above, there are differences between the right to freedom of science, potentially in the sense of “*Wissenschaftsfreiheit*” or “the right to free scholarship,” and the right to academic freedom, the latter probably providing more extensive protection to academic staff, the approach here has been not to differentiate between the two. The CONSTITUTION OF SPAIN 1978 protects both freedom of science (art. 20(1)(b)) and academic freedom (“*la libertad de cátedra*,” literally meaning “the freedom of the academic chair”) (art. 20(1)(c)).

129. In the UK, “there is no *constitutional* guarantee of academic or scientific freedom.” See BARENDT, *supra* note 22, at 74–75.

130. See GERMAN BASIC LAW 1949, art. 5(3); SPANISH CONSTITUTION 1978, art. 20(1)(b), (c).

131. See AUSTRIAN BASIC LAW OF 1867, art. 17(1); FINNISH CONSTITUTION 1999, § 16(3); GREEK CONSTITUTION 1975, art. 16(1); ITALIAN CONSTITUTION 1947, art. 33(1); SWEDISH INSTRUMENT OF GOVERNMENT 1974, ch. 2, art. 18(2).

132. See BULGARIAN CONSTITUTION 1991, art. 54(2); CROATIAN CONSTITUTION 1990, art. 69(1); ESTONIAN CONSTITUTION 1992, § 38(1); HUNGARIAN FUNDAMENTAL LAW 2011, art. X(1), (2); LATVIAN CONSTITUTION 1992, § 113; LITHUANIAN CONSTITUTION 1992, art. 42; POLISH CONSTITUTION 1997, art. 73; SLOVAKIAN CONSTITUTION 1992, art. 43(1); SLOVENIAN CONSTITUTION 1991, art. 59.

133. See CZECH CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS 1992, art. 15(2).

134. See PORTUGUESE CONSTITUTION 1976, arts. 42(1), 73(4).

135. Article 13(4) of the ICESCR protects “the liberty of individuals and bodies to establish and direct educational institutions.”

Constitution's generally paternalistic, even authoritarian, stance—to the effect that the right to academic freedom is ensured “within the framework laid down in an Act” does not augur too well for the protection of that right.

Express provisions on *institutional autonomy* are contained in fifteen constitutions (Austria, Bulgaria, Croatia, Estonia, Finland, North Rhine-Westphalia (Germany), Greece, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovenia, and Spain), while provisions on *self-governance* are contained in only three (Bavaria (Germany), Portugal, and Spain). All of these are “fully compliant,” except for Hungary's provisions on institutional autonomy, which must be held to be “non-compliant.”¹³⁶ Article X(3) of the Hungarian Constitution provides that

Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organization shall be regulated by an Act. The Government shall, within the framework of an Act, lay down the rules governing the financial management of public higher education institutions and shall supervise their financial management.¹³⁷

Finally, regarding *the robustness of constitutional provisions*, the question was whether the normative context of constitutions (values reflected by relevant provisions, specific or general limitations clauses, etc.) fully supports the effective protection of the rights concerned, specifically the right to academic freedom.¹³⁸ The Constitution of Poland, for example, in Article 31(3), contains a general limitation provision reflecting internationally accepted standards, stating that limitations upon human rights

may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

The Romanian Constitution, in Article 20(1), requires constitutional provisions concerning rights and freedoms “[to] be interpreted and enforced in conformity with the Universal Declaration of Human

136. See HUNGARIAN HELSINKI COMMITTEE, EÖTVÖS KÁROLY POLICY INSTITUTE & HUNGARIAN CIVIL LIBERTIES UNION, MAIN CONCERNS REGARDING THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY point 9 (Statement, Feb. 26, 2013) (stating that “the Fourth Amendment entirely abolishes the autonomy of universities in financial questions.”).

137. The Hungarian Constitution further provides for the President of the Republic to appoint university rectors. See HUNGARIAN FUNDAMENTAL LAW 2011, art. 9. A similar provision may be found in the Slovakian Constitution. See SLOVAKIAN CONSTITUTION 1992, art. 102.

138. It may be noted that all those states whose constitutions do not contain express provisions on the right to academic freedom have maximally been considered to be in “partial compliance” in this respect.

Rights, with the covenants and other treaties Romania is a party to." Many constitutions, such as those of Bulgaria, Croatia, Greece, Italy, Lithuania, Malta, Portugal, or Spain, moreover, call upon states to actively promote the development of science, arts, and culture, this implicitly requiring that respect for academic freedom be furthered. Factors negatively affecting protective standards encompass, for example, excluding non-citizens from protection against discrimination on the ground of political opinions (see Malta) or adopting far-reaching constitutional amendments entailing a general erosion of universally accepted constitutional principles (see Hungary).¹³⁹

Table 1: Country Ranking: Ratification of International Agreements and Constitutional Protection

Country	Percentage & Score out of 20 in parentheses
1. Portugal, Spain	100 (20)
2. Finland, Italy	95 (19)
3. Slovakia	90 (18)
4. Austria, Bulgaria, Croatia, Estonia, Germany, Lithuania, Poland, Slovenia	87.5 (17.5)
5. Latvia, Sweden	82.5 (16.5)
6. Czech Republic, Greece	77.5 (15.5)
<i>Average</i>	<i>78.04 (15.61)</i>
7. Belgium, France, Luxemburg	70 (14)
8. Cyprus, Denmark, Netherlands, Romania	62.5 (12.5)
9. Hungary, Ireland	57.5 (11.5)
10. Malta, United Kingdom	55 (11)

B. The Express Protection of Academic Freedom in Higher Education Legislation

If constitutional provisions on the right to academic freedom legitimately may be rather concise, then—in accordance with what has been stated regarding the requirement of "legislation"¹⁴⁰—all salient aspects of that right need to be concretized and operationalized by way of parliamentary legislation. Further detail

139. *Supra* note 136 (regarding Hungary); *see infra* Annex, Indicator A.2.5. (noting that, Full compliance = Aus., Bulg., Croat., Czech Rep., Est., Fin., Ger. (F.R.G.), N.R.W. (F.R.G.), Greece, Italy, Lat., Lith., Pol., Port., Slov., Slov., Spain, Swed.; Partial compliance = Belg. (nl.), Belg. (fr.), Cyprus, Den., Fr., Hung., Ir., Lux., Malta, Neth., Rom., U.K.; Non-compliance = none).

140. *See* Part III.A., *supra*.

can be regulated in subordinate legislation. A state's Act on Higher Education should thus make it clear that academic freedom (*stricto sensu*) entails a right to carry out research, a right to teach, and a right to study without restrictions. Ideally, each of these elements should then be defined. The Higher Education Act of 2006 of Bavaria (Germany), for example,¹⁴¹ provides in Article 3:

(2) 1. Freedom of research (first sentence of Article 5(3) of the Basic Law and Article 108 of the [Bavarian] Constitution) shall cover in particular the topic of research, the methodological approach applied and the evaluation and dissemination of research findings. 2. Decisions on research matters may be taken by the competent bodies of an institution of higher education to the extent that they refer to the organization of research activities, the promotion and coordination of research projects and the formulation of the areas of focus for research; such decisions shall not impair freedom of research as defined in the first sentence . . .

(3) 1. Without prejudice to the second sentence of Article 5(3) of the Basic Law,¹⁴² freedom of teaching (first sentence of Article 5(3) of the Basic Law and Article 108 of the [Bavarian] Constitution) shall, within the framework of the teaching duties allocated, cover in particular the holding of classes, including the way they are structured in terms of content conveyed and methods applied, as well as the right to express scholarly . . . views on doctrinal issues. 2. Decisions on questions of teaching may be taken by the competent bodies of an institution of higher education to the extent that they refer to the organization of teaching activities and the adoption and observance of study and examination regulations; such decisions shall not impair freedom of research as defined in the first sentence.

(4) 1. Without prejudice to study and examination regulations, freedom of study shall cover in particular the free choice of classes, the right, within a study course, to freely choose one's areas of focus, as well as the formulation and expression of scholarly . . . views. 2. Decisions on study issues may be taken by the competent bodies of an institution of higher education to the extent that they refer to the organization and proper implementation of teaching and study activities and to guaranteeing the orderly pursuit of studies.¹⁴³

141. BAYERISCHES HOCHSCHULGESETZ [BAYHSCHG], May 23, 2006, GVBL. 2006, 245; see BARENDT, *supra* note 22, at 117–60 (for an analysis of the legal protection of academic freedom in Germany); see *id.* at 317–18 (for a select bibliography of relevant literature on the situation in Germany).

142. GERMAN BASIC LAW 1949, art. 5(3), second sentence ("Freedom of teaching shall not absolve any person from allegiance to the Basic Law.").

143. A somewhat different approach is that followed by Lithuania in its Law on Higher Education and Research of 2009 (LIETUVOS RESPUBLIKOS MOKSLO IR STUDIJŲ ĮSTATYMAS Apr. 30, 2009, Nr. XI-242, ŽIN., 2009, Nr. 54-2140, 61, 101). Two provisions enumerate a whole series of rights that should be considered encompassed by "academic freedom." Article 53 states that academic freedom includes freedom of thought and freedom of expression; freedom to choose the methods of research and teaching (provided they are in conformity with accepted principles of ethics); and protection against restrictions to and sanctions for publishing the results of research and manifesting beliefs (unless information constitutes a state/official secret and/or is in violation of the law). The provision further mentions intellectual property rights,

Furthermore, legislation should reflect that academic freedom serves as a guiding principle for activity within HE, as would be evidenced by “academic freedom” forming part of a general part of the HE Act on “general principles” and/or it being referred to in various contexts throughout HE legislation. In Austria’s Universities Act of 2002, for example, Section 2, entitled “Guiding Principles,” refers to freedom of the sciences and their teaching, diversity of scientific theories, methods and opinions, and freedom of study as essential principles to be observed by universities in the pursuance of their tasks.¹⁴⁴ References to academic freedom then recur in various sections of the Act. Target agreements concluded with academic staff must respect freedom of science and “leave sufficient room” to individual members of the academic staff in their research and teaching.¹⁴⁵ Students are entitled to freedom of study in accordance with the provisions of the law.¹⁴⁶ Academic staff may not be required to participate in scholarly work if this conflicts with their conscience.¹⁴⁷ The dismissal of a member of the academic staff is null and void if this has occurred because that member supported a certain opinion or method in his or her research or teaching.¹⁴⁸

Legislation should, moreover, spell out essential duties of academic staff related to the enjoyment of academic freedom.

equal rights to take part in competitions, and objective and open reviewing of scholarly works. Article 64 also provides a list of rights of academic staff: to participate in competitions for research projects and research funding, and to utilize any funding allocated; to participate in competitions for postdoctoral scholarships in Lithuania and abroad; to obtain from state institutions information for research purposes (in the case of state/official secrets, in accordance with special procedures provided for); to participate in the deliberation of laws and regulations of their institution; to participate in trade unions and other associations, including those abroad; to work independently or in groups; and to independently publish their scholarly work.

144. BUNDESGESETZ ÜBER DIE ORGANISATION DER UNIVERSITÄTEN UND IHRE STUDIEN [UNIVERSITÄTSGESETZ] StF: BGBl. I Nr. 120/2002 (NR: GP XXI RV 1134 AB 1224 S. 111; BR: 6697 AB 6717 S. 690). To mention another example, also Croatia’s recent Act on Science and Higher Education of 2013 (ZAKON O ZNANSTVENOJ DJELATNOSTI I VISOKOM OBRAZOVANJU, NARODNE NOVINE broj 123/03, 198/03, 105/04, 174/04, 2/07 – OUSRH, 46/07, 45/09, 63/11, 94/13, 139/13) clearly articulates that academic freedom constitutes a guiding principle: Article 2(3) states: “Higher education shall be based on: – Academic freedom, academic self-governance and university autonomy, . . . – Reciprocity and partnership among members of the academic community – the European humanistic and democratic tradition . . . – Respect for and recognition of human rights, . . .” Article 4(2) and (3) further provide for academic freedom, academic self-governance and university autonomy “in accordance with the Constitution, international agreements and this Act.”

145. UNIVERSITÄTSGESETZ 2002, *supra* note 144, § 20(5).

146. *Id.* § 59(1).

147. *Id.* § 105.

148. *Id.* § 113; see Walter Berka, *Wissenschaftsfreiheit an staatlichen Universitäten: Zur Freiheit und Verantwortung des Wissenschaftlers*, in VOM VERFASSUNGSSTAAT AM SCHEIDEWEG: FESTSCHRIFT FÜR PETER PERNTHALER 67 (Karl Weber et al. eds., 2005), (discussing the protection of the right to academic freedom in public universities in Austria in terms of the Universities Act of 2002).

Article 310 of the Romanian National Education Law of 2011,¹⁴⁹ for example, stipulates that plagiarism, the fabrication of research findings, and the provision of false information in applications for funding constitute "serious violations of proper conduct in scientific research and university activities."

Finally, legislation should make it clear that HE institutions *themselves* are also obliged to respect the academic freedom of members of the academic staff. Institutional structures need to be established to facilitate the internal enforcement of rights in this respect. Latvia's Law on Institutions of Higher Education of 1995,¹⁵⁰ for instance, in Section 6(5), emphasizes that "[t]he administration of an institution of higher education shall have a duty to guarantee and respect the rights of students and academic staff [entailed by academic freedom]." Section 19 then proceeds to provide for an academic arbitration tribunal, competent to receive "submissions of students and academic staff regarding a restriction or infringement of academic freedom and [other] rights."

The assessment revealed that the express protection of academic freedom in HE legislation in the states examined occurs at varying levels. The HE legislation of Austria, Croatia, France, North Rhine-Westphalia (Germany), Latvia, Lithuania, and Slovakia contains express provisions on academic freedom largely in compliance with generally agreed criteria on academic freedom. The provisions show that academic freedom serves as a guiding principle for activity within HE ("full compliance").

A second group of HE systems were considered to have performed less than wholly satisfactorily ("between full and partial compliance")—namely those of Bulgaria, the Czech Republic, Finland, Bavaria (Germany), Ireland, Luxemburg, Romania, and Spain. Within this group, some or other deficit in the otherwise commendable legislative provisions could be identified in each case. The Bulgarian Higher Education Act of 1995,¹⁵¹ in Article 19(3), provides that "[a]cademic autonomy shall include academic freedom, academic self-governance and inviolability of the premises of an institution of higher education." It should rather have been made clear that "academic freedom" is the superseding right covering the others, including institutional autonomy. The latter finds its confines in individual academic freedom, not the other way around.¹⁵² The

149. LEGEA EDUCAȚIEI NAȚIONALE, Law No. 1, Jan. 5, 2011, MONITORUL OFICIAL AL ROMÂNIEI, Partea I, Aug. 30, 2013.

150. AUGSTSKOLU LIKUMS, Nov. 2, 1995, LATVIJAS VĒSTNESIS 179 (462), Nov. 17, 1995, ZINĀTĀJS 1, Jan. 11, 1996.

151. Закон за висшето образование, Обн., ДВ, бр. 112 от 27.12.1995 г. [Higher Education Act, prom. STATE GAZETTE No. 112, Dec. 27, 1995].

152. A similar conceptual problem is encountered in Article 6 of the Italian Law of May 9, 1989, No. 168, on the Establishment of the Ministry of Universities and Scientific and Technological Research (LEGGE del 9 maggio 1989, n. 168, ISTITUZIONE

preferable way of formulation is reflected in Article 2(3) of the Spanish Organic Law on Universities of 2001:¹⁵³ “The activity of the university and its autonomy are based on the principle of academic freedom, which encompasses the freedom to teach, carry out research and study.” A problem at another level may be identified in Section 14 of the Irish Universities Act of 1997.¹⁵⁴ Whereas Paragraph 2 provides a definition of academic freedom, Paragraph 1 lays down *inter alia* these two principles that rank on a par: on the one hand, a university is “to preserve and promote the traditional principles of academic freedom,” while, on the other hand, in regulating its affairs, “it shall have regard to . . . the effective and efficient use of resources.” This seems to imply the legitimacy of trade-offs between academic freedom and purely economic considerations. It is one thing to say that institutional accountability entails the efficient use of resources, but yet another—and fatal—to state that academic freedom may find its limits in an economic calculus.¹⁵⁵

A third group of HE systems (held to be in “partial compliance”), namely those of Flanders (Belgium), Wallonia (Belgium), Cyprus, the Netherlands, and Poland, merely refer to the principle of academic freedom in their HE legislation.¹⁵⁶ Article 1.6. (Chapter 1, Title 1) of the Dutch Law on Provisions concerning Higher Education and Scientific Research of 1992,¹⁵⁷ for example, solely states that “[a]t the institutions, academic freedom shall be respected.”

The legislation in a fourth group of HE systems, those of Denmark, Greece, Hungary, Slovenia, Sweden, and the United Kingdom, does address academic freedom, but in a less satisfactory way than that in the previous group (“between partial and non-

DEL MINISTERO DELL'UNIVERSITÀ E DELLA RICERCA SCIENTIFICA E TECNOLOGICA, GAZZ. UFF. May 11, 1989, No. 108, S.O.), Article 74 of the Portuguese Law on the Legal Status of Institutions of Higher Education of 2007 (LEI n.º 62/2007 de 10 de Setembro, REGIME JURÍDICO DAS INSTITUIÇÕES DE ENSINO SUPERIOR, DIÁRIO DA REPÚBLICA 1st Ser., No. 174, Sept. 10, 2007), and Article 6 of the Slovene Law on Higher Education of 1993 (ZAKON O VISOKEM ŠOLSTVU [ZVIS], URADNI LIST RS, No. 67/93, Dec. 17, 1993).

153. LEY ORGÁNICA 6/2001, de 21 de diciembre, DE UNIVERSIDADES, BOE No. 307, Dec. 24, 2001.

154. Universities Act, 1997 (No. 24 of 1997).

155. Similar formulations may be found in Article 4(3) of the Greek Law No. 4009 on Structure, Functioning, Quality Assurance of Studies and Internationalization of Higher Education Institutions of 2011 (Νόμος υπ' αριθ. 4009, Δομή, λειτουργία, διασφάλιση της ποιότητας των σπουδών και διεθνοποίηση των ανωτάτων εκπαιδευτικών ιδρυμάτων, ΕΦΗΜΕΡΙΣ ΤΗΣ ΚΥΒΕΡΝΗΣΕΩΣ, Τεύχος Πρώτο, Αρ. Φύλλου 195 [GOVERNMENT GAZETTE, 1st Iss., Ref. Sheet 195], Sept. 6, 2011, 4255) and Article 118(1) of the Romanian National Education Law of 2011 (LEGEA EDUCAȚIEI NAȚIONALE 2011, *supra* note 149).

