

RETROGRESSION IN THE LEGAL PROTECTION OF THE RIGHT TO ACADEMIC FREEDOM IN EUROPE

Klaus D. Beiter*

Associate Professor, Faculty of Law, North-West
University (Potchefstroom Campus), South Africa

Klaus.Beiter@nwu.ac.za

Terence Karran

Professor of Higher Education Policy, School of
Education, University of Lincoln, U.K.

TerenceK@lincoln.ac.uk

Kwadwo Appiagyei-Atua

Senior Lecturer, School of Law, University of Ghana

KAppiagyeiAtua@ug.edu.gh

*The author wishes to thank the EU for its award of a Marie Curie Intra-European Fellowship under its 7th Framework Programme for research funding, enabling the author to work on the project "Safeguarding Academic Freedom in Europe" at the University of Lincoln, U.K.

Abstract

This article assesses to what extent the right to academic freedom as construed in terms of international human rights law, specifically UNESCO's *Recommendation on the Status of Higher-Education Teaching Personnel* of 1997, is protected in the law of the 28 Member States of the European Union. It determines the elements of this right, to then operationalise these by way of indicators accorded numeric values in order to assess state compliance and rank states in terms of their performance. The article shows that there is retrogression in Europe insofar as the legal protection of the right to academic freedom is concerned. Institutional autonomy is being misconstrued, academic self-governance denied and job security eroded. These developments appear to be the result of deliberate policy decisions by EU Member States seeking to make higher education "the arm of national economic policy," so as to ensure higher education will contribute to national GDP.

1. Introduction

This article builds on earlier research where a preliminary comparative analysis of the right to academic freedom in Europe was undertaken based on parameters of measurement drawn from UNESCO's *Recommendation concerning the Status of Higher-Education Teaching Personnel* of 1997.¹ Since then, there have been significant changes in the legislation on higher education ("HE") in many European countries, enhancing levels of autonomy (or, what policy-makers consider to constitute autonomy) of HE institutions, and limiting the extent to which academic staff are involved in the management of institutions, reducing the scope of their participation in strategic decision-making, while increasing that of rectors, deans, heads of departments, and external "experts." Moreover, the law regulating conditions of employment for academic staff in HE is increasingly guided by notions of "flexibilisation," legitimising the conclusion of fixed-term service contracts (without long-term perspectives) also at post-entry levels of the academic career and, further, the termination of service contracts on operational grounds without restraint. It appears paradoxical therefore that national constitutions and HE laws continue to emphasise the importance of the right to academic freedom. These circumstances call for a

¹ See Terence Karran, "Academic Freedom in Europe: A Preliminary Comparative Analysis", *Higher Education Policy* 20 (2007), pp. 289–313; Terence Karran, "Academic Freedom in Europe: Reviewing UNESCO's *Recommendation*", *British Journal of Educational Studies* 57 (2009), pp. 191–215.

renewed assessment of the state of health of the right to academic freedom in Europe in the light of UNESCO's Recommendation.

This article relies on the following five parameters of the right to academic freedom:

1. Ratification of relevant international agreements and constitutional protection;
2. Express protection of academic freedom in HE legislation;
3. Protection of institutional autonomy in HE legislation;
4. Protection of academic self-governance in HE legislation; and
5. Protection of job security (including "tenure") in relevant legislation.

The analysis also uses a set of specific human rights-based indicators, spread over the five main categories of assessment, to measure compliance by individual states. A numeric value has been accorded to each indicator. Adding up the scores of states for each of these values makes it possible to rank states according to five core aspects as well as their overall protection of the right to academic freedom.

Our article examines the *legal* protection of the right to academic freedom in Europe, i.e. its protection in the legislation of the 28 EU Member States.² The *factual* protection of the right – *inter alia* as a

²For detailed accounts of the results, see Klaus D. Beiter, Terence Karran & Kwadwo Appiagyei-Atua, "'Measuring' the Erosion of Academic Freedom as an International Human Right: A Report on the Legal Protection of Academic Freedom in Europe", *Vanderbilt Journal of Transnational Law* 49 (2016), pp. 597–691 and, by the same authors, "Academic Freedom and Its Protection in the Law of

result of institutional, faculty and/or departmental regulations, policies and customs – will be analysed in subsequent publications, relying primarily on the results of an online survey on academic freedom, open for participation by academic staff in Europe since 2015 until further notice.³

2. The right to academic freedom: International human rights law and UNESCO's 1997 Recommendation

With regard to HE teaching personnel, UNESCO defines “academic freedom” as

the right [of such personnel], without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and 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.⁴

Besides these teaching and research freedoms, “academic freedom” includes at least three other aspects: self-governance by the academic

European States: Measuring an International Human Right”, *European Journal of Comparative Law and Governance* 3 (2016), pp. 254–345.

