

SCRAPPED ACADEMIC FREEDOM TO TRANSGRESSED CONSTITUTIONALISM: THE LEX CEU IN HUNGARY

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ABSTRACT

Narrowing the academic space of Central European University (CEU) by the 'Lex CEU' in 2017 and onwards, the Hungarian Government has impeded directly the constitutional right to academic freedom, and transgressed the bounds of constitutionalism, especially in terms of the legislative process and judicial restraints. The legislatures, executives and judiciary of Government acted as a joint force in ravaging the academic activities of CEU that has already been a reliable hub embarking a plausible transformation in both academic and socio-political aspects in Central and Eastern Europe. This research article aims at examining the intrusion on constitutionalism in Hungary connecting the breach of constitutional commitment of 'academic freedom of CEU' with the enactment of Lex CEU which is a legislative instrument of an irregular mode, and the judicial review the Constitutional Court of Hungary turned ineffective against the enactment. Throughout this academic research paper, the encroachment upon the academic freedom considered as the transgression of substantive constitutionalism has been investigated exploring the liberating force of academic freedom and CEU in building the open, liberal and democratic society in Hungary and beyond. While locating the breach of academic freedom as a deviation of substantive constitutionalism, the research has been further directed to unpack the impetus of offended procedural constitutionalism encompassing the irregular law-making and non-functioning of the Hungarian Constitutional Court while dealing with the review petition.

I. INTRODUCTION

The Court of Justice of European Union (CJEU) has recently that 'Lex CEU', amendment to National Higher Education Act, 2011 (NEHA) contradicts Hungary's World Trade Organization (WTO) commitments and the European Union's Charter of Fundamental Rights' provision of academic freedom in a lawsuit brought by the European Commission in 2018.¹ The defeasance of the illiberal Hungarian government in the said legal battle has not only unearthed their breach of academic freedom and the pledge of supra-legal rules, but the crisis that has extended further to the loss of constitutionalism nationally. More

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¹ *Commission vs. Hungary* Case C-66/18 (Court of Justice of the European Union PRESS RELEASE No 125/20 Luxembourg (October 06, 2020).

specifically, along with the encroachment on the autonomy and independence of higher education, especially the CEU, a renowned and promising academic hub located in Central Europe, the irregular legislative process and the omission of the Hungarian Constitutional Court (CC) in exercising judicial review jurisdiction have alarmingly undermined the essence of constitutionalism in Hungary. No doubt, the rightist authoritarian wave curving constitutionalism has been an appalling threat to the postmodern wave of democratization.² In that continuity, the recent attack of Hungarian government condensing the academic space and freedom CEU has provoked to embark an academic research on the erosion of constitutionalism thereto.

Narrowing the academic space of CEU in 2017 onwards, Hungarian Government has eventually downsized the kernels of constitutionalism by violating the constitutional right to academic freedom, and interrupted tacitly the overall constitutional development in Hungary. The expedition of illiberal constitutionalism in Hungary since its adoption of the new constitution in 2011, the conservative rightist government has been shaping all the lego-political events under the demise of constitutionalism, and leaving the fundamental rights insecure and the constitutional institutions either malfunctioning or inoperative. The legal enactments, executive actions and judicial decisions are being abused to legalise the politics over constitutional force in Hungary. In particular, the preceding governmental instruments too often have affected the constitutional freedoms of people, accommodative nationalities, inclusive and regular law-making process, independence of judiciary and so on.³ Constitutional spirit reflected in the fundamental rights and the rule of law guided by constitutionalism is seemingly undermined by the legislative and judicial instruments.⁴ When the constitutional bodies or governmental organs should practise within the constitutional limits imposed by the constitution itself, they have reversely constrained the growth of constitutionalism while subverted the constitutional academic freedom substantively and the required protection thereafter procedurally.

The legislatures, executives and judiciary in Hungary have been blurred in ravaging the academic freedom of CEU that has already been a reliable educational hub embarking towards a plausible transformation in socio-political aspects in Central and Eastern Europe. This research article aims at examining the obstruction of constitutional development in Hungary connecting the breach

² Enyedi, Z., "Right-wing authoritarian innovations in Central and Eastern Europe", 36(3) (2020) *East European Politics*, pp. 363-377.

³ Amnesty International, "Defending Rule of Law in Hungary", (29 September, 2020), available at <https://www.amnesty.eu/news/defending-rule-of-law-in-hungary/> (Last visited on March 11, 2021).

⁴ European Commission, "Rule of Law Report- 'Country Chapter on the rule of law situation in Hungary'", 316 final, 2020, Brussels, pp. 1-25.

of constitutional commitment of ‘academic freedom of CEU’ with the tailor-made enactment of Lex CEU⁵ which is a legislative instrument of an irregular procedure, and the unconstitutional approach of the CC in delaying and suspending the review of judicial petition against the enactment. Ignoring the extensive role of academia in reconstructing the political society, how a European state has engaged all the vital actors and apparatuses to erode academic freedom will be explained in this research article. In doing so, started with the understanding of the impact of academia in a political society, the encroachment upon academic freedom considered as the transgression of substantive constitutionalism will be investigated exploring the liberating force of CEU in building the open, liberal and democratic society in Hungary. Furthermore, in locating the transgression of procedural propriety towards constitutionalism, the paper will be directed to unpack the debate about the legislative process of the disputed legal enactment, and the (mal) function of the CC in dealing with the review petition.

II. IMPACT OF ACADEMIA IN SHAPING POLITICAL SOCIETY

Western education classically started from Athens aimed at cultivating *arête* (excellence of any kind) among the citizens in their city-states.⁶ Exploring the features and purposes of city-states and the impacts of education thereto, Freeman noted “its future depends on the character of citizens. The real national education of Sparta and Athens was dedicated to cultivate the character of its future citizens, once it was needed.”⁷ Illustratively, Plato’s ‘Academy’ and Aristotle’s ‘Lyceum’ and their contribution to socio-political construction of the then society can be used to substantiate the argument as these ancient academic institutions enlightened people not for their personal development, instead they paved effort to educate citizens socially and politically whereas they had to participate in governance and characterize their statehood.⁸ Plato’s Academy, precisely, endeavoured for educating a generation to express the dissenting opinion against the stereo-type of Athens *polis* and protested the direct participation of mass *viz-a-viz* their popular regimes.⁹ Institutional theories argue that the vision and mission of world-society were organised with the standardized

⁵ A set of amendments brought to the National Higher Education Act, 2011 (NEHA) at the end of March 2017.

⁶ Zovko, M. E. and Dillon, J. “Humanism vs. Competency: Traditional and contemporary models of education”, 50(6) (2018) *Educational Philosophy and Theory*, pp. 554- 564.

⁷ Freeman, J. K., *School of Hellas: An Essay on the Practice and Theory of Ancient Greek Education from 600 to 300 BC*, McMillan & Co, London, 2013, at p. 228.

⁸ Mingqin, W., Jing, S., and Yuanping, S., “Research on the Higher Education Ideas in Ancient Greece and Its Modern Values”, *Cross-cultural Communication*, 11(8)(2015) pp. 11-14, at p. 12.

⁹ Ober, J., *Political Dissent in Democratic Athens: Intellectual Critics of Popular Rule*, Princeton University Press, 2001, at p. 43.