156. In the case of Italy and Portugal, HE legislation contains more than mere references to academic freedom. The overall situation in these countries, however, reflects a situation best described to be in “partial compliance.”

157. WET van 8 oktober 1992, HOUDENDE BEPALINGEN MET BETREKKING TOT HET HOGER ONDERWIJS EN WETENSCHAPPELIJK ONDERZOEK [WHW], STB. 1992, 593.

compliance"). There may, therefore, be a mere reference to academic freedom, simultaneously flawed in some respect or another, or there may be more structured provisions, which, however, fall seriously short of the standards defined in UNESCO's Recommendation. Section 14(6) of the Danish (Consolidation) Act on Universities of 2012,¹⁵⁸ for instance, provides:

Academic staff enjoy freedom of research ("*forskningsfrihed*") and, within the bounds of the university's research strategy, are free to perform independent research during the time when not performing allocated tasks . . . Academic staff may not be directed to perform specific tasks during the entirety of their working hours for an extended period of time, which would in essence deprive them of their freedom of research ("*forskningsfrihed*").

Restricting the enjoyment of freedom of research and academic freedom to the time when academic staff work on independent research seriously depletes the meaning of this right. Academic staff must enjoy academic freedom whenever acting in their academic capacity. The exact nature of their entitlements, of course, will depend on the particular circumstance. To mention another example, the United Kingdom's Education Reform Act of 1988,¹⁵⁹ in Section 202(2)(a), stipulates that "academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions." However, the Act recognizes this freedom only whilst simultaneously, and in the context of, abolishing academic tenure. In terms of Sections 202 to 204, university commissioners are to be appointed to ensure that dismissals notably for reasons of redundancy (which the Act legitimizes) do not violate academic freedom. It seems that, in practice, no such commissioners have been appointed to perform that function. Altogether, the Act reflects a minimalist view of academic freedom.¹⁶⁰

Finally, there is a fifth group of HE systems (Estonia and Malta), whose HE legislation contains no reference to academic freedom whatsoever ("non-compliance").

158. BEKENDTGØRELSE AF LOV OM UNIVERSITETER [UNIVERSITETSLOVEN], LBK No. 960, Aug. 14, 2014.

159. Education Reform Act, 1988, ch. 40.

160. See BARENDT, *supra* note 22, at 73–116 (for an analysis of the legal protection of academic freedom in the UK); *see id.* at 316–17 (for a select bibliography of relevant literature on the situation in the UK).

Table 2: Country Ranking: Express Protection of Academic Freedom in HE Legislation

Country	Percentage & Score out of 20 in parentheses
1. Austria, Croatia, France, North Rhine-Westphalia (Germany), Latvia, Lithuania, Slovakia	100 (20)
2. Germany	87.5 (17.5)
3. Bulgaria, Czech Republic, Finland, Bavaria (Germany), Ireland, Luxemburg, Romania, Spain	75 (15)
Average	59.38 (11.88)
4. Belgium, Cyprus, Flanders (Belgium), Italy, Netherlands, Poland, Portugal, Wallonia (Belgium)	50 (10)
5. Denmark, Greece, Hungary, Slovenia, Sweden, United Kingdom	25 (5)
6. Estonia, Malta	0 (0)

C. The Protection of Institutional Autonomy in Higher Education Legislation

HE legislation should expressly provide for HE institutions to be autonomous, detailing the various constituent elements of meaningful autonomy (organizational, financial, staffing, and academic), to then weave the parameters of these into the fabric of the legislative framework as a whole. Thirty HE systems having been assessed, the HE Acts of nine contain an express and adequate provision on autonomy, twenty an express but in certain respects problematic or incomplete provision, and one a seriously deficient provision.¹⁶¹

Article 2 of the Spanish Organic Law on Universities of 2001,¹⁶² for example, contains a provision on university autonomy by and large satisfying criteria to be considered "adequate." Paragraph 1 specifies that universities are endowed with legal personality and carry out their functions autonomously, and it stresses that the objective of autonomy is achievement of the goals of university education defined in the Law. Paragraph 2 goes on to mention various aspects covered by autonomy, including, for instance, development of the university statutes; election, designation, and

161. See *infra* Annex, Indicator C.1. (noting that, Full compliance = Bulg., Croat., Czech Rep., Fin., Lith., Port., Rom., Slov., Spain; Partial compliance = Aus., Belg. (nl.), Belg. (fr.), Cyprus, Den., Est., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Ir., Italy, Lat., Lux., Neth., Malta, Pol., Slovn., Swed., U.K.; Non-compliance = Hung).

162. LEY ORGÁNICA 6/2001 DE UNIVERSIDADES, *supra* note 153.

removal of the governing and representative organs; creation of specific structures supporting teaching and research; development of syllabuses; selection and promotion of teaching, research, and administrative staff, and the determination of their working conditions; admission of students; preparation of budgets and administration of assets; and establishment of relations with other relevant organizations. Accordingly, it broadly encompasses all four elements of autonomy. Additionally, it is stated that universities have "[a]ny other competence necessary for the appropriate fulfillment of [their] functions." Paragraph 3 underlines that university autonomy is based on academic freedom. Paragraph 4, finally, points out that universities are accountable to society for the use of their means and resources.¹⁶³

Externally, university autonomy should be buttressed by guaranteeing the inviolability of university premises, a principle long since recognized by human rights bodies.¹⁶⁴ Article 55 of Croatia's Act on Science and Higher Education of 2013,¹⁶⁵ for example, provides

- (1) The premises of the university shall be inviolable.
- (2) Competent state bodies may enter the premises of the university only with the consent of its head, pursuant to a decision of a competent court or if there is immediate danger to life and health of persons or to property.
- (3) Search of the premises of the university may exceptionally be ordered only by a competent court if all conditions prescribed by the Criminal Procedure Act are fulfilled.

163. For some more recent literature on academic freedom, institutional autonomy, and self-governance in Spain, see, e.g., Enriqueta Expósito, *Libertad de cátedra del professor universitario: Contenido y amenazas en el contexto actual de reforma del modelo de universidad pública*, LA REVISTA DE EDUCACIÓN Y DERECHO No. 7 (2013); Lucas A. Galindo, *Academic Freedom and Higher Education Regulations: Spanish Universities before the European Systems*, 2 J.L. & CONFLICT RESOL. 20 (2010); Georgeta Ion & Diego Castro, *Governance in Spanish Universities: Changing Paradigms*, 11 J. HISP. HIGH. EDUC. 336 (2012); Juan Pérez de Munguía, *New Requirements for Higher Education, Academic Freedom and Business Interests*, ESPECIAL EDUCACIÓN SUPERIOR No. 10, 37 (2009); David Vallespín Pérez, *La gobernanza de la universidad: El camino hacia un "Cambio Razonable" compatible con el respeto de la autonomía universitaria y la libertad de cátedra*, LA REVISTA DE EDUCACIÓN Y DERECHO No. 7 (2013).

164. The Committee on Economic, Social and Cultural Rights, supervising implementation of the ICESCR, has thus, following the examination of state reports, expressed its concern in cases where university campuses have been put under military guardianship or has commented that "police presence on university campuses may infringe on the freedoms necessary for academic and cultural expression." See BEITER, *supra* note 30, at 599–600.

165. ZAKON O ZNANSTVENOJ DJELATNOSTI I VISOKOM OBRAZOVANJU 2013, *supra* note 144.

(4) A search on the premises of a higher education institution may be undertaken in the absence of its head, or the person authorized by him or her, only if he or she has not responded to a timely notification without justified reason.

Similar provisions may be found in the HE Acts of Bulgaria, Lithuania, Poland, Romania, and Slovakia. Universities in Greece benefited from a very wide “university asylum” in the past. This has been abolished in the course of the reform of university laws in 2011 and thereafter,¹⁶⁶ and the new laws do not mention the principle of the inviolability of university premises.¹⁶⁷

Concerning the assessment of institutional autonomy *in detail* in terms of compliance (or not) with certain key requirements on organizational, financial, staffing, and academic autonomy (i.e., requirements, compliance with which may be considered to be highly indicative of a more general compliance with institutional autonomy), the following may be stated:¹⁶⁸ Regarding *determination of the rector*: The state should not be involved in this; that is, the rector should not be required to be appointed or the election to be confirmed by the state—also not formally at the highest executive level by the state president, the cabinet, or a minister, as this conveys an undesirable image of “closeness” of state and HE institutions. In fourteen of the HE systems examined, the state is involved in the process in some way or another—usually in the stated symbolic manner.¹⁶⁹

Regarding *competence to decide on internal structures*, the law should clearly not prescribe the specific faculties, departments, or institutes to be created. Article 15(3) of the Law of 12 August 2003 on the University of Luxemburg,¹⁷⁰ for example, prescribes a Faculty of Science, Technology, and Communication; a Faculty of Law, Economics, and Finances; and a Faculty of Letters, Human Sciences, Arts, and Educational Sciences. The state should further not be

166. See, e.g., William Dearden, *Tackling Ancient Problems: Higher Education Reform in Greece*, 30 PERSP. BUS. & ECON. (Greece: The Epic Battle for Economic Recovery) 75, 75–81 (2012).

167. On the situation of Greek HE following the most far-reaching reforms in this sphere since the HE law of 1982, see, e.g., *id.*; Dionysios Gouvias, *The Post-Modern Rhetoric of Recent Reforms in Greek Higher Education*, 10 J. CRIT. EDUC. POLY STUD. 282 (2012); Vangelis Tsiligiris, *The Debt Crisis and Higher Education Reforms in Greece: A Catalyst for Change*, 4 ANGLOHIGHER 15 (2012).

168. For an assessment of compliance by European states in the light of the indicators addressed in this paragraph (but also other indicators), see ESTERMANN ET AL., SCORECARD, *supra* note 83, at 20–52.

169. See *infra* Annex, Indicator C.2.1.1. (noting that, Full compliance = Aus., Belg. (nl.), Bulg., Croat., Cyprus, Den., Est., Fin., Fr., N.R.W. (F.R.G.), Ir., Lith., Malta, Pol., Slov., U.K.; Partial compliance = Neth., Port.; Non-compliance = Belg. (fr.), Czech Rep., Bay. (F.R.G.), Greece, Hung., Italy, Lat., Lux., Rom., Slov., Spain, Swed.).

170. LOI du 12 août 2003 PORTANT CRÉATION DE L'UNIVERSITÉ DU LUXEMBOURG, MEMORIAL JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG A – No. 149, Oct. 6, 2003, 2989.

required to set up or dissolve faculties, departments, or institutes or to confirm their establishment/dissolution (the latter being the case, for example, in Cyprus), and it should not of itself be able to create a faculty, department, or institute within a HE institution (e.g., Romania).¹⁷¹

Financial autonomy requires, amongst others, that *HE institutions receive state funds* as a block grant (global budgets), leaving them "free to divide and distribute their funding internally according to their needs." Whereas eleven HE systems fully comply with this requirement, another seventeen accept it in principle but apply minor restrictions. It appears that only Cyprus and Greece still make use of a line-item budget, which "pre-allocates university funding to cost items and/or activities."¹⁷²

HE institutions should further be competent to acquire funding additional to that directly allocated by the state from various sources. Notably, they should be able to *perform (publicly or privately) commissioned research* against payment. Although this is the case in all HE systems analyzed,¹⁷³ not all of them clearly spell this out in their primary legislation.¹⁷⁴ While not all the powers of HE institutions need to be elaborated on in parliamentary legislation, core competences entailed by institutional autonomy should be addressed in primary legislation.

Staffing autonomy means that the law should lay down a minimum of detail regarding the academic positions available and the requirements for positions. In the United Kingdom, in fact, the law refrains from regulating these matters. In Finland, a minimum of detail is laid down; Section 31 of the Finnish Universities Act of 2009¹⁷⁵ merely states that "[a] university has professors and other teaching and research staff," leaving the detail to be dealt with in university regulations. Further, there should be no or only minor

171. This is not to say that the state may not encourage and promote certain structural developments within HE institutions. See *infra* Annex, Indicator C.2.1.2. (noting that, Full compliance = Aus., Belg. (nl.), Belg. (fr.), Den., Est., Fin., N.R.W. (F.R.G.), Ir., Lat., Lith., Pol., Slovn., Swed., U.K.; Partial compliance = Croat., Czech Rep., Fr., Hung., Italy, Malta, Neth., Port., Slov., Non-compliance = Bulg., Cyprus, Bay. (F.R.G.), Greece, Lux., Rom., Spain).

172. ESTERMANN ET AL., SCORECARD, *supra* note 83, at 30–31; see *infra* Annex, Indicator C.2.2.1. (noting that, Full compliance = Aus., Belg. (nl.), Den., Est., N.R.W. (F.R.G.), Ir., Italy, Lux., Neth., Spain, U.K.; Partial compliance = Belg. (fr.), Bulg., Croat., Czech Rep., Bay. (F.R.G.) (in the process of moving from line-item to global budgets), Hung., Fin., Fr., Lat., Lith., Malta, Pol., Port., Rom., Slov., Slovn., Swed.; Non-compliance = Cyprus, Greece).

173. See EURYDICE, *supra* note 102, at 77–78.

174. See *infra* Annex, Indicator C.2.2.2. (noting that, Full compliance = Aus., Bulg., Croat., Den., Est., Fin., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.), Lat., Lith., Lux., Pol., Port., Rom., Slov., Spain; Partial compliance = Belg. (nl.), Belg. (fr.), Cyprus, Czech Rep., Greece, Hung., Ir., Italy, Malta, Neth., Slovn., Swed., U.K.; Non-compliance = none).

175. YLIOPISTOLAKI (LAG), No. 558/2009, July 24, 2009.

restrictions concerning the recruitment and promotion of academic staff at faculties and departments. There should also be no requirement to the effect that the appointment of professors be performed or confirmed by the state. For instance, the Bavarian Higher Education Institution Personnel Law of 2006 (Germany) stipulates that, in principle, the competence to decide on the appointment of professors rests with the responsible minister.¹⁷⁶

With regard to *the selection of first-cycle (Bachelor) students*, HE institutions should be granted the competence to determine the selection criteria for and conduct the actual selection of such students largely themselves. This is the case in nine HE systems. In thirteen, the responsibilities in this regard are shared between the state and HE institutions. In eight, the state plays a dominant role in this respect.¹⁷⁷

Finally, considering that quality control in HE should essentially be left to be organized by HE institutions themselves (jointly and/or severally), the requirement of having degree programs accredited must be considered inimical to academic autonomy. Only six of the HE systems examined dispense with the requirement of *accreditation of first-cycle programs*.¹⁷⁸

Generally addressing the extent of government powers regarding HE institutions, a reading of a state's HE legislation should reflect wide competences for HE institutions and a minimal measure of involvement of the state in regulating their activity. This is not to say that the state does not retain ultimate responsibility in respect of the HE sector. Article 121 of the Romanian National Education Law of 2011¹⁷⁹ thus states that "[t]he Ministry of Education, Research, . . . controls the way universities exercise their autonomy,

176. GESETZ ÜBER DIE RECHTSVERHÄLTNISSE DER HOCHSCHULLEHRER UND HOCHSCHULLEHRERINNEN SOWIE DES WEITEREN WISSENSCHAFTLICHEN UND KÜNSTLERISCHEN PERSONALS AN DEN HOCHSCHULEN [BAYERISCHES HOCHSCHULPERSONALGESETZ – BAYHSCHPG], May 23, 2006, GVBL. 2006, 230, Art. 18(6), (10); *see infra* Annex, Indicator C.2.3. (noting that, Full compliance = Fin., Malta, Neth., Swed., U.K.; Partial compliance = Aus., Belg. (nl.), Den., Est., N.R.W. (F.R.G.), Ir., Lat., Lith., Lux., Pol., Slovn.; Non-compliance = Belg. (fr.), Bulg., Croat., Cyprus, Czech Rep., Fr., Bay. (F.R.G.), Greece, Hung., Italy, Port., Rom., Slov., Spain).

177. *See infra* Annex, Indicator C.2.4.1. (noting that, Full compliance = Croat., Est., Fin., Hung., Ir., Italy, Lux., Malta, U.K.; Partial compliance = Bulg., Cyprus, Czech Rep., Lat., Lith., Neth., Pol., Port., Rom., Slov., Slovn., Spain, Swed.; Non-compliance = Aus., Belg. (nl.), Belg. (fr.), Den., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece).

178. *See infra* Annex, Indicator C.2.4.2. (noting that, Full compliance = Aus., Croat., Ir., Lux., Malta, U.K.; Partial compliance = Belg. (fr.), Est., Fin., Pol.; Non-compliance = Belg. (nl.), Bulg., Cyprus, Czech Rep., Den., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Hung., Italy, Lat., Lith., Neth., Port., Rom., Slov., Slovn., Spain, Swed.).

179. LEGEA EDUCAȚIEI NAȚIONALE 2011, *supra* note 149.

assume their overall and their own mission and exercise their accountability."¹⁸⁰

The state should, however, merely supervise whether legal requirements have been complied with (German: "*Rechtsaufsicht*"), but not review decisions on their merits (German: "*Fachaufsicht*"). HE institutions should be in a position to enact most regulations and take most decisions without these requiring prior approval or subsequent confirmation by the state. Section 5 of the Austrian Universities Act of 2002¹⁸¹ thus stresses that universities are not subject to ministerial instructions. In Section 45 then, the Act states that universities "shall be subject to supervision by the Federal Government. This shall comprise monitoring of compliance with laws and regulations, including the university statutes (legal supervision)." In a handful of the HE systems examined, HE legislation reflects a very high degree of proximity between state and universities. In terms of the Danish (Consolidation) Act on Universities of 2012,¹⁸² for example, the responsible minister is granted wide-ranging competences to regulate matters or to lay down general or specific rules on a variety of topics, using formulations such as "The minister may set maximum enrolment quotas for degree programmes,"¹⁸³ "The minister shall lay down the rules regulating the acquisition of doctoral degrees,"¹⁸⁴ "The minister shall lay down rules regarding the education provided, including tests, examinations and grading,"¹⁸⁵ or "The minister may lay down rules on the appointment of academic staff and teachers."¹⁸⁶ Most of the HE systems examined may be considered to be in "partial compliance," and about one fifth in "full compliance," in respect of ensuring that

180. On university autonomy and academic freedom in Romania, see, e.g., Camelia F. Stoica & Marieta Safta, *University Autonomy and Academic Freedom: Meaning and Legal Basis*, 2 PERSP. BUS. L.J. 192 (2013).

181. UNIVERSITÄTSGESETZ 2002, *supra* note 144.

182. UNIVERSITETSLOVEN 2014, *supra* note 158.

183. *Id.* § 4(5).