³ The survey is accessible at

<https://www.surveymonkey.com/s/AcademicFreedomSurvey>.

⁴ UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* (1997), para. 27 [hereinafter (the) (UNESCO) Recommendation].

community, employment security (including “tenure”) and the autonomy of HE institutions. The various rights thus entailed by “academic freedom” must, however, be interpreted in the light of special duties and responsibilities for staff and students, and the fact that a proper balance between the level of autonomy enjoyed by HE institutions and their systems of accountability should be ensured. All these elements together make up what may be termed “the right to academic freedom.”⁵

Over twenty years ago Manfred Nowak argued that international law has largely neglected the topic of academic freedom and institutional autonomy.⁶ This remains true today to the extent that international “hard” law (i.e. treaties legally binding on states parties thereto) is concerned. The right to academic freedom, as such, is not protected in the two U.N. human rights covenants – the 1966 *International Covenant on Civil and Political Rights* (“ICCPR”) and the 1966 *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) – or in any other binding instrument of international law at the global or regional level. Certain provisions of

⁵For analyses of the right to academic freedom and its constituent elements, see, e.g., Terence Karran, “Academic Freedom in Europe: Time for a Magna Charta?”, *Higher Education Policy* 22 (2009), pp. 163–89; André Prüm & Rusen Ergec, “La liberté académique”, *Revue du droit public et de la science politique en France et à l'étranger* No. 1 (2010), pp. 3–28; Jogchum Vrielink et al., *Academic Freedom as a Fundamental Right* (League of European Research Universities, Advice Paper No. 6, Dec. 2010). See also U.N., Committee on Economic, Social and Cultural Rights, General Comment No. 13, The Right to Education (Art. 13 ICESCR), U.N. Doc. E/C.12/1999/10, paras. 38–40.

⁶Manfred Nowak, “The Right to Education”. In: Asbjørn Eide et al. (eds.), *Economic, Social and Cultural Rights: A Textbook*. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995, pp. 209–10.

the various human rights treaties may, however, be relied on to protect certain aspects of the right to academic freedom.⁷ Focusing specifically on the U.N. human rights covenants, three Covenant provisions provide protection for the right to academic freedom more comprehensively: Article 19 ICCPR on the right to freedom of opinion and expression, Article 15 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 ICESCR on the right to education.⁸

In 1997, UNESCO adopted the *Recommendation concerning the Status of Higher-Education Teaching Personnel*. With its goal of improving the professional, material and social position of HE teaching personnel, it also aimed to enhance the quality of the HE system.⁹ Although the Recommendation is not “an international instrument on academic freedom,” guaranteeing academic freedom in HE is a fundamental concern of the document. Various provisions of the Recommendation address aspects of academic freedom. As these constitute the most current expression of agreed international

⁷ See Robert Quinn & Jesse Levine, “Intellectual-HRDs and Claims for Academic Freedom under Human Rights Law”, *International Journal of Human Rights* 18 (2014), pp. 902–12.

⁸ 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”, *Intercultural Human Rights Law Review* 11 (2016), pp. 107–90.

⁹ 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*. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 280.

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, since they have been adopted by the General Conference of UNESCO, they must be considered to reflect an international consensus on the specific subject matter dealt with. Recommendations "have a normative character in their intent and effects and the States concerned regard them as political or moral commitments."¹⁰ Supervision of the Recommendation's implementation by UNESCO Member States is entrusted to a Joint ILO/UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel ("CEART"), a body composed of twelve independent experts – six appointed by UNESCO, six by the ILO.

3. Developing a standard scorecard "to measure" the right to academic freedom in Europe

3.1. The "legal" protection of the right to academic freedom: The requirement of legislation

The Human Rights Committee, the body supervising implementation of the ICCPR, stressed 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

¹⁰ Yve Daudet & Kishore Singh, *The Right to Education: An Analysis of UNESCO's Standard-Setting Instruments*. Paris: UNESCO, 2001, p. 45.

and practices as are necessary to ensure their conformity with the Covenant.”¹¹ Likewise, the Committee on Economic, Social and Cultural Rights, the body supervising implementation of the ICESCR, entertains the view that, in realising rights under the ICESCR, “in many instances legislation is highly desirable and in some cases may even be indispensable.”¹² Although the Covenants do not *unequivocally* make the adoption of legislation mandatory, these Committee statements suggest that – to secure the effective realisation of human rights and to respect fundamental principles of democracy – all salient elements in the definition of the various human rights, the general framework authorising measures aimed at fulfilling them and possible limitations of those rights be contained in legislation adopted by national parliaments. Subordinate legislation as adopted by executive/administrative organs of state may then “add flesh to the bones” and operationalise the norms contained in primary legislation, but cannot substitute a “stable” legislative framework where it is mandatory. This article will assess whether states have complied with the requirement of adopting legislation protecting the different aspects of the right to academic freedom, applying the stated standards in respect of “legislation.”

¹¹ U.N., Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 13.

¹² U.N., Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of States Parties’ Obligations (Art. 2(1) ICESCR), U.N. Doc. E/1991/23, Annex III, 86 (1991), para. 3.

3.2. 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 present purposes, be divided into four groups:

1. Provisions on individual rights and freedoms in Paragraphs 25 to 30, including "the principle of academic freedom" (para. 27);
2. Provisions on institutional autonomy in Paragraphs 17 to 21;
3. Provisions on self-governance and collegiality in Paragraphs 31 and 32; and
4. Provisions on security of employment, including "tenure or its functional equivalent, where applicable," in Paragraphs 45 and 46.

Together these elements may be stated to make up "the right to academic freedom." A few words should be said with regard to each of the aspects protected, starting with "the principle of *academic freedom*." Scholars have been described as "dangerous" minds.¹³ 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."¹⁴ For this reason, advances in HE depend not only on infrastructure and resources, but need to be underpinned by academic

¹³ Robert Quinn, "Defending 'Dangerous' Minds: Reflections on the Work of the Scholars at Risk Network", *Items & Issues* 5 (2004), pp. 1–5.

¹⁴ Karran (2009), *supra* note 1, at p. 191.

freedom (para. 5). HE teaching personnel thus “have a right to carry out research work without any interference, or any suppression, ... subject to ... recognised professional principles of intellectual rigour, scientific inquiry and research ethics.” They “should also have the right to publish and communicate the conclusions of the research of which they are authors or co-authors” (para. 29). 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” (para. 28). Academic freedom is subject to important duties and responsibilities, as described in Paragraphs 33 to 36.

UNESCO Member States are obliged “to protect higher education institutions from threats to their autonomy coming from any source” (para. 19). Threats need not, therefore, necessarily emanate from the state, but they may also, for example, originate with private actors such as private companies commissioning research. *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 consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights” (para. 17). 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 freedom¹⁵ – thus the UNESCO Recommendation’s stress that institutional autonomy must be understood to mean autonomy “consistent with ... respect for academic freedom.” The Recommendation understands autonomy as “the institutional form of academic freedom” (para. 18). 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” (para. 20). As indicated, autonomy is to go hand in hand with principles of public accountability, as described in Paragraphs 22 to 24.

HE institutions must organise themselves in a way as will guarantee that decisions taken by persons/organs will be “in the best interest of science and scholarship,” notably by promoting academic freedom. This implicates a form of organisation in terms of which academics can *sufficiently participate* in the taking of these decisions. Clearly, by virtue of their training and competence, academics are best qualified to ensure that decisions taken are “in the best interest of science and scholarship” and support academic freedom.¹⁶ UNESCO’s Recommendation contains provisions on self-governance and collegiality. *Self-governance* entails that HE teaching personnel should have the right “without discrimination of any kind,

¹⁵ Pavel Zgaga, “Reconsidering University Autonomy and Governance: From Academic Freedom to Institutional Autonomy”. In: Hans G. Schuetze et al. (eds.), *University Governance and Reform: Policy, Fads, and Experience in International Perspective*. New York: Palgrave Macmillan, 2012, p. 19.

¹⁶ For this line of reasoning, see the *Hamburgisches Hochschulgesetz* case, Judgement of 20 July 2010, Fed. Const. Ct., Fed. Rep. of Germany, BVerfGE 127, 87, paras. 88–95.

according to their abilities, to take part in the governing bodies and to criticise 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” (para. 31). 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.” 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” (para. 32). The Recommendation further stresses that “[s]elf-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education” (para. 21).