184. *Id.* § 6(2).

185. *Id.* § 8(1).

186. *Id.* § 29(3). On the extensive regulation of the HE sector by the Danish government in furthering HE "as a component of the national economy" and limited self-governance in Danish universities, see, e.g., Evanthia Kalpazidou Schmidt & Kamma Langberg, *Academic Autonomy in a Rapidly Changing Higher Education Framework: Academia on the Procrustean Bed?*, 39 EUR. EDUC. 80 (2007–08); Susan Wright & Rebecca Boden, *Markets, Managerialism, and Measurement: Organisational Transformations of Universities in UK and Denmark*, in UNIVERSITY PERFORMANCE MANAGEMENT: THE SILENT MANAGERIAL REVOLUTION AT DANISH UNIVERSITIES 79 (Jens E. Kristensen et al. eds., 2011); Susan Wright & Jakob W. Ørberg, *Autonomy and Control: Danish University Reform in the Context of Modern Governance*, 1 LEARNING & TEACHING 27 (2008).

their HE legislation reflects restraint in granting governments powers to regulate HE institutions.¹⁸⁷

Finally, the independence of HE institutions *vis-à-vis* private interests should enjoy a notable measure of protection in HE legislation. There should be a clear statement emphasizing that private funding may not compromise the independence of teaching and research in HE institutions, linking this to an obligation of HE institutions to reveal the sources and scope of private funding. It seems only one HE system roughly complies with this requirement. The recent Act on the Future of Higher Education of September 2014 of North Rhine-Westphalia (Germany),¹⁸⁸ in Section 71 on “Third party-funded research,” provides that a member of the academic staff may undertake such research, “provided this does not prejudice the performance of other tasks of the HE institution, his or her freedom in science, research, teaching and study as well as the rights and duties of other persons” (§ 71(2)). In Section 71a, entitled “Transparency regarding third party-funded research,” the HE Act then calls upon “[t]he rector [to inform] the public in an adequate manner about completed research projects in terms of [Section] 71(1)” (§ 71a(1)). A similar requirement, obliging public research institutions to provide an annual overview of private financing of research conducted at such institutions, also exists in Denmark. This has not been provided for in terms of legislation, however, but by way of guidelines issued by the Ministry of Science, Technology, and Innovation.¹⁸⁹ In sum, one HE system may be held to be in “full compliance,” five in “partial compliance,” and all the others in “non-compliance,” with the requirement of adopting legislation protecting the independence of HE institutions against threats to autonomy emanating from private sources.¹⁹⁰

187. See *infra* Annex, Indicator C.3. (noting that, Full compliance = Belg. (nl.), Fin., Ir., Lat., U.K.; Partial compliance = Aus., Belg. (fr.), Bulg., Croat., Cyprus, Czech Rep., Est., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Italy, Lith., Lux., Malta, Neth., Pol., Port., Rom., Slov., Slovn., Spain; Non-compliance = Den., Hung., Swed.).

188. HOCHSCHULZUKUNFTSGESETZ [HZG NRW], Sept. 16, 2014, GV. NRW. 2014, No. 27, Sept. 29, 2014, 543.

189. See EURYDICE, *supra* note 102, at 85.

190. On accountability measures for private funds in HE in Europe, see *id.*; see *infra* Annex, Indicator C.4. (noting that, Full compliance = N.R.W. (F.R.G.); Partial compliance = Aus., Croat., Cyprus, Den., Italy; Non-compliance = Belg. (nl.), Belg. (fr.), Bulg., Czech Rep., Est., Fin., Fr., Bay. (F.R.G.), Greece, Hung., Ir., Lat., Lith., Lux., Malta, Neth., Pol., Port., Rom., Slov., Slovn., Spain, Swed., U.K.).

**Table 3: Country Ranking: Protection of Institutional
Autonomy in HE Legislation**

Country	Percentage & Score out of 20 in parentheses
1. Finland	75 (15)
2. United Kingdom	67.5 (13.5)
3. Croatia, North Rhine-Westphalia (Germany)	65 (13)
4. Ireland	62.5 (12.5)
5. Austria	60 (12)
6. Lithuania	55 (11)
7. Estonia, Flanders (Belgium), Malta	52.5 (10.5)
8. Latvia	50 (10)
9. Poland	47.5 (9.5)
Average	46.29 (9.26)
10. Germany	46.25 (9.25)
11. Bulgaria, Denmark, Italy, Luxemburg, Netherlands, Portugal	45 (9)
12. Belgium, Slovakia, Slovenia, Spain	42.5 (8.5)
13. Cyprus, Czech Republic, Romania	40 (8)
14. France	35 (7)
15. Sweden, Wallonia (Belgium)	32.5 (6.5)
16. Bavaria (Germany)	27.5 (5.5)
17. Greece	22.5 (4.5)
18. Hungary	12.5 (2.5)

*D. The Protection of Academic Self-Governance in Higher Education
Legislation*

Also the core elements of the right of academic self-governance should be clearly articulated in HE legislation and then be given concrete shape in the various provisions on the institutional/faculty/departmental governing and representative organs of HE institutions. The right of self-governance being a central component of meaningful academic freedom, HE legislation that does not articulate and operationalize its essential features does not comply with the right to academic freedom. Granted, it is in the interest of enhanced institutional autonomy to leave the regulation of many aspects in this context to institutions of HE themselves; nevertheless, criteria such as those requiring academic staff to be able to elect a majority of representatives to the senate or requiring them to be entitled to exercise "control" over who is chosen as the rector, need to be guaranteed at the level of primary legislation. Where the United Kingdom's Education Reform Act of 1988 thus

merely refers to “the academic board of an institution,” providing no further particulars,¹⁹¹ this falls short of minimum standards of compliance. The same holds true where HE legislation does not deal with issues of governance at faculty/departmental level at all, as is the case, for example, in Flanders (Belgium), Ireland, or Lithuania.

Of the thirty HE systems having been assessed, the HE Acts of only three contain an express and adequate provision on self-governance, twelve an express, but in certain respects problematic or incomplete provision, and fifteen no express provision.¹⁹² An example of an express and adequate provision on self-governance would perhaps be that of Section 26 of the Latvian Law on Institutions of Higher Education of 1995.¹⁹³

(3) A staff member shall have the right to participate in the governance of an institution of higher education and decisions of self-governance, and the formulation of internal laws and regulations of that institution, in accordance with the constitution of the institution, as well as to take part in the taking of decisions related to the interests of staff, to participate in the meetings of collegial governing bodies of an institution of higher education, and to be given the opportunity to be heard.

(4) A staff member shall have the right to participate in elections of self-governance of an institution of higher education and to be elected therein.

A majority—ideally between 60 and 70 percent—of the members of the senate (or its equivalent) should be representatives of academic staff. Students should, however, also be adequately represented.¹⁹⁴ Article 12(1) of the University of Cyprus Law 1989 to 2013,¹⁹⁵ for example, provides that the senate is to consist of the rector and the vice-rectors (elected from among the professors by the boards of the departments (i.e., academic staff and student representatives)), the deans of faculties (elected from among the professors and associate professors by the boards of the departments of the faculties concerned), three representatives of the teaching staff of each faculty elected by the board of the faculty (i.e., certain academic staff and student representatives), and the representatives of the students

191. Education Reform Act, 1988, ch. 40, § 125(2), sched. 7A, para. 3.

192. See *infra* Annex, Indicator D.1. (noting that, Full compliance = Bay. (F.R.G.), N.R.W. (F.R.G.), Lat.; Partial compliance = Aus., Bulg., Croat., Czech Rep., Den., Fr., Lith., Neth., Pol., Port., Rom., Slov.; Non-compliance = Belg. (nl.), Belg. (fr.), Cyprus, Est., Fin., Greece, Hung., Ir., Italy, Lux., Malta, Slovn., Spain, Swed., U.K.).

193. AUGSTSKOLU LIKUMS 1995, *supra* note 150.

194. See *infra* Annex, Indicator D.2.1. (noting that, Full compliance = Aus., Cyprus, Hung., Italy, Spain; Partial compliance = Belg. (fr.), Bulg., Croat., Czech Rep., Den., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Ir., Lat., Lux., Malta, Pol., Port., Rom., Slov., Slovn., Swed.; Non-compliance = Belg. (nl.), Est., Fin., Fr., Lith., Neth., U.K.).

195. Οι περί Πανεπιστημίου Κύπρου Νόμοι του 1989–2013 [University of Cyprus Law 1989 to 2013] (Αριθμός 144 του 1989 – Αριθμός 116(I) του 2013 [No. 144 of 1989 – No. 116(I) of 2013]).

(whose number is to correspond to the number of faculties). Clearly, there will always be at least 80 percent representatives of academic staff on the senate.

Quite a number of HE Acts remain vague when providing for the composition of the senate (or its equivalent). The Estonian Universities Act of 1995 thus provides for academic staff representatives on the council of the university, not stipulating how many representatives there should be, adding that there may also be "other persons prescribed by the statutes" on the council.¹⁹⁶ The French Code de l'Éducation provides for the *conseil académique* to comprise members of the *commission de la recherche* and the *commission de la formation et de la vie universitaire*. Depending on how exactly the provisions of the Education Code are implemented, the former may have between 40 and 73 percent representatives of academic staff, the latter between 37.5 to 40 percent.¹⁹⁷

There should further not be too many representatives of students on the senate (or its equivalent). In the Czech Republic, there may be up to 50 percent representatives of students on the senate.¹⁹⁸ Academic staff other than professors should also be adequately represented. In Bavaria (Germany), the ratio of representatives of professors to representatives of other academic staff ("*wissenschaftliche Mitarbeiter*") is six to one.¹⁹⁹

Rectors should be scholars coming from within the HE institution they are to serve, the academic staff of that institution should be able to exercise "control" over who is chosen as the rector (for instance, by holding a majority of votes), rector and staff should govern "co-operatively," and the academic staff should also be able to exercise "control" over the rector's dismissal by means of a vote of no-confidence. Although principles of "managerial efficiency" may perhaps call for a different governance regime, the one above is that most beneficial to promoting "the free search for truth" and is required in terms of human rights criteria, including the principles of self-governance and collegiality as enshrined in the UNESCO Recommendation.²⁰⁰

196. ÜLIKOOLISEADUS, Jan. 12, 1995, RIIGI TEATAJA RT I 1995, 12, 119, § 14(2).

197. See CODE DE L'ÉDUCATION, arts. L. 712-4–L. 712-6; see BEAUD, *supra* note 121 (for an analysis of the protection of the right to academic freedom in France).

198. ZÁKON 111/1998 Sb., Apr. 22, 1998, O VYSOKÝCH ŠKOLÁCH A O ZMĚNĚ A DOPLNĚNÍ DALŠÍCH ZÁKONŮ [ZÁKON O VYSOKÝCH ŠKOLÁCH] [Act on Higher Education Institutions], SBÍRKA ZÁKONŮ ČR No. 39/1998, 5388, § 8(1).

199. BAYERISCHES HOCHSCHULGESETZ [BAYHSCHG] 2006, *supra* note 141, art. 25(1).

200. See Georg Krücken, *Lässt sich Wissenschaft managen?*, 41 WISSENSCHAFTSRECHT 345 (2008) (generally expressing doubt as to whether science and research are susceptible to "management principles" whatsoever).

Article 20(2) of the Spanish Organic Law on Universities of 2001,²⁰¹ for example, states that “[t]he rector shall be elected . . . from among officials of the body of university professors (“*cuerpo de catedráticos de universidad*”) active in it.” Clearly, the rector here is “a scholar” coming from within the HE institution. The assessment has shown that rectors increasingly may come from outside the institution and often it is not expressly stated that they should be academics.²⁰²

Regarding the particular manner in which rectors are chosen, the models employed in this respect in the HE systems examined are highly varied.²⁰³ Academic staff may be entitled to directly elect the head of the institution. Pursuant to the Wallonian Loi sur l’organisation de l’enseignement universitaire par l’Etat of 1953 (Belgium), the rector is elected from among the ordinary professors of the university by academic staff, administrative personnel, and students, with the vote of academic staff weighted 75 percent.²⁰⁴ The government then appoints the rector.²⁰⁵ Article 23 of the Slovene Law on Higher Education of 1993²⁰⁶ provides that “[t]he rector shall be elected by all higher education teachers, scientific staff and higher education employees Students shall also have a voting right—namely, a fifth of the votes” Academic staff may be entitled to take part in the rector’s election indirectly through the senate (or its equivalent). Section 10(2) of Slovakia’s Act on Higher Education Institutions of 2002²⁰⁷ thus stipulates that “[t]he rector shall be appointed and dismissed at the proposal of the senate . . . by the President of the Slovak Republic.”

The general trend, however, is “to do away with” direct or indirect participation of academic staff and to have the rector appointed by a “third body,” to wit HE institution boards, with many introduced in the wake of “new university management” policies *en vogue* since the 1990s. Customarily, all or the majority of the

201. LEY ORGÁNICA 6/2001 DE UNIVERSIDADES, *supra* note 153.

202. See *infra* Annex, Indicator D.2.2.1. (noting that, Full compliance = Belg. (nl.), Belg. (fr.), Bulg., Croat., Cyprus, Pol., Spain; Partial compliance = Den., Est., Fin., Fr., Bay. (F.R.G.), Greece, Hung., Italy, Lat., Lith., Lux., Port., Rom.; Non-compliance = Aus., Czech Rep., N.R.W. (F.R.G.), Ir., Malta, Neth., Slov., Slovn., Swed., U.K.).

203. See *infra* Annex, Indicator D.2.2.2. (noting that, Full compliance = Slovn.; Partial compliance = Aus., Belg. (nl.), Belg. (fr.), Bulg., Croat., Cyprus, Czech Rep., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Hung., Italy, Lat., Port., Rom., Slov., Spain; Non-compliance = Den., Est., Fin., Fr., Ir., Lith., Lux., Malta, Neth., Pol., Swed., U.K.). The assessment has also taken into account whether or not general principles of democratic elections/selection procedures have been complied with.

204. LOI SUR L’ORGANISATION DE L’ENSEIGNEMENT UNIVERSITAIRE PAR L’ÉTAT, Law 11338, Apr. 28, 1953, MONITEUR BELGE, May 1, 1953, art. 11.

205. *Id.* art. 6.

206. ZAKON O VISOKEM ŠOLSTVU [ZViS] 1993, *supra* note 152.

207. ZÁKONY 131/2002 Z.z., Feb. 21, 2002, O VYSOKÝCH ŠKOLÁCH A O ZMENE A DOPLNENÍ NIEKTORÝCH ZÁKONOV, ZBIERKE ZÁKONOV No. 58/2002, 1462.

members of these boards are external, representing a variety of interests—including government and corporate. The bodies sometimes merely perform a supervisory function, but in many cases they play a decisive role in strategic decision-making.²⁰⁸ Under the Maltese Education Act of 1988, the council, “the supreme governing body of the university,”²⁰⁹ thus elects the rector. There must be external members on the council, and, depending on the circumstances, “academic” members would constitute between 10 and 45 percent of council members.²¹⁰ In the Netherlands, the Law on Provisions concerning Higher Education and Scientific Research of 1992 envisages all members of the rectorate (*college van bestuur*), including the rector, to be appointed by the supervisory board (*raad van toezicht*), consisting of three to five external members, appointed by the minister.²¹¹ In terms of the Swedish Higher Education Act of 1992 and the accompanying Ordinance of 1993, the government is to appoint a rector based on the proposal of the board of governors, the latter making the proposal following consultations with academic and other staff, and students.²¹² The board roughly comprises 50 percent external members, appointed by the government, and 25 percent representatives of academic staff and students, respectively.²¹³

A study of HE laws shows that the dismissal of rectors follows a similar logic as the particular manner in which they are chosen, discussed above. Some HE systems leave the powers in this respect to academic staff. In Estonia, the university council (the equivalent of a senate) may thus, by virtue of Section 14(3)(18) of the Universities Act of 1995,²¹⁴ adopt a vote of no-confidence in the rector. Article 2(e) of the Italian Law of 30 December 2010, No. 240, on Rules on the Organization of Universities, Academic Staff and Recruitment, as well as Governance to Enhance the Quality and Efficiency of the University System,²¹⁵ provides that the senate is to be granted the competence “to propose to the electorate with a majority of at least

208. Attesting to these developments, but commenting on them neutrally, see EURYDICE, *supra* note 102, at 33–42; ESTERMANN ET AL., SCORECARD, *supra* note 83, at 20–29.

209. Education Act, Act XXIV of 1988 (Cap. 327, Laws of Malta, 1988), art. 77.

210. See *id.* arts. 74(10), 76.

211. WET OP HET HOGER ONDERWIJS EN WETENSCHAPPELIJK ONDERZOEK [WHW] 1992, *supra* note 157, ch. 9, tit. 1, arts. 9.3.1.–2., 9.7., 9.8.1.a.

212. HÖGSKOLEFÖRORDNING, Feb. 4, 1993, SFS No. 1993:100, ch. 2, §§ 8, 11.

213. HÖGSKOLELAG, Dec. 17, 1992, SFS No. 1992:1434, ch. 2, § 4; HÖGSKOLEFÖRORDNING 1993, ch. 2, §§ 1, 7a, 7b.

214. ÜLIKOOLISEADUS 1995, *supra* note 196.

215. LEGGE, 30 dicembre 2010, n. 240, NORME IN MATERIA DI ORGANIZZAZIONE DELLE UNIVERSITÀ, DI PERSONALE ACCADEMICO E RECLUTAMENTO, NONCHÉ DELEGA AL GOVERNO PER INCENTIVARE LA QUALITÀ E L'EFFICIENZA DEL SISTEMA UNIVERSITARIO, GAZZ. UFF. Jan. 14, 2011, No. 10, S.O. No. 11.

two thirds of its members a motion of no-confidence in the rector.”²¹⁶ Nevertheless, also in this respect, the trend is for those systems in which the rector is chosen by a board to also grant the board the competence to dismiss the rector. Thus, in Denmark or Lithuania, the board appoints or elects the rector and dismisses him or her.²¹⁷

In some of the HE systems assessed, the rector and the senate (or its equivalent) retain responsibility for strategic decision-making. This is so, for example, in Bulgaria, the Czech Republic, Hungary, Latvia, and Romania. In these cases, there may additionally be certain other bodies that include external experts, but these are then assigned solely advisory or supervisory powers.²¹⁸ As has been pointed out, however, provision is increasingly made for separate boards, composed entirely or to a large extent of external members, with important decision-making powers in strategic matters. They are usually competent to appoint and dismiss rectors, often coming from outside the HE institution. The rectors (or sometimes rectorates) may be granted far-reaching executive powers. Together, rector and board decide on issues such as internal structure, the heads of units, teaching and research strategy, budgets, and administrative setup.