Finally, UNESCO’s Recommendation emphasises that HE teaching personnel should enjoy *security of employment, including “tenure or its functional equivalent, where applicable.”* In the Recommendation’s perception, tenure (or its equivalent) “constitutes one of the major procedural safeguards of academic freedom and against arbitrary decisions” (para. 45). Tenure protects academic freedom by ensuring that academics can engage in a free search for the truth without having to fear losing their jobs, for example, because

of the views expressed.¹⁷ Tenure and academic freedom are closely linked to scholars' responsibility for promoting the interests of society as a whole through their teaching and research.¹⁸ Paragraph 46 of UNESCO's Recommendation envisages tenure to be granted "after a reasonable period of probation" – "following rigorous evaluation" – "to those who meet stated objective criteria in teaching ... [and] research to the satisfaction of an academic body." It entails "continuing employment" and potential dismissal only "on professional grounds and in accordance with due process." 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." Moreover, tenure "should be safeguarded as far as possible even when changes in the organisation of or within a higher education institution or system are made."

¹⁷ See Conrad Russell, *Academic Freedom*. London/New York: Routledge, 1993, p. 23 ("The 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.").

¹⁸ The justification for safeguarding academic freedom and tenure is actually two-fold: firstly, ensuring that scholars can engage in a free search for the truth for the benefit of society as a whole and, secondly, ensuring that scholars through their academic endeavours can promote the values of intellectual independence. See Ronald Dworkin, "We Need a New Interpretation of Academic Freedom". In: Louis Menand (ed.), *The Future of Academic Freedom*. Chicago: University of Chicago Press, 1996, pp. 185–89.

3.3. The scorecard and *modus operandi*

The four parameters – individual academic freedom, institutional autonomy, self-governance and tenure – will be accorded equal weight in the standard scorecard used “to measure” the right to academic freedom – 20% each. The final 20% to arrive at an overall percentage score for each country is accorded to the parameter “ratification of international agreements and constitutional protection.” Altogether, 37 specific indicators measuring state compliance, concretising the main parameters, have been identified. These are *human rights* indicators – indicators essentially operationalising 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 are irrelevant in – and, in any event, subordinate to – a human rights approach as binding on all the states considered in this assessment. 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, but also overall. With a few exceptions (Indicators under A.1., and Indicators B., D.2.3. and E.3.), a three-point scale is applied in respect of each indicator, measuring

“full compliance” (full marks), “qualified compliance” (half the marks), or “non-compliance” (no marks).¹⁹

Some detail on the scorecard will now be provided. For purposes of illustration, we refer to the example of the scorecard with the results for Austria, reproduced in the table below. 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 and whether their constitutions provide appropriate protection. Under *column B*, there is only one indicator, this enquiring 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 with notably the Recommendation’s criteria on academic freedom and do they show that academic freedom should serve as a guiding principle for activity within HE? *Column C* covers indicators on *institutional autonomy*. The indicators chosen here enquire whether there is a satisfactory, problematic or seriously deficient/no provision in HE legislation expressly protecting institutional autonomy, how each of organisational, financial, staffing and academic autonomy is realised in the law by reference to one or two legitimate key indicators in each instance (each aspect of autonomy weighted equally), how wide or narrow the extent of governmental powers generally are and, finally, as to the

¹⁹ Thus, Karran’s earlier method is followed in this respect. See Karran (2009), *supra* note 1, at pp. 197–98.

extent to which institutional independence is protected against private interests.

Column D covers indicators on *self-governance*. The first ascertains whether there is a satisfactory, problematic or seriously deficient/no provision in HE legislation expressly protecting self-governance. This is followed by indicators examining the state of self-governance at the level of the institution, and then another set of indicators measuring this at the faculty/departmental level. In each group, there is an indicator assessing whether academic staff are able to elect a majority of representatives to bodies responsible for decisions on academic matters at the respective level, i.e. the senate (or its equivalent), and collegial bodies at faculty/departmental level. In each group, there are further indicators on the respective executive officers directing the institution, or faculties/departments, i.e. the rector, and deans/heads of departments, ascertaining: 1. whether these officers come from within the institution or faculty/department, and hold a PhD/are professors, 2. whether academic staff can exercise “control” over who is chosen as the rector or dean/head of department, and 3. whether they can exercise “control” over the dismissal of the rector or dean/head of department by virtue of a vote of no-confidence. The provisions of the UNESCO Recommendation are closest to the *primus inter pares* model, in terms of which academic staff are to decide on “their leaders” (rectors, deans, heads of departments) themselves, choosing them from among themselves, for a certain period of time, after which they become ordinary

members of staff again,²⁰ and, moreover, may express a lack of confidence in their ability to lead, where appropriate. In the group of indicators on self-governance at the institutional level, there is finally an indicator enquiring whether academic staff are adequately represented on the body/bodies taking strategic decisions (strategic planning, general teaching/research policy, overall institutional development, preparing the budget, adopting the HE institution's statutes, etc.). Strategic decision-making would customarily be the task of the rector (rectorate) and the senate (or its equivalent) and/or – notably and increasingly nowadays – a separate board to which academic staff, external experts and other stake-holders are elected/appointed.²¹ Even if not necessarily to the same extent as for “academic” decision-making, academic staff should have a right to take part in strategic decision-making.²²

Finally, *Column E* covers indicators on *security of employment, including “tenure” (or its equivalent)*. Indicators concern three topics: duration of contract of service, termination of contract of service on operational grounds, and prospect of advancement based on objective assessment of competence. Regarding *the first topic*, there is, for example, an indicator assessing whether the legal

²⁰ In this vein, see Karran (2007), *supra* note 1, at pp. 303–04, with regard to the rector.

²¹ On the typical governance bodies encountered in (European) HE institutions, see Eurydice – The Information Network on Education in Europe, *Higher Education Governance in Europe: Policies, Structures, Funding and Academic Staff*, 2008, pp. 33–42.

²² For an indication of the scope of collegial decision-making, see UNESCO Recommendation, para. 32.

framework of the states concerned envisages permanent contracts for academic staff, alternatively, commencement on a tenure-track (i.e. during a first phase (usually that following the award of a doctoral degree), a probationary period or fixed-term contracts with long-term prospects). Regarding *the second topic*, there is notably an indicator ascertaining whether there is an adequate, problematic or seriously deficient/no provision in HE legislation protecting (not solely, but specifically permanently employed) academic staff against dismissals based on grounds of managerial efficiency. Dismissals on grounds of serious misconduct, a flagrant violation of scholarly duties, or two or more consecutive negative appraisals of work quality will be permissible, if due process rules are observed.²³ Dismissals on operational grounds (i.e. restructuring, down-sizing, reorganisation 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 been observed, a formalised procedure been followed, and procedural safeguards been respected. *Finally*, as regards *the topic* of a prospect of advancement based on an objective assessment of competence: As academic freedom is to be protected by restricting dismissal, it 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 academics) in terms of which promotion is granted where defined scholarly criteria have been met as objectively

²³ See UNESCO Recommendation, paras. 47(e), 48–51.

assessed, without the need for the academic having to newly apply for a higher position within his/her institution on a competitive basis. It will thus be assessed whether legislation makes adequate provision (e.g. through a tenure-track system) for such advancement.

The assessment undertaken here considers only public institutions of HE and, from among these, only universities.²⁴ The analysis entailed an examination of 30 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. In the case of Germany with a different HE system in each of the 16 *Länder*, it has been decided to study the situation in the two most populous *Länder*, Bavaria and North Rhine-Westphalia, where one third of Germany's population live. Regarding Spain, certain powers in the field of HE regulation rest with the autonomous regions. As for the U.K., the situation essentially in England has been studied (more than 80% of the U.K.'s population living here), giving some consideration to elements of the Scottish system. The actual legislation of EU states as in force at the beginning of 2014 (including the HE Act of North Rhine-Westphalia of September 2014, however) constituted the primary source of information for purposes of the assessment.²⁵

²⁴ The assessment does not consider student academic freedom. Neither does it address artistic freedom.

²⁵ Citations from laws used here are largely own renderings of texts in the light of all sources available.