It may well be asked to what extent the principles of self-governance and collegiality permit “managerial” governance structures to be introduced in HE institutions. Strengthening the rector’s (rectorate’s) powers or providing for a board making external expertise available and involved in strategic decision-making would probably be permissible provided these measures are adequately counterbalanced by securing effective participatory and control rights for academic staff, ensuring the system of governance does not become “detached” from the academic staff whom it should serve.²¹⁹

216. On recent changes in the governance of HE institutions in Italy, see, e.g., Davide Donina et al., *Higher Education Reform in Italy: Tightening Regulation Instead of Steering at a Distance*, 28 HIGH. EDUC. POL’Y 215 (2015).

217. See *infra* Annex, Indicator D.2.2.3. (noting that, Full compliance = Rom., Spain; Partial compliance = Aus., Belg. (fr.), Bulg., Croat., Czech Rep., Bay. (F.R.G.), N.R.W. (F.R.G.), Hung., Italy, Pol., Port., Slov.; Non-compliance = Belg. (nl.), Cyprus, Den., Est., Fin., Fr., Greece, Ir., Lat., Lith., Lux., Malta, Neth., Slovn., Swed., U.K.).

218. In terms of the Bulgarian Higher Education Act of 1995, for example, a board of trustees representing the interests of society is to “express its comments” on various matters (Higher Education Act 1995, *supra* note 151, art. 35a–35c). Likewise, under the Czech Act on Higher Education Institutions of 1998, a board of trustees representing the public interest, apart from granting its consent to certain legal acts, “expresses its views” on different issues (ZÁKON O VYSOKÝCH ŠKOLÁCH 1998, *supra* note 207, §§ 14–15).

219. See Hamburgisches Hochschulgesetz, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] [Federal Constitutional Court] July 20, 2010, BVerfGE 127, 87, at 114–18, ¶¶ 88–95 (Ger.). The court in this case, in the German context, pointed out that, where bodies such as the rector (rectorate) or dean (dean’s office) are granted substantive decision-making powers that have a bearing on science and scholarship, academic staff must retain effective participatory and control rights.

It is submitted that academic staff should thus retain the power to elect the rector from among their midst and, where appropriate, to express a lack of confidence in him or her. Further, academic staff should ideally have at least 50 percent representation on the board.²²⁰ An arrangement in terms of which there are principally external members on the board, most of whom are determined by academic staff, would perhaps still pass muster, but only at the level of "partial compliance" (e.g., Austria²²¹). In Portugal, the general council (replacing general assembly and senate) has a majority of representatives of academic staff and at least 30 percent external members.²²² The governing authority in Irish universities could include up to about 75 percent external members. Representation of academic staff may be as low as 13 or as high as somewhat more than 50 percent.²²³ In post-1992 English universities, at least half of the 12 (13) to 24 (25) members of the governing body must be "independent." Up to two members may be teachers at the institution nominated by the academic board. There are further one to nine co-opted members among the members²²⁴ who could potentially be teachers at the institution.²²⁵

The above inquiry has been replicated at the level of the units of HE institutions (faculties and departments). First of all, have collegial bodies been provided for at the faculty and departmental level?²²⁶ Do these bodies adequately represent academic staff?²²⁷

220. Cf. Lewis Elton, *Collegiality and Complexity: Humboldt's Relevance to British Universities Today*, 62 HIGH. EDUC. Q. 224, 232 (2008) (stressing the need for "a democratic form of leadership, distributed throughout an organisation, very different from the current form of top-down leadership" in HE); *id.* at 233 (emphasizing that the vice-chancellor should be the "university's first servant"); Michael Shattock, *Re-balancing Modern Concepts of University Governance*, 56 HIGH. EDUC. Q. 235, 240 (2002) (arguing in support of "moving back to a more evenly balanced approach to governance—the 'shared governance' concept").

221. UNIVERSITÄTSGESETZ 2002, *supra* note 144, § 21(6) (providing that 50 percent of the board members are "to be determined" by academic staff, and 50 percent by the government).

222. LEI n.º 62/2007, REGIME JURÍDICO DAS INSTITUIÇÕES DE ENSINO SUPERIOR, *supra* note 152, art. 81. For an account of the more recent changes in Portuguese HE, see, e.g., Antonio Magalhães et al., *Governance of Governance in Higher Education: Practices and Lessons Drawn from the Portuguese Case*, 67 HIGH. EDUC. Q. 295 (2013); Rui Santiago & Teresa Carvalho, *Managerialism Rhetorics in Portuguese Higher Education*, 50 MINERVA 511 (2012).

223. Universities Act, 1997 (No. 24 of 1997), § 16.

224. Education Reform Act, 1988, ch. 40, sched. 7A, para. 3 (composition of governing body).

225. See *infra* Annex, Indicator D.2.3. (noting that, Full compliance = Bulg., Croat., Pol., Port., Slov.; Between full and partial compliance = Belg. (nl.), Belg. (fr.), Czech Rep., N.R.W. (F.R.G.), Greece, Hung., Lat., Lith., Rom., Slov.; Partial compliance = Aus., Cyprus, Est., Fr., Bay. (F.R.G.), Neth., Spain; Between partial and non-compliance = Den., Fin., Ir., Italy, Lux., Malta, Swed.; Non-compliance = U.K.).

226. See *infra* Annex, Indicator D.3.1.1. (noting that, Full compliance = Belg. (nl.), Bulg., Croat., Cyprus, Czech Rep., Est., Fin., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.),

Further, are deans and heads of departments required to be scholars from within their institution?²²⁸ Do academic staff exercise "control" over who is chosen as the dean or head of department, or do they exercise certain, but more restricted rights of participation in this respect, or, in fact, none at all?²²⁹ Likewise, are they able to exercise "control" over the dean's or head of department's dismissal by means of a vote of no-confidence, or have they been accorded qualified or no rights of participation in this regard?²³⁰ The criteria of compliance and the rationale underlying these resemble those at the institutional level and need not be repeated here. A number of the HE systems assessed (Austria, Flanders (Belgium), Wallonia (Belgium), Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Portugal, Sweden, and the United Kingdom) fail to regulate the right of self-governance at the unit level whatsoever or they do so in a clearly insufficient way. As has been underlined, although the particular manner in which governance at the unit level is concretized should as far as possible be left to HE institutions themselves to decide, human rights aspects of self-governance at this level need to be provided for in primary legislation.

Greece, Italy, Lat., Lux., Malta, Neth., Pol., Rom., Slov., Slovn., Spain; Partial compliance = Den., Port.; Non-compliance = Aus., Belg. (fr.), Hung., Ir., Lith., Swed., U.K.).

227. See *infra* Annex, Indicator D.3.1.2. (noting that, Full compliance = Cyprus; Partial compliance = Bulg., Croat., Czech Rep., Den., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Italy, Malta, Pol., Port., Rom., Slov., Slovn., Spain; Non-compliance = Aus., Belg. (nl.), Belg. (fr.), Est., Fin., Fr., Hung., Ir., Lat., Lith., Lux., Neth., Swed., U.K.).

228. See *infra* Annex, Indicator D.3.2.1. (noting that, Full compliance = Bulg., Cyprus, Fr., Bay. (F.R.G.), Greece, Lux., Slovn., Spain; Partial compliance = Aus., Croat., Den., N.R.W. (F.R.G.), Malta, Neth., Pol., Rom.; Non-compliance = Belg. (nl.), Belg. (fr.), Czech Rep., Est., Fin., Hung., Ir., Italy, Lat., Lith., Port., Slov., Swed., U.K.).

229. See *infra* Annex, Indicator D.3.2.2. (noting that, Full compliance = Cyprus, Slovn.; Partial compliance = Aus., Bulg., Croat., Czech Rep., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Lat., Lux., Malta, Rom., Slov., Spain; Non-compliance = Belg. (nl.), Belg. (fr.), Den., Est., Fin., Fr., Hung., Ir., Italy, Lith., Neth., Pol., Port., Swed., U.K.).

230. See *infra* Annex, Indicator D.3.2.3. (noting that, Full compliance = none; Partial compliance = Bulg., Croat., Czech Rep., Bay. (F.R.G.), N.R.W. (F.R.G.), Rom., Slov.; Non-compliance = Aus., Belg. (nl.), Belg. (fr.), Cyprus, Den., Est., Fin., Fr., Greece, Hung., Ir., Italy, Lat., Lith., Lux., Malta, Neth., Pol., Port., Slovn., Spain, Swed., U.K.).

Table 4: Country Ranking: Protection of Academic Self-Governance in HE Legislation

Country	Percentage & Score out of 20 in parentheses
1. Bulgaria	72.5 (14.5)
2. Croatia	70 (14)
3. Cyprus, North Rhine-Westphalia (Germany), Poland, Romania, Slovakia	62.5 (12.5)
4. Germany	61.25 (12.25)
5. Bavaria (Germany), Spain	60 (12)
6. Portugal	57.5 (12.5)
7. Czech Republic, Slovenia	55 (11)
8. Greece, Latvia	52.5 (10.5)
9. Austria, Hungary	45 (9)
Average	42.99 (8.6)
10. Wallonia (Belgium), Italy	40 (8)
11. Belgium	37.5 (7.5)
12. Flanders (Belgium)	35 (7)
13. Denmark, France	32.5 (6.5)
14. Lithuania, Luxemburg, Malta	30 (6)
15. Netherlands	27.5 (5.5)
16. Estonia	22.5 (4.5)
17. Finland, Ireland, Sweden	15 (3)
18. United Kingdom	0 (0)

E. The Protection of Job Security (including "Tenure") in Relevant Legislation

The legal framework governing the duration of contracts of service of academic staff in HE at post-entry levels (i.e., following any stage of doctoral employment) should envisage permanent contracts or commencement on a tenure-track. HE systems whose laws are in compliance with this requirement include, among others, Flanders (Belgium), Bulgaria, and France.²³¹ Article V.28 of the Flemish Codification of the Decretal Provisions concerning Higher Education

231. See *infra* Annex, Indicator E.1.1. (noting that, Full compliance = Belg. (nl.), Belg. (fr.), Bulg., Fr., Greece, Hung., Port., Spain; Partial compliance = Aus., Cyprus, Den., Bay. (F.R.G.), N.R.W. (F.R.G.), Ir., Italy, Lith., Lux., Rom., Slov., Swed.; Non-compliance = Croat., Czech Rep., Est., Fin., Lat., Malta, Neth., Pol., Slov., U.K.).

of 2013 (Belgium)²³² thus provides for full-time members of the “independent academic staff” to be appointed, further stating that

[t]he university administration may, in the case of a first appointment as a member of the independent academic staff, appoint a person on a fixed-term basis . . . for a period not exceeding three years with the prospect of a permanent appointment without new vacancy, if the university administration assesses the performance of the person concerned positively.

Article V.29 further provides for an optional tenure-track system (see below when addressing the issue of promotion of academic staff).

The legal framework of some of the HE systems assessed—for example that in place in Austria or the Czech Republic—leaves it to HE institutions themselves to decide whether or not to offer permanent contracts.²³³ In these cases, the use of fixed-term contracts may be subject to fairly strict limitations as to legitimate cases of use, maximum number of successive contracts, and their maximum cumulated duration. The Austrian Universities Act of 2002²³⁴ thus states that “[e]mployment contracts for a limited term shall, on pain of the invalidity of the employment contract, be concluded for a maximum period of six years”²³⁵ and that “[t]he conclusion of limited-term contracts immediately succeeding each other shall only be permissible for staff employed in connection with third party-funded or research projects, for staff engaged exclusively in teaching as well as for temporary replacement staff,” adding that “[t]he total duration of such contracts immediately succeeding each other shall not exceed six years”²³⁶ The use of fixed-term contracts may, however, also be subject to rather lax requirements. In terms of Section 39 of the Czech Labor Code of 2006,²³⁷ a fixed-term contract may be concluded for a maximum period of three years, it being permissible to renew this twice. The overall labor relation can, therefore, last up to nine years (3+3+3)! Whereas cases such as that of Austria should be held to constitute instances of “partial

232. CODIFICATIE van 11 oktober 2013 VAN DE DECRETALE BEPALINGEN BETREFFENDE HET HOGER ONDERWIJS [CODEX HOGER ONDERWIJS], as endorsed by DECREET TOT BEKRACHTIGING VAN DE DECRETALE BEPALINGEN BETREFFENDE HET HOGER ONDERWIJS, gecodificeerd op 11 oktober 2013 (1), Dec. 20, 2013, BELGISCH STAATSBLAD, Feb. 27, 2014.

233. In Austria, in terms of the Collective Agreement for Employees of Universities of 2013, permanent contracts are to be concluded with professors (§ 25(3)) and associate professor (§ 27(5)). Such security of employment should, however, already be available under parliamentary legislation and not depend on volatile collective bargaining.

234. UNIVERSITÄTSGESETZ 2002, *supra* note 144.

235. *Id.* § 109(1).

236. *Id.* § 109(2).

237. Zákon 262/2006, Apr. 21, 2006, ZÁKONÍK PRÁCE, SBÍRKA ZÁKONŮ ČR No. 84/2006, 3146.

compliance," those in the nature of the Czech example should be considered cases of "non-compliance."

Clearly also "in non-compliance" are HE systems, whose legal framework expressly envisages fixed-term contracts for academic staff at post-entry levels, even those with senior positions (associate or full professors), with there being little or no prospect of permanent contracts being concluded. The Estonian Universities Act of 1995,²³⁸ in Section 39(1), thus states that "[t]he positions of regular teaching and research staff at a university shall be filled for up to five years by way of public competition with equal conditions for all participants . . ." It is further stipulated, in Section 39¹(1), that "[t]he successive conclusion of fixed-term employment contracts with teaching or research staff shall not cause the employment relationship to become one for an unlimited term." In fact, "[a]n employment contract for an unlimited term shall [only] be concluded with a person who has been employed in the same university and has worked as a professor for at least eleven years, following evaluation under conditions and procedures established by the council of the university"²³⁹

In practice, the situation regarding the duration of contracts of service is in many instances not as one would expect it to be in terms of the letter of the law in force.²⁴⁰ In some cases, protective legislation does not actually have a protective effect. Hence, the effect of the provisions of the Austrian Universities Act of 2002, referred to above, in practice is not that universities conclude permanent

238. ÜLIKOOLISEADUS 1995, *supra* note 196.

239. *Id.* § 39¹(2); see also European Commission, *Commission Asks Estonia to Apply the Fixed-Term Employment Directive Fully in Academia and the Arts*, EUROPEAN COMMISSION (Oct. 24, 2012), <http://ec.europa.eu/social/main.jsp?langId=de&catId=157&newsId=1707&furtherNews=yes> [https://perma.cc/K389-9CT7] (archived Apr. 10, 2016) (reporting that the European Commission has asked Estonia to provide fixed-term staff in universities with protection against successive fixed-term employment contracts in accordance with Council Directive 99/70, 1999 O.J. (L 175) 43 (EC) (Directive concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP), this establishing a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships). Legislative provisions similar to those in Estonia exist in Croatia, Latvia and Slovakia.

240. See *infra* Annex, Indicator E.1.2. (noting that, Full compliance = Bulg., Fr., Greece, Hung., Ir., Malta, Neth., Slov., Spain, U.K.; Partial compliance = Cyprus, Czech Rep., Den., Italy, Pol., Port., Rom., Swed.; Non-compliance = Aus., Belg. (nl.), Belg. (fr.), Croat., Est., Fin., Bay. (F.R.G.), N.R.W. (F.R.G.), Lat., Lith., Lux., Slov.). Various sources of information have been used to assess compliance regarding this indicator. See, e.g., Gülay Ates & Angelika Brechelmacher, *Academic Career Paths, in THE WORK SITUATION OF THE ACADEMIC PROFESSION IN EUROPE: FINDINGS OF A SURVEY IN TWELVE COUNTRIES* 13 (Ulrich Teichler & Ester A. Höhle eds., 2013); IDEA CONSULT ET AL., *SUPPORT FOR CONTINUED DATA COLLECTION AND ANALYSIS CONCERNING MOBILITY PATTERNS AND CAREER PATHS OF RESEARCHERS* (Final Report MORE2, Prepared for European Commission, Research Directorate-General, Brussels, Aug. 2013), http://ec.europa.eu/euraxess/pdf/research_policies/more2/Final%20report.pdf [http://perma.cc/Y3LX-8PAT] (archived Feb. 27, 2016).

contracts with academic staff after six years. Rather, they prefer not to retain staff. Many Austrian scholars accordingly leave their country at that point to find employment abroad.²⁴¹ In Germany, the provisions of the Act on Fixed-Term Contracts of Employment in Academia of 2007,²⁴² intended to restrict the use of fixed-term contracts, allowing these only where staff are financed primarily out of third-party funds, are being abused by converting ordinary academic positions into third-party-funded positions.²⁴³ In other cases, a legal framework may not be in accordance with required standards, yet does not prevent a high level of protection in practice. In the United Kingdom, for instance, despite the absence of parliamentary legislation on the matter, almost 90 percent of academic staff either have permanent contracts or fixed-term contracts with long-term prospects.²⁴⁴

The HE legislation of roughly a third of the HE systems assessed either contains provisions prohibiting dismissals of academic staff on operational grounds (restructuring, down-sizing, reorganization, or economic difficulties) or contains provisions laying down protective standards for cases where such dismissals take place.²⁴⁵ Ireland and Portugal *expressis verbis* require academic staff to enjoy “tenure.” Section 25(6) of the Irish Universities Act of 1997 insists that “[a] university . . . shall provide for the tenure of officers.”²⁴⁶ Article 50 of the Portuguese Law on the Legal Status of Institutions of Higher Education of 2007²⁴⁷ states that, “[s]o as to guarantee their scientific and pedagogical autonomy, higher education institutions must have a permanent staff of teachers and researchers benefiting from an enhanced level of employment stability (tenure).”

In the case of Greece and Poland, dismissals of certain academic staff for reasons of redundancy are not allowed or restricted. In

241. See Ingrid Brodnig, *Österreich vergrault seinen Wissenschaftsnachwuchs*, ZEIT ONLINE (Jan. 19, 2012), <http://www.zeit.de/studium/hochschule/2012-01/oesterreich-nachwuchs> [<https://perma.cc/K27L-2HBV>] (archived Feb. 27, 2016); Fabian Kretschmer, *Ein Vertrag, der die Forschung in Ketten legt*, DERSTANDARD.AT (Mar. 7, 2012), <http://derstandard.at/1330390685392/Externe-Lehrbeauftragte-Ein-Vertrag-der-die-Forschung-in-Ketten-legt> [<https://perma.cc/KBY4-5PNG>] (archived Feb. 27, 2016).

242. GESETZ ÜBER BEFRISTETE ARBEITSVERTRÄGE IN DER WISSENSCHAFT [WISSENSCHAFTSZEITVERTRAGSGESETZ – WISSZEITVG], Apr. 12, 2007, BGBl. I, at 506.

243. See, e.g., Annika Sartor, *Forschen auf Zeit: Wissenschaftliche Mitarbeiter sind meistens befristet angestellt—Warum eigentlich?*, ZEIT ONLINE (June 18, 2013), <http://www.zeit.de/campus/2013/04/wissenschaftliche-mitarbeiter-befristung> [<https://perma.cc/SXJ8-7RMX>] (archived Feb. 27, 2016).

244. See Ates & Brechelmacher, *supra* note 240, at 27 (figures for 2007/08).

245. See *infra* Annex, Indicator E.2.1. (noting that, Full compliance = Greece; Partial compliance = Aus., Belg. (nl.), Belg. (fr.), Bulg., Croat., Cyprus, Fin., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.), Ir., Italy, Pol., Port., Rom., Spain, U.K.; Non-compliance = Czech Rep., Den., Est., Hung., Lat., Lith., Lux., Malta, Neth., Slov., Slovn., Swed.).

246. Universities Act, 1997 (No. 24/1997) (defining the term “officer” in § 3).

247. LEI n.º 62/2007, REGIME JURÍDICO DAS INSTITUIÇÕES DE ENSINO SUPERIOR, *supra* note 152.

Greece, professors may only be dismissed for reasons of a criminal conviction, a grave disciplinary breach, illness or disability, or professional incompetence.²⁴⁸ In Poland, those "appointed" to their position and holding the title of "professor" may generally not be dismissed for reasons of redundancy.²⁴⁹

In the case of Austria, Finland, and the United Kingdom, HE legislation contains provisions to the effect that a contract of service may not be terminated because a member of the academic staff has exercised his or her freedom to teach or carry out research, precluding "redundancy" serving as a pretext for "getting rid of" certain members of staff.²⁵⁰ The Bulgarian Higher Education Act of 1995,²⁵¹ in Article 58(1)(3), countenances dismissals for reasons of redundancy, but only if there are no opportunities for reallocation to another department or re-qualification in a related discipline.

In a number of HE systems, all members or at least senior members of the academic staff are civil/public servants or public sector workers (i.e., not "ordinary" employees in terms of private law). This status may entail their dismissal on operational grounds being excluded (even where HE legislation does not expressly affirm such protection). This is the case in Flanders (Belgium), Wallonia (Belgium), Croatia, Cyprus, Bavaria (Germany), North Rhine-Westphalia (Germany), Greece, Ireland, Italy, Portugal, and Spain. In the case of France, Hungary, the Netherlands, and Slovenia, academic staff who are civil servants may (at least in theory) be dismissed on operational grounds.²⁵² Concluding the comments on this indicator, it may be noted that the HE legislation (in the form of parliamentary enactments) of none of the HE systems assessed contains a full-fledged provision providing adequate protection, entailing the consideration of alternatives, the observance of suitable priority criteria, the following of a formalized procedure, and the

248. This is, in fact, provided for in terms of the Greek Constitution. See GREEK CONSTITUTION 1975, art. 16(6).

249. Ustawa, z dnia 27 lipca 2005 r., PRAWO O SZKOLNICTWIE WYŻSZYM [Act, July 27, 2005, Law on Higher Education], *DZIENNIK USTAW* 2005, No. 164, Item 1365, as amended, arts. 123–28. Art. 125 does, however, provide for termination "on other compelling grounds."

250. See UNIVERSITÄTSGESETZ 2002, *supra* note 144, § 113 (Aus.); YLIOPISTOLAKI (LAG) 2009, *supra* note 175, § 32 (Fin.); Education Reform Act, 1988, ch. 40, §§ 202–04 (U.K.).

251. Higher Education Act 1995, *supra* note 151.

252. See CHRISTOPH DEMMKE & TIMO MOILANEN, EUROPEAN INSTITUTE OF PUBLIC ADMINISTRATION, THE FUTURE OF PUBLIC EMPLOYMENT IN CENTRAL PUBLIC ADMINISTRATION: RESTRUCTURING IN TIMES OF GOVERNMENT TRANSFORMATION AND THE IMPACT ON STATUS DEVELOPMENT 49 (Study Commissioned by the Chancellery of the Prime Minister of the Republic of Poland, Nov. 2012), http://www.eupan.eu/files/repository/2013021293522_Study_The_future_of_public_employment.pdf [<http://perma.cc/97FL-QK8U>] (archived Feb. 28, 2016).

guarantee of procedural safeguards, in circumscribed cases where contracts may be terminated on operational grounds.

To the extent that HE legislation does not address the issue of the termination of contracts of service on operational grounds, recourse needs to be had to the provisions of "ordinary" civil service and/or labor law. These may provide adequate, some, or insufficient protection to academic staff in this regard. Adequate protection would imply that the notice of termination clearly state the grounds of termination, that alternatives to termination (such as transfer to another similar position within the institution, transfer to another similar position in another institution, or retraining) be considered and that, where termination cannot be avoided, suitable priority criteria (e.g., length of service or age) be followed. In Germany, for example, Section 1(2)(2) of the Act on Protection in Cases of Dismissal of 1969²⁵³ obliges the employer of public law status to try to avoid dismissals by offering employees another suitable position. Likewise, such employers are required to retain employees where they can be retrained or where their working conditions can be changed in such a way as to make continued employment possible. Where dismissal cannot be avoided, Section 1(3) provides for a mandatory social selection on the basis of criteria such as length of service, age, etc., to take place. On the whole, twelve HE systems provide a rather high level of protection in this context, eleven a medium, and seven a low level of protection.²⁵⁴

Adequate provision for advancement of academic staff to a higher position based on an objective assessment of competence should further be made. Some of the HE systems assessed do so through a tenure-track system.²⁵⁵ Article V.29 of the Flemish

253. KÜNDIGUNGSSCHUTZGESETZ [KSCHG] in the version of Aug. 25, 1969, BGBl. I, at 1317, last changed by Art. 3(2) of Law, Apr. 20, 2013, BGBl. I, at 868.

254. See *infra* Annex, Indicator E.2.2. (noting that, Full compliance = Croat., Fr., Bay. (F.R.G.), N.R.W. (F.R.G.), Greece, Ir., Italy, Lat., Lith., Port., Slovn., Swed.; Partial compliance = Belg. (nl.), Belg. (fr.), Cyprus, Est., Fin., Lux., Malta, Neth., Pol., Slov., Spain; Non-compliance = Aus., Bulg., Czech Rep., Den., Hung., Rom., U.K.). Various sources of information have been used to assess compliance regarding this indicator. See, e.g., ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD EMPLOYMENT OUTLOOK 2014 (2014), http://www.keepeek.com/Digital-Asset-Management/oced/employment/oced-employment-outlook-2014_empl_outlook-2014-en#page1 [<https://perma.cc/UAT8-W9ZM>] (archived Feb. 29, 2016); legislative texts as found in the ILO Employment Protection Legislation Database, i.e., EPLex, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/epllex/termmain.home?p_lang=en [<https://perma.cc/QR5E-4KDM>] (archived Feb. 29, 2016), or on the websites of national governments.

255. For an overview of tenure-track systems (most of them not based on general legislation) in a number of European countries, see HANS-JOCHEN SCHIEWER ET AL., TENURE AND TENURE TRACK AT LERU UNIVERSITIES: MODELS FOR ATTRACTIVE RESEARCH CAREERS IN EUROPE (League of European Research Universities, Advice Paper No. 17, Sept. 2014), http://www.leru.org/files/publications/LERU_API17_tenure-track_final.pdf [<https://perma.cc/N8PB-JEH6>] (archived Feb. 29, 2016).

Codification of the Decretal Provisions concerning Higher Education of 2013 (Belgium)²⁵⁶ thus provides for a tenure-track system (which is optional, however), in terms of which a "docent" may, following a positive evaluation of his or her performance, be promoted to the position of "hoofddocent." Likewise, Article 24(5) of the Italian Law of 30 December 2010, No. 240, on Rules on the Organization of Universities, Academic Staff and Recruitment, as well as Governance to Enhance the Quality and Efficiency of the University System,²⁵⁷ stipulates that certain so-called type "B" researchers, in the third year of their contract, in the case of a positive evaluation, are to be appointed as associate professors.

Other HE systems create entitlements relating to promotion otherwise than through a tenure-track system. Article 18(3) of the Greek Law on Structure, Functioning, Quality Assurance of Studies and Internationalization of Higher Education Institutions of 2011²⁵⁸ lays down that

assistant and associate professors have the right to request a vacancy at the next level after a stay at the rank they hold after six and four years, respectively . . . In this case, the vacancy notice is mandatory If assistant and associate professors are not promoted to the next level, they have the right to request a re-announcement of the position after a lapse of at least three years following the decision not to be promoted.

At the opposite end of the scale are HE systems such as that of Lithuania; Article 65(4) of its Law on Higher Education and Research of 2009²⁵⁹ provides that "[p]ersons shall gain access to a higher position in the teaching or research staff by way of an open competition [only]." Altogether, HE systems fail to adequately deal with the issue of advancement. Only the Greek arrangements have been considered to be in "full compliance," while those of sixteen other HE systems are in "non-compliance."²⁶⁰

256. CODEX HOGER ONDERWIJS 2013, *supra* note 232.

257. LEGGE, 30 dicembre 2010, n. 240, NORME IN MATERIA DI ORGANIZZAZIONE DELLE UNIVERSITÀ, *supra* note 215.

258. Law No. 4009 on Higher Education Institutions 2011, *supra* note 155.

259. MOKSLO IR STUDIJŲ ĮSTATYMAS 2009, *supra* note 143.

260. See *infra* Annex, Indicator E.3. (noting that, Full compliance = Greece; Between full and partial compliance = none; Partial compliance = Belg. (nl.), Cyprus, Fr., Italy, Malta; Between partial and non-compliance = Aus., Belg. (fr.), Den., Bay. (F.R.G.), N.R.W. (F.R.G.), Neth., Slov., Swed.; Non-compliance = Bulg., Croat., Czech Rep., Est., Fin., Hung., Ir., Lat., Lith., Lux., Pol., Port., Rom., Slov., Spain, U.K.).

**Table 5: Country Ranking: Protection of Job Security
(including "Tenure") in Relevant Legislation**

Country	Percentage & Score out of 20 in parentheses
1. Greece	100 (20)
2. France	77.5 (15.5)
3. Italy	57.5 (11.5)
4. Spain	55 (11)
5. Ireland, Portugal, Slovenia	52.5 (10.5)
6. Flanders (Belgium), Cyprus	50 (10)
7. Bulgaria	47.5 (9.5)
8. Belgium	46.25 (9.25)
9. Wallonia (Belgium), Malta, Sweden	42.5 (8.5)
10. Bavaria (Germany), North Rhine-Westphalia (Germany), Germany, Hungary	40 (8)
Average	37.28 (7.46)
11. Netherlands	35 (7)
12. Denmark, Romania, United Kingdom	27.5 (5.5)
13. Austria, Lithuania, Poland	25 (5)
14. Croatia	22.5 (4.5)
15. Luxemburg	17.5 (3.5)
16. Finland, Latvia	15 (3)
17. Czech Republic	10 (2)
18. Estonia, Slovakia	7.5 (1.5)

*F. The Legal Protection of the Right to Academic Freedom in Europe:
Overall Results*

The following two tables provide an overview of the total scores and results in the main categories of assessment and further an overall country ranking for the legal protection of the right to academic freedom in Europe.

Table 6: Legal Protection of the Right to Academic Freedom in Europe: Overview of Total Scores and Results in Main Categories of Assessment (Percentage and Score out of 20 in parentheses)

Country	Total (%)	Ratification of International Agreements and Constitutional Protection	Express Protection of Academic Freedom in HE Legislation
1. Austria (Aus.)	63.5	87.5 (17.5)	100 (20)
2. Belgium (Belg.)	49.25	70 (14)	50 (10)
2.1. Belgium (Flanders) (Belg. nl.)	51.5	70 (14)	50 (10)
2.2. Belgium (Wallonia) (Belg. fr.)	47	70 (14)	50 (10)
3. Bulgaria (Bulg.)	65.5	87.5 (17.5)	75 (15)
4. Croatia (Croat.)	69	87.5 (17.5)	100 (20)
5. Cyprus (Cyprus)	33	62.5 (12.5)	50 (10)
6. Czech Republic (Czech Rep.)	51.5	77.5 (15.5)	75 (15)
7. Denmark (Den.)	38.5	62.5 (12.5)	25 (5)
8. Estonia (Est.)	34	87.5 (17.5)	0 (0)
9. Finland (Fin.)	55	95 (19)	75 (15)
10. France (Fr.)	63	70 (14)	100 (20)
11. Germany (F.R.G.)	64.5	87.5 (17.5)	87.5 (17.5)
11.1. Germany (Bavaria) (Bay. (F.R.G.))	58	87.5 (17.5)	75 (15)
11.2. Germany (North Rhine-Westphalia) (N.R.W. (F.R.G.))	71	87.5 (17.5)	100 (20)
12. Greece (Greece)	55.5	77.5 (15.5)	25 (5)
13. Hungary (Hung.)	36	57.5 (11.5)	25 (5)
14. Ireland (Ir.)	52.5	57.5 (11.5)	75 (15)
15. Italy (Italy)	57.5	95 (19)	50 (10)
16. Latvia (Lat.)	60	82.5 (16.5)	100 (20)
17. Lithuania (Lith.)	59.5	87.5 (17.5)	100 (20)
18. Luxembourg (Lux.)	47.5	70 (14)	75 (15)
19. Malta (Malta)	36	55 (11)	0 (0)
20. Netherlands (Neth.)	44	62.5 (12.5)	50 (10)
21. Poland (Pol.)	54.5	87.5 (17.5)	50 (10)
22. Portugal (Port.)	61	100 (20)	50 (10)
23. Romania (Rom.)	53.5	62.5 (12.5)	75 (15)
24. Slovakia (Slovak.)	60.5	90 (18)	100 (20)
25. Slovenia (Sloven.)	52.5	87.5 (17.5)	25 (5)
26. Spain (Spain)	66.5	100 (20)	75 (15)
27. Sweden (Swed.)	39.5	82.5 (16.5)	25 (5)
28. United Kingdom (U.K.)	35	55 (11)	25 (5)

Table 6: Legal Protection of the Right to Academic Freedom in Europe: Overview of Total Scores and Results in Main Categories of Assessment (% and Score out of 20 in parentheses) (cont.)

Country	Protection of Institutional Autonomy in HE Legislation	Protection of Academic Self-Governance in HE Legislation	Protection of Job Security (including "Tenure") in Relevant Legislation
1. Austria (Aus.)	60 (12)	45 (9)	25 (5)
2. Belgium (Belg.)	42.5 (8.5)	37.5 (7.5)	46.25 (9.25)
2.1. Belgium (Flanders) (Belg. nl.)	52.5 (10.5)	35 (7)	50 (10)
2.2. Belgium (Wallonia) (Belg. fr.)	32.5 (6.5)	40 (8)	42.5 (8.5)
3. Bulgaria (Bulg.)	45 (9)	72.5 (14.5)	47.5 (9.5)
4. Croatia (Croat.)	65 (13)	70 (14)	22.5 (4.5)
5. Cyprus (Cyprus)	40 (8)	62.5 (12.5)	50 (10)
6. Czech Republic (Czech Rep.)	40 (8)	55 (11)	10 (2)
7. Denmark (Den.)	45 (9)	32.5 (6.5)	27.5 (5.5)
8. Estonia (Est.)	52.5 (10.5)	22.5 (4.5)	7.5 (1.5)
9. Finland (Fin.)	75 (15)	15 (3)	15 (3)
10. France (Fr.)	35 (7)	32.5 (6.5)	77.5 (15.5)
11. Germany (F.R.G.)	46.25 (9.25)	61.25 (12.25)	40 (8)
11.1. Germany (Bavaria) (Bay. (F.R.G.))	27.5 (5.5)	60 (12)	40 (8)
11.2. Germany (North Rhine-Westphalia) (N.R.W. (F.R.G.))	65 (13)	62.5 (12.5)	40 (8)
12. Greece (Greece)	22.5 (4.5)	52.5 (10.5)	100 (20)
13. Hungary (Hung.)	12.5 (2.5)	45 (9)	40 (8)
14. Ireland (Ir.)	62.5 (12.5)	15 (3)	52.5 (10.5)
15. Italy (Italy)	45 (9)	40 (8)	57.5 (11.5)
16. Latvia (Lat.)	50 (10)	52.5 (10.5)	15 (3)
17. Lithuania (Lith.)	55 (11)	30 (6)	25 (5)
18. Luxembourg (Lux.)	45 (9)	30 (6)	17.5 (3.5)
19. Malta (Malta)	52.5 (10.5)	30 (6)	42.5 (8.5)
20. Netherlands (Neth.)	45 (9)	27.5 (5.5)	35 (7)
21. Poland (Pol.)	47.5 (9.5)	62.5 (12.5)	25 (5)
22. Portugal (Port.)	45 (9)	57.5 (11.5)	52.5 (10.5)
23. Romania (Rom.)	40 (8)	62.5 (12.5)	27.5 (5.5)
24. Slovakia (Slovak.)	42.5 (8.5)	62.5 (12.5)	7.5 (1.5)
25. Slovenia (Sloven.)	42.5 (8.5)	55 (11)	52.5 (10.5)
26. Spain (Spain)	42.5 (8.5)	60 (12)	55 (11)
27. Sweden (Swed.)	32.5 (6.5)	15 (3)	42.5 (8.5)
28. United Kingdom (U.K.)	67.5 (13.5)	0 (0)	27.5 (5.5)

Table 7: Overall Country Ranking: Legal Protection of the Right to Academic Freedom in Europe

Country	Total (%) & Grade (A-F)
1. North Rhine-Westphalia (Germany)	71 B
2. Croatia	69 C
3. Spain	66.5 C
4. Bulgaria	65.5 C
5. Germany	64.5 C
6. Austria	63.5 C
7. France	63 C
8. Portugal	61 C
9. Slovakia	60.5 C
10. Latvia	60 C
11. Lithuania	59.5 D
12. Bavaria (Germany)	58 D
13. Italy	57.5 D
14. Greece	55.5 D
15. Finland	55 D
16. Poland	54.5 D
17. Romania	53.5 D
<i>Average</i>	<i>52.79 D</i>
18. Cyprus	53 D
19. Ireland, Slovenia	52.5 D
20. Czech Republic, Flanders (Belgium)	51.5 D
21. Belgium	49.25 E
22. Luxemburg	47.5 E
23. Wallonia (Belgium)	47 E
24. Netherlands	44 E
25. Sweden	39.5 F
26. Denmark	38.5 F
27. Hungary, Malta	36 F
28. United Kingdom	35 F
29. Estonia	34 F

VI. ANALYSIS AND OBSERVATIONS: THE STATE OF HEALTH OF THE LEGAL PROTECTION OF THE RIGHT TO ACADEMIC FREEDOM IN EUROPE

The assessment has shown that by and large the twenty-eight EU member states formally ascribe to the value of academic freedom. In general, they have ratified relevant international agreements providing protection to the right to academic freedom (ICCPR, ICESCR, ECHR, etc.) and give recognition to the right (or related rights) at the constitutional level. Table 1 reflects countries to have

scored an average of 78 percent in this category. Also at the level of HE legislation, academic freedom enjoys express recognition in most HE systems, Table 2 showing that an average of 59 percent compliance was achieved in this category. There are, however, some HE systems—those of Denmark, Estonia, Greece, Hungary, Malta, Slovenia, Sweden, and the United Kingdom—whose HE legislation does not or only inadequately refers to academic freedom. Whereas all HE systems, in a more or less satisfactory manner, expressly provide for the autonomy of institutions of HE in their HE legislation, rights of self-governance of academic staff and tenure in the sense of employment stability are accorded express recognition in fifteen and eight HE systems, respectively, with a rating of “full compliance” having been awarded in only three cases and one case, respectively.