Country	A. The Ratification of International Agreements and Constitutional Protection (20%)	B. The Express Protection of Academic Freedom in HE Legislation (20%)
Austria 63,5%	<p><u>1. The Ratification of International Agreements (10) 8,5</u></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><u>2. Constitutional Protection (10) 9</u></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>Total: 17,5</p>	<p>[0–2,5–5–7,5–10 (x2)] 10</p> <p>– 0 – No Reference to Academic Freedom at All (Non-Compliance)</p> <p>– 2,5 – Provision(s) Seriously Falling Short of Defined Standards (Between Partial and Non-Compliance)</p> <p>– 5 – Mere Reference to Academic Freedom, or Provisions Revealing Various Deficits (Partial Compliance)</p> <p>– 7,5 – Some or Other Deficit in Otherwise Commendable Provisions (Between Full and Partial Compliance)</p> <p>– 10 – Academic Freedom Serves as Guiding Principle for Activity within HE (Full Compliance)</p> <p>Total: 10x2=20</p>

C. The Protection of Institutional Autonomy in HE Legislation (20%)	D. The Protection of Self-Governance in HE Legislation (20%)	E. The Protection of Job Security (and Tenure”) in Relevant Legislation (20%)
<p>1. Provision on Institutional Autonomy [0–2–4] 2</p> <p>2. Autonomy in Detail (8) 6</p> <p>2.1. Organisational (2)</p> <p>2.1.1. Autonomy to Determine Rector [0–0,5–1] 1</p> <p>2.1.2. Autonomy to Determine Internal Structures [0–0,5–1] 1</p> <p>2.2. Financial (2)</p> <p>2.2.1. State Grant as Block Grant [0–0,5–1] 1</p> <p>2.2.2. Express Competence to Perform Commissioned Research [0–0,5–1] 1</p> <p>2.3. Staffing (2)</p> <p>Right to Define Academic Positions in HE Institutions and their Requirements, and to Recruit and Promote Academic Staff [0–1–2] 1</p> <p>2.4. Academic (2)</p> <p>2.4.1. Capacity to Determine Selection Criteria for Bachelor Students and to Select the Latter [0–0,5–1] 0</p> <p>2.4.2. Whether or Not Bachelor Programmes Need to be Accredited [0–0,5–1] 1</p> <p>3. Extent of Governmental Powers [0–2–4] 2</p> <p>4. Institutional Independence <i>vis-à-vis</i> Private Interests [0–2–4] 2</p> <p>Total: 12</p>	<p>1. Provision on Academic Self-Governance [0–1–2] 1</p> <p>2. Academic Self-Governance at Institutional Level (12) 7</p> <p>2.1. Senate (or its Equivalent) – Composition [0–1,5–3] 3</p> <p>2.2. Rector (3)</p> <p>2.2.1. Academic Position or Qualification of Rector [0–0,5–1] 0</p> <p>2.2.2. Determining the Rector [0–0,5–1] 0,5</p> <p>2.2.3. Dismissing the Rector [0–0,5–1] 0,5</p> <p>2.3. Participation in Strategic Decision-Making (through Senate or its Equivalent, or Otherwise) [0–1,5–3–4,5–6] 3</p> <p>3. Academic Self-Governance at Faculty and Departmental Level (6) 1</p> <p>3.1. Collegial Bodies (3)</p> <p>3.1.1. Existence of Collegial Bodies [0–0,5–1] 0</p> <p>3.1.2. Composition of Collegial Bodies [0–1–2] 0</p> <p>3.2. Dean/Head of Department (3)</p> <p>3.2.1. Academic Position or Qualification of Dean/Head of Department [0–0,5–1] 0,5</p> <p>3.2.2. Determining the Dean/Head of Department [0–0,5–1] 0,5</p> <p>3.2.3. Dismissing the Dean/Head of Department [0–0,5–1] 0</p> <p>Total: 9</p>	<p>1. Duration of Contract of Service (8) 2</p> <p>1.1. Regulatory Framework [0–2–4] 2</p> <p>1.2. Situation in Practice [0–2–4] 0</p> <p>2. Termination of Contract of Service on Operational Grounds (6) 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 or Labour Legislation [0–1,5–3] 0</p> <p>3. Prospect of Advancement Based on Objective Assessment of Competence [0–1,5–3–4,5–6] 1,5</p> <p>Total: 5</p>

4. 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.