If one turns to analyzing the way the right to academic freedom has been concretized in the HE and other legislation of the states concerned, it will be noted that performance levels are far less satisfactory than those identified in view of its formal protection. The average score for institutional autonomy lies at 46 percent (Table 3), that for academic self-governance below that at 43 percent (Table 4), and that for job security (including “tenure”) at a mere 37 percent (Table 5). Many commentators would perhaps disagree and consider institutional autonomy to enjoy a higher level of legal protection than is borne out here. However, as has been stressed above, “institutional autonomy” in the context of this study means “institutional autonomy as limited by academic freedom and human rights.” HE institutions in many of the HE systems assessed do possess wide competences to include external members in their governing bodies, to levy and decide on the amount of study fees, to dismiss academic staff for reasons of “redundancy,” and to freely engage in collaborative activities with private industry to acquire funding subject to only limited public control. Such unbridled powers, however, are not concomitant with institutional autonomy—rather, they expose a misinterpretation of the concept. Table 3 shows Finland and the United Kingdom to be the top performers in the category “institutional autonomy.” At the bottom of the table is Hungary, Hungarian HE legislation reflecting a paternalistic role of the state in regulating HE.²⁶¹

261. A reading of the Hungarian HE Act thus reflects an “omnipresent” role of the state in the administration of HE institutions. By way of example, the President of the Republic appoints rectors (Sections 64(2)(c), 73(3)(e) of the Hungarian Act on National Higher Education of 2011 (2011, ÉVI CCIV, TÖRVÉNY A NEMZETI FELSOROKTATÁSRÓL, MAGYAR KÖZLÖNY 165, Dec. 30, 2011, 41181)) and professors (Sections 27(3), 64(2)(c)). The state’s agreement is required to found business organizations (Section 12(3)(g)(gc)), or the state is required to perform typical review functions (such as reviewing the budget of a HE institution), which in many other HE systems are performed by a (supervisory) organ of the HE institution (Section 73(3)(c)).

The autonomy of an institution of HE, moreover, cannot be divorced from the guarantee of academic self-governance. HE institutions, which possess wide powers, but in which the academic community—encompassing academic staff, but also students—does not retain the competence to sufficiently participate in the taking of decisions directly or indirectly having a bearing on science and scholarship, can at most be seen to be nominally autonomous, and they are certainly not in accordance with the standards of the UNESCO Recommendation. The assessment has revealed that the HE legislation of European states inadequately protects the right of “sufficient participation,” which is increasingly being eroded by promoting an “alternative model.” At the institutional level, states achieve an average score of just 49.4 percent (the percentage average of the sum of the scores for indicators under D.2.) and, at the faculty and departmental level (where a large-scale failure to regulate aspects of self-governance whatsoever by way of legislation may be observed), merely 35 percent (the percentage average of the sum of the scores for indicators under D.3.) for their implementation of the right to self-governance.

Legislative changes adopted in the past five to ten years, in some instances also before that, have accordingly witnessed the powers of senates (or their equivalents) having been restricted to purely academic matters (or worse, senates (or their equivalents) having been replaced by “committees of academics,” often presided over by non-elected administrators); the introduction of institutional boards with strategic decision-making powers, composed of various stakeholders, many external and representing government and corporate interests (academic staff, in the worst case, not being represented and/or having no control over candidates appointed);²⁶² and the strengthening of the executive powers of rectors and deans and departmental heads, who frequently come from outside the institution, academic staff not being able to adequately participate in their election or dismissal. But also generally, governance structures in HE institutions increasingly exclude academics, recruiting instead a new “caste” of personnel with administrative, but little or no subject-specific academic expertise, responsible for “managing” HE

262. According to oral information provided to the authors by the official of a union representing academic staff in HE in New Zealand, a country that has very recently, in 2015, modified its HE legislation along the lines described—for which reason the concerns expressed may be transposed to the European context—the indications are that the reforms in that country will lead to HE institution governance becoming “whiter and male-dominated” again. As governments and corporate actors also in Europe do not reflect a high measure of diversity in their respective composition and as they are to play a significant role, directly or indirectly, in “redesigned” governance, also European HE institution governance may become less inclusive again.

institutions and their affairs.²⁶³ Interestingly, states such as Bulgaria, Croatia, and Romania that are not yet in the tow of Bologna reforms perform best in the category of “self-governance.” The United Kingdom, a top performer on “institutional autonomy,” fares worst on “self-governance.”

Institutional autonomy is also limited by the requirements of security of employment, including “tenure or its functional equivalent, where applicable.” HE institutions in Europe, however, in “managing” their affairs, have come to view their academic staff as strategic capital. If staff are not “useful” in accordance with “strategic objectives” anymore, they forfeit their right to remain with the HE institution concerned. The assessment has shown that states achieve an average score of just 47.3 percent (the percentage average of the sum of the scores for indicators under E.1.) and merely 43.8 percent (the percentage average of the sum of the scores for indicators under E.2.) for the assurance of stable employment in terms of the duration of contracts of service and the protection against dismissals on operational grounds, respectively.

While the premise in academia used to be that “the university does not employ academics, it facilitates their work,” this notion appears to be absent in HE institutions today. As Rebecca Boden and Debbie Epstein point out, “[a] facilitator provides resources and eases one’s path towards one’s goals. But an employer regards employees as resources—along with other inputs—to be managed to achieve organizational objectives.”²⁶⁴ The “HE institution as facilitator” notion underlies the UNESCO Recommendation and its conception of the right to academic freedom. States in Southern and Western Europe (Greece, France, Italy, Spain, and Portugal) are among the “top” performers in the category “security of employment.” Only seven states altogether, however, achieved a score above 50 percent.

263. In this vein with regard to universities in the UK, see Dr. Matt Waring (Cardiff Metropolitan University), researcher on human resource management in HE, and also a senior trade union official, in a talk on “Management technologies and academic freedom,” delivered on Sept. 9, 2014 at UNIKE (Universities in the Knowledge Economy) Workshop 4: Management Technologies, held from Sept. 8–10, 2014 at the University of Roehampton, London. See also Thomas Docherty, *Thomas Docherty on Academic Freedom*, TIMES HIGHER EDUC. (Dec. 4, 2014), <https://www.timeshighereducation.co.uk/features/thomas-docherty-on-academic-freedom/2017-268.article> [<https://perma.cc/RCG5-CWX4>] (archived Mar. 3, 2016) (holding that “[m]anagerial fundamentalism has taken hold in universities, with scholars viewed as resources that must be controlled . . .”); Paul Taylor, *Humboldt’s Rift: Managerialism in Education and Complicit Intellectuals*, 3 EUR. POLIT. SCI. 75 (2003) (referring to the phenomenon of “supinely acquiescent academics,” who disagree with “managerialism,” but do not “speak out”).

264. See Rebecca Boden & Debbie Epstein, *A Flat Earth Society? Imagining Academic Freedom*, 59 SOC. REV. 476, 481 (2011), citing Matt Waring, *Labouring in the Agean Stables? HRM and the Reconstitution of the Academic Worker*, 3 INT’L J. MGMT. CONCEPT. & PHIL. 257 (2009) in this respect.

Finally, turning to Table 7, showing the overall country ranking on the legal protection of the right to academic freedom in accordance with the assessment, it will have to be conceded that it is difficult to identify clear trends. One HE system—that of North Rhine-Westphalia (Germany)—scored 71 percent, eight scored between 60 and 69.9 percent,²⁶⁵ twelve between 50 and 59.9 percent,²⁶⁶ three between 40 and 49.9 percent,²⁶⁷ and six between 30 and 39.9 percent.²⁶⁸ HE systems that used to be steeped in the Humboldtian tradition with its emphasis on *Lernfreiheit* (freedom of study), *Lehrfreiheit* (freedom of teaching), *Forschungsfreiheit* (freedom of research), and further the *Einheit von Forschung und Lehre* (the unity of research and teaching)—those of Austria, Bavaria (Germany), and North Rhine-Westphalia (Germany)—still seem to benefit from this in terms of their position in the overall ranking.²⁶⁹ The HE systems of Southern and Western Europe—those of France, Greece, Italy, Portugal, and Spain—also appear in the upper half of the table. The HE systems of the Benelux states—those of Flanders (Belgium), Wallonia (Belgium), Luxemburg, and the Netherlands—feature in the lower half of the table, as do those of Scandinavian countries—i.e., the HE systems of Denmark, Finland, and Sweden.²⁷⁰ Also, the HE systems of Anglophone Europe—those of Ireland, Malta, and the United Kingdom—are found in this part of the table. The picture is rather diffuse for the Baltic states, as it is for countries of Eastern Europe. The HE systems of Latvia and Lithuania lie on positions ten and eleven, respectively, but that of Estonia in place twenty-eight. Croatia lands on the second place, Slovenia on the nineteenth. Bulgaria lands on the fourth place, Slovakia on the ninth, Romania on the seventeenth, and the Czech Republic on the twentieth.

265. In the order of performance: Croat. (69%), Spain (66.5%), Bulg. (65.5%), Aus. (63.5%), Fr. (63%), Port. (61%), Slov. (60.5%), Lat. (60%). See *supra* tbl. 7.

266. In the order of performance: Lith. (59.5%), Bay. (F.R.G.) (58%), Italy (57.5%), Greece (55.5%), Fin. (55%), Pol. (54.5%), Rom. (53.5%), Cyprus (53%), Ir. (52.5%), Slov. (52.5%), Czech Rep. (51.5%), Belg. (nl.) (51.5%).

267. In the order of performance: Lux. (47.5%), Belg. (fr.) (47%), Neth. (44%).

268. In the order of performance: Swed. (39.5%), Den. (38.5%), Hung. (36%), Malta (36%), U.K. (35%), Est. (34%).

269. On the Humboldtian tradition in Germany, see MITCHELL G. ASH, *GERMAN UNIVERSITIES: PAST AND FUTURE: CRISIS OR RENEWAL?* (1997) [German transl.: *MYTHOS HUMBOLDT: VERGANGENHEIT UND ZUKUNFT DER DEUTSCHEN UNIVERSITÄTEN* (1999)]. For a critical examination of the relevance of Humboldtian ideals in modern HE, see PETER JOSEPHSON ET AL., *THE HUMBOLDTIAN TRADITION: ORIGINS AND LEGACIES* (Peter Josephson, Thomas Karlsohn & Johan Östling eds., 2014).

270. For a discussion of academic freedom and institutional autonomy in the Scandinavian countries, see, e.g., Terhi Nokkala & Agneta Bladh, *Institutional Autonomy and Academic Freedom in the Nordic Context: Similarities and Differences*, 27 *HIGH. EDUC. POL'Y* 1 (2014).

The overall average lies at 52.8 percent—demonstrating that the state of the legal protection of the right to academic freedom in Europe is one of “ill-health.” While this is disappointing in itself, what is a matter of greater concern is that, when compared to the situation that existed prior to the changes in HE legislation effected during the last ten or more years in the states assessed,²⁷¹ a downward trend in protection levels may be observed. The concept of institutional autonomy is increasingly being misconstrued as autonomy not subject to the requirements of academic freedom, self-governance, and security of employment, including “tenure.” Self-governance itself has, at all levels in HE institutions, largely become eroded. The same may be stated to be the case with regard to employment security, including “tenure,” of academic staff. Although the various changes may in some instances be the result of “suboptimal legislative draftsmanship skills” (this might perhaps be so for Estonia, for example),²⁷² they usually are part of a deliberate reform agenda for the HE sector implemented by states in Europe.

VII. VIOLATIONS OF THE RIGHT TO ACADEMIC FREEDOM AND THE RIGHT TO EDUCATION

The academic community has traditionally been—and in many parts of the world continues to be—a particularly vulnerable target of direct state repression.²⁷³ In Europe, however, it is nowadays rather sources of a different nature from which direct threats to academic freedom emanate, the state having become a (seemingly innocent) actor in the background. The state has assigned HE institutions fairly wide-reaching powers (as it were, has delegated many of its powers to these institutions). In practice, this has had the effect that HE institutions themselves have become direct violators of academic freedom. Research funding bodies are yet another source of peril to academic freedom. It may hence be asked whether the system *en vogue* today of research funding having to be applied for internally, or externally through “independent” research councils/foundations, etc., on a competitive basis for virtually all research projects, does not by its very nature favor research on “fashionable” topics yielding short-

271. This has become apparent when, in the course of examining the HE legislation of the states concerned, present laws were compared to those existing prior to the laws in operation now.

272. See *supra* text accompanying note 196 (discussing the provisions of the Estonian Universities Act of 1995 on the composition of the council of the university at V.D. above).

273. On the state of academic freedom in different parts of the world, see generally Philip G. Altbach, *Academic Freedom in a Global Context: 21st Century Challenges*, in THE NEA 2007 ALMANAC OF HIGHER EDUCATION 49 (Nat'l Educ. Assoc., 2007).

term results, thus obstructing research of real or long-term significance for society (elementary research).²⁷⁴ Likewise, the reluctance to install effective control mechanisms targeting the activities of private or corporate actors providing finance to HE institutions has made it possible for the activities of such actors to compromise the independence of research in HE institutions.²⁷⁵ As has been indicated, in only very few cases does the law in Europe oblige HE institutions to account to the public for private financing.

HE institutions have become direct violators of academic freedom because they find themselves in an environment where they often cannot but violate that right. These days, HE in Europe follows a neoliberal logic. Whereas it used to be a public good, paid for by the state, available free of charge to students, and based on the idea that (also) "knowledge for its own sake" merits pursuit and transmission, HE has now "become the arm of national economic policy," defined both as the problem, failing to produce a skilled workforce and marketable academic output, and the solution, in that it should upgrade skills and create a source of earnings.²⁷⁶ The commercialization of HE is to go hand in hand with reductions in government spending for and "new public management" methods in HE.²⁷⁷ States consider that HE institutions will use public money

274. See Li Bennich-Björkman, *Has Academic Freedom Survived? An Interview Study of the Conditions for Researchers in an Era of Paradigmatic Change*, 61 HIGH. EDUC. Q. 334, 348–52 (2007) (presenting the results of an interview study of academic staff in Swedish universities, which, according to the author, reflect the general European experience); see also Justin Thorens, *Liberties, Freedom and Autonomy: Reflections on Academia's Estate*, 19 HIGH. EDUC. POLY 87, 100 (2006) (critically discussing the role of research councils and funding decisions).

275. See Rendel, *supra* note 68, at 83 (warning, in 1988, before private industry funding assumed the importance in HE it has at present, that those commissioning research "may want answers only within their own frame of reference"); David Robinson, *Corrupting Research Integrity: Corporate Funding and Academic Independence*, in GLOBAL CORRUPTION REPORT: EDUCATION 202, 202 (Transparency International, Gareth Sweeney et al. eds., 2013), http://files.transparency.org/content/download/675/2899/file/2013_GCR_Education_EN.pdf [<https://perma.cc/PDM4-4UZC>] (archived Feb. 26, 2016) (stating that "[t]he increasing industrial sponsorship of university-based research is raising widespread concerns about how these arrangements can corrupt and distort academic research."); Michele Rostan, *Challenges to Academic Freedom: Some Empirical Evidence*, 18 (Suppl. No. 1) EUR. REV. 71, 78–80 (2010) (commenting on the threats posed by research funding by private actors); *id.* at 80–85 (commenting on the threats arising from links connecting academics to the economic sector).

276. See Jill Blackmore, *Globalisation: A Useful Concept for Feminists Rethinking Theories and Strategies in Education*, in GLOBALISATION AND EDUCATION: CRITICAL PERSPECTIVES 133, 134 (Nicholas C. Burbules & Carlos Alberto Torres eds., 2000). On the notion that academic freedom also covers pursuing and transmitting "knowledge for its own sake," see Thaddeus Metz, *A Dilemma Regarding Academic Freedom and Public Accountability in Higher Education*, 44 J. PHIL. EDUC. 529 (2010).

277. On the commercialization of and "new public management" in HE in the U.K., see, e.g., ROGER BROWN & HELEN CARASSO, EVERYTHING FOR SALE? THE MARKETISATION OF UK HIGHER EDUCATION or ANDREW MCGETTIGAN, THE GREAT

responsibly and produce “measurable” outcomes only if they have to acquire a substantial part of funding through state and non-state sources themselves (by levying study fees, “selling” academic “merchandise” and “services” (e.g., marketing intellectual property rights or carrying out commissioned research), their academic staff applying for external research funding on a competitive basis and producing state income-generating publications, etc.), and further if they have to account for public money “at every inch of the road” (internal and external audits, staff appraisals, student evaluations of staff, national research assessment exercises, etc.).²⁷⁸

This new model—substituting that in terms of which a solid measure of trust is placed in the competence of academics to be good teachers/researchers and responsible recipients of adequate finance—compels HE institutions “to do well” in HE institution rankings if they wish to remain able to attract fee-paying students and be awarded contracts for their academic “merchandise” and “services.” These rankings themselves apply questionable criteria of measuring excellence.²⁷⁹ They do not ask, for example, whether students from

UNIVERSITY GAMBLE: MONEY, MARKETS AND THE FUTURE OF HIGHER EDUCATION (2013). Regarding these issues in the U.S.A., see ELLEN SCHRECKER, *THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON ACADEMIC FREEDOM AND THE END OF THE AMERICAN UNIVERSITY* (2010). Regarding these issues in Canada, see HOWARD R. WOODHOUSE, *SELLING OUT: ACADEMIC FREEDOM AND THE CORPORATE MARKET* (2009). Regarding these issues in New Zealand, see Cris Shore & Mira Taitz, *Who “Owns” the University? Institutional Autonomy and Academic Freedom in an Age of Knowledge Capitalism*, 10 *GLOB., SOC’IES & EDUC.* 201 (2012). Generally on these issues, see Francine Rochford, *Academic Freedom and the Ethics of Marketing Education*, in *CASES ON INNOVATIONS IN EDUCATIONAL MARKETING: TRANSNATIONAL AND TECHNOLOGICAL STRATEGIES* 160 (Purnendu Tripathi & Siran Mukerji eds., 2011); HANS G. SCHUETZE ET AL., *UNIVERSITY GOVERNANCE AND REFORM: POLICY, FADS, AND EXPERIENCE IN INTERNATIONAL PERSPECTIVE* (Hans G. Schuetze et al. eds., 2012). On “Commercialization as a New Infringement on Academic Freedom,” see William G. Tierney & Michael Lanford, *The Question of Academic Freedom: Universal Right or Relative Term*, 9 *FRONTIERS EDUC. CHINA* 4, 14–18 (2014).

278. Therefore, ironically, although neoliberalism customarily advocates “deregulation,” it has entailed a rise of standards and audits in HE in practice. Frequently, these instruments have awkward consequences for the quality of teaching or research. The national UK research assessment exercises, for example, require submission of a certain number of research outputs. In practice, this has meant an increased “production” of shorter publications on “easy” topics at the expense of more thoroughly researched, longer (including monograph) publications on “more demanding” topics. Research is also required to “have impact” beyond the institutional context. It may well be asked, how it should be shown, for instance, that a feminist critique has actually changed stereotyped attitudes. See generally Susan Wright, *What Counts? The Skewing Effects of Research Assessment Systems*, 29 (spec. ed.) *NORDISK PEDAGOGIK* 18 (2009), on the “skewing effects” of research assessment systems. Also assessments of teaching performance potentially unjustifiably interfere with the right to academic freedom. See, e.g., Wolfram Höfling, *Die Lehrfreiheit: Gefährdungen eines Grundrechts durch die neuere Hochschulrechtentwicklung?*, 41 *WISSENSCHAFTSRECHT* 92 (2008). Although the article deals with the situation in Germany, most of its statements are equally applicable in a more general sense.

279. For a critique of university rankings, see, e.g., Sarah Amsler, *University Ranking: A Dialogue on Turning towards Alternatives*, 13 *ETHICS SCI. ENV’T POL.* 155

disadvantaged backgrounds can still afford good quality higher education. They do not inquire whether academic staff can exercise rights of academic freedom. They assess teaching quality quantitatively, but not by having recourse to scientifically sound qualitative methods. They do not assess whether research addresses "the major questions of humanity" and, moreover, does so in sufficient depth. Instead, the rankings rely upon: the volume of research income scaled against staff numbers; the "number of papers" published in "high-quality peer-reviewed" journals; the "number of citations" of published work; the ability "to help industry with innovations, inventions, and consultancy;" opinion polls of "experienced scholars;"²⁸⁰ and the "satisfaction" of students. On the last point, that of student satisfaction, it may be noted that this criterion, coupled with the fact that students are required to pay ever-increasing fees for their studies, has made them "customers" of HE, quasi-entitled to good marks and a qualification, with corresponding duties on teachers "to deliver," relinquishing the ideal of the student as a mature young adult also bearing responsibilities himself or herself to master the subject.²⁸¹

(2013); Barbara M. Kehm, *Global University Rankings: Impacts and Unintended Side Effects*, 49 EUR. J. EDUC. 102 (2014); Kathleen Lynch, *New Managerialism, Neoliberalism and Ranking*, 13 ETHICS SCI. ENV'T POL. 141 (2013); Brian Pusser & Simon Marginson, *University Rankings in Critical Perspective*, 84 J. HIGH. EDUC. 544 (2013); David Robinson, *The Mismeasure of Higher Education? The Corrosive Effect of University Rankings*, 13 ETHICS SCI. ENV'T POL. 65 (2013); Konstantinos I. Stergiou & Stephan Lessenich, *On Impact Factors and University Rankings: From Birth to Boycott*, 13 ETHICS SCI. ENV'T POL. 101 (2013); Michael Taylor et al., *Rankings Are the Sorcerer's New Apprentice*, 13 ETHICS SCI. ENV'T POL. 73 (2013); Susan Wright, *Ranking Universities within a Globalised World of Competition States: To What Purpose, and with What Implications for Students?*, in UDDANNELSESKVALITET I EN GLOBALISERET VERDEN 81 (Hanne L. Andersen & Jens C. Jacobsen eds., 2012).

280. See *World University Rankings 2013-14 Methodology*, TIMES HIGHER EDUC. (Oct. 1, 2014), <https://www.timeshighereducation.com/world-university-rankings-2013-14-methodology> [<https://perma.cc/L4HW-78V9>] (archived Mar. 24, 2016) (mentioning *inter alia* the stated parameters; detailing "the essential elements in our world-leading formula.").

281. For a critique of the notion of the student as "customer," see, e.g., MIKE MOLESWORTH ET AL., *THE MARKETISATION OF HIGHER EDUCATION AND THE STUDENT AS CONSUMER* (Mike Molesworth et al. eds., 2011); Mark Albanese, *Students Are Not Customers: A Better Model for Medical Education*, 74 ACAD. MED. 1172 (1999); Marcel F. D'Eon & Cille Harris, *If Students Are Not Customers, What Are They?*, 75 ACAD. MED. 1173 (2000); Lynne Eagle & Ross Brennan, *Are Students Customers? TQM and Marketing Perspectives*, 15 QUALITY ASSURANCE EDUC. 44 (2007); Tim Kaye et al., *Criticising the Image of the Student as Consumer: Examining Legal Trends and Administrative Responses in the US and UK*, 18 EDUC. & LAW 85 (2006); Janice A. Newson, *Disrupting the "Student as Consumer" Model: The New Emancipatory Project*, 18 INT'L REL. 227 (2004); Göran Svensson & Greg Wood, *Are University Students Really Customers? When Illusion May Lead to Delusion for All!*, 12 INT'L J. EDUC. MGMT. 17 (2007). See also Dennis Hayes, *Academic Freedom and the Diminished Subject*, 57 BRIT. J. EDUC. STUD. 127, 143-44 (2009) (lamenting that a "diminished" view of humanity in HE institutions has also entailed a "diminished" view of students).

The new model in HE also induces HE institutions to compel academic staff to “deliver” under “target/performance agreements,” as staff output equals revenue. Usually imposed on staff, structured by revenue considerations, and their very premise being that the production of scientific truth can “be planned,” “target/performance agreements” more often than not are highly arbitrary (“*wissenschaftsinadäquat*”).²⁸² It may further be noted that HE institutions these days expect academics to perform so many administrative tasks—preparing budget plans, seeking funding, etc.—that this has left them with less time to do what they do best—teaching and carrying out research.²⁸³

As borne out by the assessment undertaken here, the new model in HE as described above is easiest implemented by engaging “managers” of various sorts “to control” academics/teaching/research, by excluding academic staff from meaningful participation in decision-making, and by introducing “executive-style” management processes in HE. In sum, HE institutions have become subject to various pressures resulting from the new design of HE. Reacting to these pressures, these institutions themselves have become direct violators of academic freedom.

These “developments”—which foreshadow the decline of European universities and other HE institutions as entities of genuine public and social significance along the lines of their U.S. counterparts²⁸⁴—have their basis in legislation designed and

282. Paragraph 47 of the UNESCO Recommendation on “Appraisal” points out that the major function of evaluation must be “the development of individuals in accordance with their interests and capacities,” that it must be based “only on academic criteria of competence,” and that it must “take due account of the difficulty inherent in measuring personal capacity, which seldom manifests itself in a constant and unfluctuating manner,” (§ 47(a)–(c), resp.).

283. See Bennich-Björkman, *supra* note 274, at 352–54.

284. At least, such a “decline” regarding HE in the United States has been held to have taken place. See, e.g., CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM (2010); CHRISTOPHER NEWFIELD, UNMAKING THE PUBLIC UNIVERSITY: THE FORTY-YEAR ASSAULT ON THE MIDDLE CLASS (2008); SCHRECKER, *supra* note 277; see also IVORY TOWER (CNN Films 2014) (produced by Andrew Rossi). A decline of universities has generally been held to have taken place. See, e.g., BILL READINGS, THE UNIVERSITY IN RUINS 21 et seqq., 62 et seqq. (1996) (considering there to have been a paradigm shift from the “university of culture” to that of “excellence,” the latter really being a business corporation); THOMAS DOCHERTY, UNIVERSITIES AT WAR ix (2015) (arguing that there is a war on for the future of the university worldwide, holding that “[m]oney has systematically replaced thought as the key driver and *raison d’être* of [HE] institution’s official existence.”). On the decline of universities in Europe, see, e.g., JOSÉ C. BERMEJO BARRERA, LA AURORA DE LOS ENANOS: DECADENCIA Y CAÍDA DE LAS UNIVERSIDADES EUROPEAS (2007). Specifically regarding universities in France, see, e.g., BEAUD, *supra* note 121, regarding universities in Germany, see, e.g., Barbara Zehnpfennig, *Die Austreibung des Geistes aus der Universität*, 46 WISSENSCHAFTSRECHT 37 (2013), regarding universities in Spain, see, e.g., JESÚS HERNÁNDEZ ALONSO ET AL., LA UNIVERSIDAD CERCADA: TESTIMONIOS DE UN NAUFRAGIO (Jesús Hernández Alonso et al. eds., 2013).

implemented by the state (i.e., they are the consequence of deliberate state action). The state, therefore, "pulling the strings in the background," is the ultimate human rights violator! In fact, the violation of the right to academic freedom has its root causes in the violation by states of another—the overarching—right to education. Article 13 of the International Covenant on Economic, Social and Cultural Rights, read with Article 2(1) of the Covenant, provides for the obligation of states parties—all states examined here having ratified the ICESCR—to take steps to the maximum of their available resources, with a view to progressively making HE available and "equally accessible to all, on the basis of capacity."²⁸⁵ There is an obligation to progressively introduce free HE,²⁸⁶ to actively pursue the development of a system of HE institutions,²⁸⁷ and to continuously improve the material conditions of teaching staff in HE.²⁸⁸

Article 13 should not be understood as merely protecting "a right to receive education." It rather provides the normative basis for a full-fledged, rights-based education system, including in the sphere of HE, also covering the rights of teaching and research staff.²⁸⁹ Consequently, to the extent that states—relying on the maximum of their available resources—are in a position to finance HE in such a way that it can be made available free of charge and that academic staff can properly attend to teaching and carrying out research²⁹⁰—

285. ICESCR, art. 13(1), (2)(c).

286. *Id.* art. 13(2)(c).

287. *Id.* art. 13(2)(e).

288. *Id.* With regard to the UK, the Committee on Economic, Social and Cultural Rights has thus "note[d] with concern that the introduction of tuition fees and student loans, which is inconsistent with article 13, paragraph 2(c) . . . has tended to worsen the position of students from less privileged backgrounds, who are already underrepresented in higher education." Committee on Economic, Social and Cultural Rights, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories, ¶ 225, U.N. Doc. E/2003/22 (2003). On the topic of the legitimacy of study fees in HE in the context of the ICESCR, see generally BEITER, *supra* note 30, at 387–88, 400–01, 458, 526, 572–73, 594, 651.

289. See, for example, BEITER, *supra* note 30, at 460–62, supporting such a wide reading of Article 13 of the ICESCR (citing in support of his view *inter alia* PIUS GEBERT, DAS RECHT AUF BILDUNG NACH ART. 13 DES UNO-PAKTES ÜBER WIRTSCHAFTLICHE, SOZIALE UND KULTURELLE RECHTE UND SEINE AUSWIRKUNGEN AUF DAS SCHWEIZERISCHE BILDUNGSWESEN 286–88 (1996)).

290. The obligation generally to have recourse to resources that are "available" becomes clear from the statement by the Committee on Economic, Social and Cultural Rights (even if made only with regard to free HE) on the report submitted by South Korea, to the effect that in that state party "[o]nly primary education is provided free of charge," but that "given the strength of the Korean economy it appears appropriate that free education should also extend to the . . . higher [sector]." Committee on Economic, Social and Cultural Rights, Concluding Observations: Republic of Korea, ¶ 76, U.N. Doc. E/1996/22 (1996). In the case of the Czech Republic, the Committee referred to the "constant decrease in the budget expenditure allocated to education and

and this may be held to be the case for most of the states examined, keeping in mind that international human rights law envisages general taxation as the principal model for financing education (study, teaching and research) and other rights under the Covenant²⁹¹—they must do so! In such circumstances, the principle of progressive realization, as a matter of principle, forbids cutbacks of standards achieved.²⁹² Hence, state legislation in Europe that compels HE institutions—in their quest of ensuring their financial survival—to violate the right to academic freedom also violates Article 13 of the ICESCR.

Envisaging “a full-fledged, rights-based education system,” Article 13 of the ICESCR does not only address infrastructure, access, and costs. Article 13(1) “recognize[s] the right of everyone to education,” stipulating the primary aim of education to be “the full development of the human personality.”²⁹³ This relates to the quality or content of education provided and, by necessary implication, also to the quality of teaching and research, and, therefore, to the rights and duties of academic staff in this context.²⁹⁴ Nobel Literature laureate John Coetzee remarked that

allowing the transient needs of the economy to define the goals of higher education is a misguided and short-sighted policy: indispensable to a democratic society—indeed, to a vigorous national economy—is a critically

the consequences thereof on the enjoyment of the right to education” and suggested to the Czech Republic that it “consider increasing the budget allocation for education.” Committee on Economic, Social and Cultural Rights, Concluding Observations: Czech Republic, ¶¶ 91, 110, U.N. Doc. E/2003/22 (2003).

291. The former UN Special Rapporteur on the right to education, Katarina Tomaševski, has pointed out that “[i]nternational human rights law assumes that states are both willing and able to generate resources needed for education through general taxation.” KATARINA TOMAŠEVSKI, FREE AND COMPULSORY EDUCATION FOR ALL CHILDREN: THE GAP BETWEEN PROMISE AND PERFORMANCE 21 (Right to Education Primers, No. 2, 2001).

292. This is clearly borne out by Paragraph 14(e) of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997, a document prepared by international experts on human rights and published in 20 HUM. RTS. Q. 691 (1998).

293. See General Comment No. 13, *supra* note 8, ¶ 4; see also BEITER, *supra* note 30, at 470–71.

294. See General Comment No. 13, *supra* note 8, ¶¶ 38–40, in support of the view that Article 13 of the ICESCR covers the right to academic freedom. Observations to the same effect were made by the former UN Special Rapporteur on the right to education, Katarina Tomaševski, in two of her annual reports. Katarina Tomaševski (Special Rapporteur on the Right to Education), *Progress Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted in Accordance with Commission on Human Rights Resolution 1999/25*, ¶¶ 42–44, U.N. Doc. E/CN.4/2000/6 (Feb. 1, 2000); Katarina Tomaševski (Special Rapporteur on the Right to Education), *Annual Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted Pursuant to Commission on Human Rights Resolution 2001/29*, 13, U.N. Doc. E/CN.4/2002/60 (Jan. 7, 2002).

literate citizenry competent to explore and interrogate the assumptions behind the paradigms of national and economic life reigning at any given moment.²⁹⁵

He goes on to point out that it is important to "believe in the humanities and in the university built on humanistic grounds, with philosophical, historical and philological studies as its pillars."²⁹⁶ A HE system that is "the arm of national economic policy," does not value the pursuit and transmission of "knowledge for its own sake" and does not breathe the full spirit of academic freedom can never further "the full development of the human personality" of students. At the same time, it constitutes an assault on the dignity of academics and their profession. But, what is worse, such a HE system ultimately erodes the very foundations of civilized society!

295. John M. Coetzee, *Foreword*, in *ACADEMIC FREEDOM IN A DEMOCRATIC SOUTH AFRICA: ESSAYS AND INTERVIEWS ON HIGHER EDUCATION AND THE HUMANITIES* xi, xii (John Higgins ed., 2014).

296. *Id.* at xiii.

ANNEX: LEGAL PROTECTION OF THE RIGHT TO ACADEMIC FREEDOM IN EUROPE—OVERVIEW OF RESULTS FOR ALL INDICATORS FOR INDIVIDUAL COUNTRIES

Country	A. Ratification of International Agreements and Constitutional Protection					
	1.	1.1.1.	1.1.2.	1.1.3.	1.1.4.	1.2.
	<u>10</u> (Subtotal)	(0-1.5)	(0-1.5)	(0-1.5)	(0-1.5)	(0-4)
1. Austria	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
2.1. Belgium: Flanders	10	(1.5)	(1.5)	(1.5)	(1.5)	(4)
2.2. Belgium: Wallonia	10	(1.5)	(1.5)	(1.5)	(1.5)	(4)
3. Bulgaria	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
4. Croatia	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
5. Cyprus	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
6. Czech Republic	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
7. Denmark	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
8. Estonia	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
9. Finland	10	(1.5)	(1.5)	(1.5)	(1.5)	(4)
10. France	8.5	(1.5)	(1.5)	(1.5)	(1.5)	(4)
11.1. Germany: Bavaria	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
11.2. Germany: N.R.W.	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
12. Greece	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
13. Hungary	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
14. Ireland	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
15. Italy	8.5	(1.5)	(1.5)	(1.5)	(1.5)	(4)
16. Latvia	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
17. Lithuania	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
18. Luxemburg	8.5	(1.5)	(1.5)	(1.5)	(1.5)	(4)
19. Malta	7	(0)	(1.5)	(1.5)	(0)	(4)
20. Netherlands	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
21. Poland	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
22. Portugal	10	(1.5)	(1.5)	(1.5)	(1.5)	(4)
23. Romania	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
24. Slovakia	10	(1.5)	(1.5)	(1.5)	(1.5)	(4)
25. Slovenia	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
26. Spain	10	(1.5)	(1.5)	(1.5)	(1.5)	(4)
27. Sweden	8.5	(1.5)	(1.5)	(1.5)	(0)	(4)
28. U.K.	7	(1.5)	(0)	(1.5)	(0)	(4)

Table continued

Country	A. Ratification of International Agreements and Constitutional Protection (cont.)					
	2.	2.1.	2.2.	2.3.	2.4.	2.5.
	10 (Subtotal)	(0-1-2)	(0-1-2)	(0-0.5-1)	(0-0.5-1)	(0-2-4)
1. Austria	9	(2)	(2)	(1)	(0)	(4)
2.1. Belgium: Flanders	4	(2)	(0)	(0)	(0)	(2)
2.2. Belgium: Wallonia	4	(2)	(0)	(0)	(0)	(2)
3. Bulgaria	9	(2)	(2)	(1)	(0)	(4)
4. Croatia	9	(2)	(2)	(1)	(0)	(4)
5. Cyprus	4	(2)	(0)	(0)	(0)	(2)
6. Czech Republic	7	(2)	(1)	(0)	(0)	(4)
7. Denmark	4	(2)	(0)	(0)	(0)	(2)
8. Estonia	9	(2)	(2)	(1)	(0)	(4)
9. Finland	9	(2)	(2)	(1)	(0)	(4)
10. France	4	(2)	(0)	(0)	(0)	(2)
11.1. Germany: Bavaria	9	(2)	(2)	(0)	(1)	(4)
11.2. Germany: N.R.W.	9	(2)	(2)	(1)	(0)	(4)
12. Greece	7	(1)	(1)	(1)	(0)	(4)
13. Hungary	3	(0)	(1)	(0)	(0)	(2)
14. Ireland	3	(1)	(0)	(0)	(0)	(2)
15. Italy	9	(2)	(2)	(1)	(0)	(4)
16. Latvia	8	(2)	(2)	(0)	(0)	(4)
17. Lithuania	9	(2)	(2)	(1)	(0)	(4)
18. Luxemburg	4	(2)	(0)	(0)	(0)	(2)
19. Malta	4	(2)	(0)	(0)	(0)	(2)
20. Netherlands	4	(2)	(0)	(0)	(0)	(2)
21. Poland	9	(2)	(2)	(1)	(0)	(4)
22. Portugal	10	(2)	(2)	(1)	(1)	(4)
23. Romania	4	(1)	(0)	(1)	(0)	(2)
24. Slovakia	8	(2)	(2)	(0)	(0)	(4)
25. Slovenia	9	(2)	(2)	(1)	(0)	(4)
26. Spain	10	(2)	(2)	(1)	(1)	(4)
27. Sweden	8	(2)	(2)	(0)	(0)	(4)
28. U.K.	4	(2)	(0)	(0)	(0)	(2)

Table continued

Country	<u>B. Express Protection of Academic Freedom in HE Legislation</u>
	10x2
1. Austria	10x2=20
2.1. Belgium: Flanders	5x2=10
2.2. Belgium: Wallonia	5x2=10
3. Bulgaria	7.5x2=15
4. Croatia	10x2=20
5. Cyprus	5x2=10
6. Czech Republic	7.5x2=15
7. Denmark	2.5x2=5
8. Estonia	0
9. Finland	7.5x2=15
10. France	10x2=20
11.1. Germany: Bavaria	7.5x2=15
11.2. Germany: N.R.W.	10x2=20
12. Greece	2.5x2=5
13. Hungary	2.5x2=5
14. Ireland	7.5x2=15
15. Italy	5x2=10
16. Latvia	10x2=20
17. Lithuania	10x2=20
18. Luxemburg	7.5x2=15
19. Malta	0
20. Netherlands	5x2=10
21. Poland	5x2=10
22. Portugal	5x2=10
23. Romania	7.5x2=15
24. Slovakia	10x2=20
25. Slovenia	2.5x2=5
26. Spain	7.5x2=15
27. Sweden	2.5x2=5
28. U.K.	2.5x2=5

Table continued

Country	C. Protection of Institutional Autonomy in HE Legislation					
	1.	2.	2.1.1.	2.1.2.	2.2.1.	2.2.2.
	<u>4</u> (0-2-4)	<u>8</u> (Subtotal)	(0-0.5-1)	(0-0.5-1)	(0-0.5-1)	(0-0.5-1)
1. Austria	2	6	(1)	(1)	(1)	(1)
2.1. Belgium: Flanders	2	4.5	(1)	(1)	(1)	(0.5)
2.2. Belgium: Wallonia	2	2.5	(0)	(1)	(0.5)	(0.5)
3. Bulgaria	4	3	(1)	(0)	(0.5)	(1)
4. Croatia	4	5	(1)	(0.5)	(0.5)	(1)
5. Cyprus	2	2	(1)	(0)	(0)	(0.5)
6. Czech Republic	4	2	(0)	(0.5)	(0.5)	(0.5)
7. Denmark	2	5	(1)	(1)	(1)	(1)
8. Estonia	2	6.5	(1)	(1)	(1)	(1)
9. Finland	4	7	(1)	(1)	(0.5)	(1)
10. France	2	3	(1)	(0.5)	(0.5)	(1)
11.1. Germany: Bavaria	2	1.5	(0)	(0)	(0.5)	(1)
11.2. Germany: N.R.W.	2	5	(1)	(1)	(1)	(1)
12. Greece	2	0.5	(0)	(0)	(0)	(0.5)
13. Hungary	0	2.5	(0)	(0.5)	(0.5)	(0.5)
14. Ireland	2	6.5	(1)	(1)	(1)	(0.5)
15. Italy	2	3	(0)	(0.5)	(1)	(0.5)
16. Latvia	2	4	(0)	(1)	(0.5)	(1)
17. Lithuania	4	5	(1)	(1)	(0.5)	(1)
18. Luxemburg	2	5	(0)	(0)	(1)	(1)
19. Malta	2	6.5	(1)	(0.5)	(0.5)	(0.5)
20. Netherlands	2	5	(0.5)	(0.5)	(1)	(0.5)
21. Poland	2	5.5	(1)	(1)	(0.5)	(1)
22. Portugal	4	3	(0.5)	(0.5)	(0.5)	(1)
23. Romania	4	2	(0)	(0)	(0.5)	(1)
24. Slovakia	4	2.5	(0)	(0.5)	(0.5)	(1)
25. Slovenia	2	4.5	(1)	(1)	(0.5)	(0.5)
26. Spain	4	2.5	(0)	(0)	(1)	(1)
27. Sweden	2	4.5	(0)	(1)	(0.5)	(0.5)
28. U.K.	2	7.5	(1)	(1)	(1)	(0.5)

Table continued

Country	C. Protection of Institutional Autonomy in HE Legislation (cont.)				
	2.3.	2.4.1.	2.4.2.	3.	4.
	(0-1-2)	(0-0.5-1)	(0-0.5-1)	$\frac{4}{(0-2-4)}$	$\frac{4}{(0-2-4)}$
1. Austria	(1)	(0)	(1)	2	2
2.1. Belgium: Flanders	(1)	(0)	(0)	4	0
2.2. Belgium: Wallonia	(0)	(0)	(0.5)	2	0
3. Bulgaria	(0)	(0.5)	(0)	2	0
4. Croatia	(0)	(1)	(1)	2	2
5. Cyprus	(0)	(0.5)	(0)	2	2
6. Czech Republic	(0)	(0.5)	(0)	2	0
7. Denmark	(1)	(0)	(0)	0	2
8. Estonia	(1)	(1)	(0.5)	2	0
9. Finland	(2)	(1)	(0.5)	4	0
10. France	(0)	(0)	(0)	2	0
11.1. Germany: Bavaria	(0)	(0)	(0)	2	0
11.2. Germany: N.R.W.	(1)	(0)	(0)	2	4
12. Greece	(0)	(0)	(0)	2	0
13. Hungary	(0)	(1)	(0)	0	0
14. Ireland	(1)	(1)	(1)	4	0
15. Italy	(0)	(1)	(0)	2	2
16. Latvia	(1)	(0.5)	(0)	4	0
17. Lithuania	(1)	(0.5)	(0)	2	0
18. Luxemburg	(1)	(1)	(1)	2	0
19. Malta	(2)	(1)	(1)	2	0
20. Netherlands	(2)	(0.5)	(0)	2	0
21. Poland	(1)	(0.5)	(0.5)	2	0
22. Portugal	(0)	(0.5)	(0)	2	0
23. Romania	(0)	(0.5)	(0)	2	0
24. Slovakia	(0)	(0.5)	(0)	2	0
25. Slovenia	(1)	(0.5)	(0)	2	0
26. Spain	(0)	(0.5)	(0)	2	0
27. Sweden	(2)	(0.5)	(0)	0	0
28. U.K.	(2)	(1)	(1)	4	0

Table continued

Country	D. Protection of Academic Self-Governance in HE Legislation					
	1.	2.	2.1.	2.2.1.	2.2.2.	2.2.3.
	<u>2</u> (0-1-2)	<u>12</u> (Subtotal)	(0-1.5-3)	(0-0.5-1)	(0-0.5-1)	(0-0.5-1)
1. Austria	1	7	(3)	(0)	(0.5)	(0.5)
2.1. Belgium: Flanders	0	6	(0)	(1)	(0.5)	(0)
2.2. Belgium: Wallonia	0	8	(1.5)	(1)	(0.5)	(0.5)
3. Bulgaria	1	9.5	(1.5)	(1)	(0.5)	(0.5)
4. Croatia	1	9.5	(1.5)	(1)	(0.5)	(0.5)
5. Cyprus	0	7.5	(3)	(1)	(0.5)	(0)
6. Czech Republic	1	7	(1.5)	(0)	(0.5)	(0.5)
7. Denmark	1	3.5	(1.5)	(0.5)	(0)	(0)
8. Estonia	0	3.5	(0)	(0.5)	(0)	(0)
9. Finland	0	2	(0)	(0.5)	(0)	(0)
10. France	1	3.5	(0)	(0.5)	(0)	(0)
11.1. Germany: Bavaria	2	6	(1.5)	(0.5)	(0.5)	(0.5)
11.2. Germany: N.R.W.	2	7	(1.5)	(0)	(0.5)	(0.5)
12. Greece	0	7	(1.5)	(0.5)	(0.5)	(0)
13. Hungary	0	9	(3)	(0.5)	(0.5)	(0.5)
14. Ireland	0	3	(1.5)	(0)	(0)	(0)
15. Italy	0	6	(3)	(0.5)	(0.5)	(0.5)
16. Latvia	2	7	(1.5)	(0.5)	(0.5)	(0)
17. Lithuania	1	5	(0)	(0.5)	(0)	(0)
18. Luxemburg	0	3.5	(1.5)	(0.5)	(0)	(0)
19. Malta	0	3	(1.5)	(0)	(0)	(0)
20. Netherlands	1	3	(0)	(0)	(0)	(0)
21. Poland	1	9	(1.5)	(1)	(0)	(0.5)
22. Portugal	1	9	(1.5)	(0.5)	(0.5)	(0.5)
23. Romania	1	8	(1.5)	(0.5)	(0.5)	(1)
24. Slovakia	1	8.5	(1.5)	(0)	(0.5)	(0.5)
25. Slovenia	0	7	(1.5)	(0)	(1)	(0)
26. Spain	0	8.5	(3)	(1)	(0.5)	(1)
27. Sweden	0	3	(1.5)	(0)	(0)	(0)
28. U.K.	0	0	(0)	(0)	(0)	(0)

Table continued

Country	D. Protection of Academic Self-Governance in HE Legislation (cont.)			
	2.3.	3.	3.1.1.	3.1.2.
	(0-1.5-3-4.5-6)	6 (Subtotal)	(0-0.5-1)	(0-1-2)
1. Austria	(3)	1	(0)	(0)
2.1. Belgium: Flanders	(4.5)	1	(1)	(0)
2.2. Belgium: Wallonia	(4.5)	0	(0)	(0)
3. Bulgaria	(6)	4	(1)	(1)
4. Croatia	(6)	3.5	(1)	(1)
5. Cyprus	(3)	5	(1)	(2)
6. Czech Republic	(4.5)	3	(1)	(1)
7. Denmark	(1.5)	2	(0.5)	(1)
8. Estonia	(3)	1	(1)	(0)
9. Finland	(1.5)	1	(1)	(0)
10. France	(3)	2	(1)	(0)
11.1. Germany: Bavaria	(3)	4	(1)	(1)
11.2. Germany: N.R.W.	(4.5)	3.5	(1)	(1)
12. Greece	(4.5)	3.5	(1)	(1)
13. Hungary	(4.5)	0	(0)	(0)
14. Ireland	(1.5)	0	(0)	(0)
15. Italy	(1.5)	2	(1)	(1)
16. Latvia	(4.5)	1.5	(1)	(0)
17. Lithuania	(4.5)	0	(0)	(0)
18. Luxemburg	(1.5)	2.5	(1)	(0)
19. Malta	(1.5)	3	(1)	(1)
20. Netherlands	(3)	1.5	(1)	(0)
21. Poland	(6)	2.5	(1)	(1)
22. Portugal	(6)	1.5	(0.5)	(1)
23. Romania	(4.5)	3.5	(1)	(1)
24. Slovakia	(6)	3	(1)	(1)
25. Slovenia	(4.5)	4	(1)	(1)
26. Spain	(3)	3.5	(1)	(1)
27. Sweden	(1.5)	0	(0)	(0)
28. U.K.	(0)	0	(0)	(0)

Table continued

Country	D. Protection of Academic Self-Governance in HE Legislation (cont.)		
	3.2.1.	3.2.2.	3.2.3.
	(0-0.5-1)	(0-0.5-1)	(0-0.5-1)
1. Austria	(0.5)	(0.5)	(0)
2.1. Belgium: Flanders	(0)	(0)	(0)
2.2. Belgium: Wallonia	(0)	(0)	(0)
3. Bulgaria	(1)	(0.5)	(0.5)
4. Croatia	(0.5)	(0.5)	(0.5)
5. Cyprus	(1)	(1)	(0)
6. Czech Republic	(0)	(0.5)	(0.5)
7. Denmark	(0.5)	(0)	(0)
8. Estonia	(0)	(0)	(0)
9. Finland	(0)	(0)	(0)
10. France	(1)	(0)	(0)
11.1. Germany: Bavaria	(1)	(0.5)	(0.5)
11.2. Germany: N.R.W.	(0.5)	(0.5)	(0.5)
12. Greece	(1)	(0.5)	(0)
13. Hungary	(0)	(0)	(0)
14. Ireland	(0)	(0)	(0)
15. Italy	(0)	(0)	(0)
16. Latvia	(0)	(0.5)	(0)
17. Lithuania	(0)	(0)	(0)
18. Luxemburg	(1)	(0.5)	(0)
19. Malta	(0.5)	(0.5)	(0)
20. Netherlands	(0.5)	(0)	(0)
21. Poland	(0.5)	(0)	(0)
22. Portugal	(0)	(0)	(0)
23. Romania	(0.5)	(0.5)	(0.5)
24. Slovakia	(0)	(0.5)	(0.5)
25. Slovenia	(1)	(1)	(0)
26. Spain	(1)	(0.5)	(0)
27. Sweden	(0)	(0)	(0)
28. U.K.	(0)	(0)	(0)

Table continued

Country	E. Job Security (including "Tenure") in Relevant Legislation		
	1.	1.1.	1.2.
	8 (Subtotal)	(0-2-4)	(0-2-4)
1. Austria	2	(2)	(0)
2.1. Belgium: Flanders	4	(4)	(0)
2.2. Belgium: Wallonia	4	(4)	(0)
3. Bulgaria	8	(4)	(4)
4. Croatia	0	(0)	(0)
5. Cyprus	4	(2)	(2)
6. Czech Republic	2	(0)	(2)
7. Denmark	4	(2)	(2)
8. Estonia	0	(0)	(0)
9. Finland	0	(0)	(0)
10. France	8	(4)	(4)
11.1. Germany: Bavaria	2	(2)	(0)
11.2. Germany: N.R.W.	2	(2)	(0)
12. Greece	8	(4)	(4)
13. Hungary	8	(4)	(4)
14. Ireland	6	(2)	(4)
15. Italy	4	(2)	(2)
16. Latvia	0	(0)	(0)
17. Lithuania	2	(2)	(0)
18. Luxemburg	2	(2)	(0)
19. Malta	4	(0)	(4)
20. Netherlands	4	(0)	(4)
21. Poland	2	(0)	(2)
22. Portugal	6	(4)	(2)
23. Romania	4	(2)	(2)
24. Slovakia	0	(0)	(0)
25. Slovenia	6	(2)	(4)
26. Spain	8	(4)	(4)
27. Sweden	4	(2)	(2)
28. U.K.	4	(0)	(4)

Table continued

Country	E. Job Security (including "Tenure") in Relevant Legislation			
	(cont.)			
	2.	2.1.	2.2.	3.
\bar{x} (Subtotal)	$(0-1.5-3)$	$(0-1.5-3)$	\bar{x} $(0-1.5-3-4.5-6)$	
1. Austria	1.5	(1.5)	(0)	1.5
2.1. Belgium: Flanders	3	(1.5)	(1.5)	3
2.2. Belgium: Wallonia	3	(1.5)	(1.5)	1.5
3. Bulgaria	1.5	(1.5)	(0)	0
4. Croatia	4.5	(1.5)	(3)	0
5. Cyprus	3	(1.5)	(1.5)	3
6. Czech Republic	0	(0)	(0)	0
7. Denmark	0	(0)	(0)	1.5
8. Estonia	1.5	(0)	(1.5)	0
9. Finland	3	(1.5)	(1.5)	0
10. France	4.5	(1.5)	(3)	3
11.1. Germany: Bavaria	4.5	(1.5)	(3)	1.5
11.2. Germany: N.R.W.	4.5	(1.5)	(3)	1.5
12. Greece	6	(3)	(3)	6
13. Hungary	0	(0)	(0)	0
14. Ireland	4.5	(1.5)	(3)	0
15. Italy	4.5	(1.5)	(3)	3
16. Latvia	3	(0)	(3)	0
17. Lithuania	3	(0)	(3)	0
18. Luxemburg	1.5	(0)	(1.5)	0
19. Malta	1.5	(0)	(1.5)	3
20. Netherlands	1.5	(0)	(1.5)	1.5
21. Poland	3	(1.5)	(1.5)	0
22. Portugal	4.5	(1.5)	(3)	0
23. Romania	1.5	(1.5)	(0)	0
24. Slovakia	1.5	(0)	(1.5)	0
25. Slovenia	3	(0)	(3)	1.5
26. Spain	3	(1.5)	(1.5)	0
27. Sweden	3	(0)	(3)	1.5
28. U.K.	1.5	(1.5)	(0)	0