4.1. The ratification of international agreements and constitutional protection

All 28 EU Member States have ratified the ICCPR (Art. 19 protecting the right to freedom of expression) and the ICESCR (Art. 13 protecting the right to education) of 1966. The U.K. 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 U.K. has violated academic freedom can thus not 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 5 May 2013.²⁶ Malta 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

²⁶ Status of ratification as at 19 Mar. 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>.

legislative measures may not be fully compatible with this article.” All EU Member States are further bound by the relevant provisions of the *European Convention on Human Rights*, as amended and supplemented.²⁷

The constitutions of all EU Member States protect the right to freedom of expression. Express provisions are found in the (written) constitutions of 27 states. In the U.K., this right should be considered part of the U.K.’s unwritten constitution.²⁸ 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.” The 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 science²⁹ – may be found in the constitutions

²⁷ Status of ratification as at 21 Mar. 2015 as reflected on the Council of Europe’s official Treaty Office website at <http://www.coe.int/en/web/conventions>.

²⁸ See Eric Barendt, “Freedom of Expression in the United Kingdom under the Human Rights Act 1998”, *Indiana Law Journal* 84 (2009), pp. 852–55.

²⁹ Although there are differences between the right to freedom of science and the right to academic freedom (see Beiter et al., *supra* note 8), the approach here has been not to differentiate between the two. The Constitution of Spain of 1978 protects both freedom of science (Art. 20(1)(b)) and academic freedom (“*la libertad de cátedra*”) (Art. 20(1)(c)).

of 18 countries.³⁰ These protect the right either as part of provisions (also) addressing the right to freedom of expression (Germany and Spain), the right to education/educational rights (Austria, Finland, Greece, Italy and Sweden), rights related to science, arts, culture, universities and research institutions (Bulgaria, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia), the right to freedom of thought, conscience and religion (Czech Republic), or both the right to education/educational rights and rights related to science, arts and culture (Portugal). The provisions contained in the Czech, Greek and Hungarian Constitutions may be considered to be problematic (“partial compliance”). Article 16(8) of the Greek Constitution, for example, prohibits the establishment of private universities, thereby also preventing opportunities for diversified notions of academic freedom to flourish in different contexts.³¹

³⁰ In the U.K., “there is no *constitutional* guarantee of academic or scientific freedom.” See Eric Barendt, *Academic Freedom and the Law: A Comparative Study*. Oxford/Portland, Oregon: Hart Publishing, 2010, pp. 74–75.

³¹ Art. 13(4) ICESCR protects “the liberty of individuals and bodies to establish and direct educational institutions.”

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

Country	Percentage & Score /20 in brackets
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)
<i>Average</i>	78,04 (15,61)
6. Czech Republic, Greece	77,5 (15,5)
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)

4.2. The express protection of academic freedom in HE 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” – all salient

aspects of that right need to be concretised and operationalised by way of parliamentary legislation. Further detail can be regulated in subordinate legislation. A state's Act on Higher Education should thus make it clear that academic freedom entails a right to carry out research, a right to teach and a right to study without undue restrictions. Ideally, each of these elements should then be defined. The *Higher Education Act* of 2006 of Bavaria (Germany), for example, provides in Article 3 *inter alia*:

(2) 1. Freedom of research ... shall cover in particular the topic of research, the methodological approach applied and the evaluation and dissemination of research findings. ...

(3) 1. ... [F]reedom of teaching ... 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. ...

(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. ...

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. Austria's *Universities Act* of 2002, for example, in 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. 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 (§ 20(5)). Students are entitled to freedom of study in accordance with the provisions of the law (§ 59(1)). Academic staff may not be required to participate in scholarly work if this conflicts with their conscience (§ 105). 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/her research or teaching (§ 113).

The assessment revealed that 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 satisfactory (“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. 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. Article 1.6. (Chapter 1, Title 1) of the Dutch *Law on Provisions concerning Higher Education and Scientific Research* of 1992, 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 U.K., does address academic freedom, but in a way less satisfactory than that in the previous group (“between partial and non-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, seriously fall short of the standards defined in UNESCO’s Recommendation. The U.K.’s *Education Reform Act* of 1988, for instance, 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.” The Act recognises this freedom, however, 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 legitimises) do not violate academic freedom. Finally, there is a fifth group of HE systems (Estonia and Malta), whose HE legislation contains no reference to academic freedom whatsoever (“non-compliance”).

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

Country	Percentage & Score /20 in brackets
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)
<i>Average</i>	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)

4.3. The protection of institutional autonomy in HE legislation

HE legislation should expressly provide for HE institutions to be autonomous, detailing the various constituent elements of meaningful autonomy (organisational, 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 9 contain an express and adequate provision on autonomy, 20 an express, but in certain respects problematic or incomplete provision, and one a seriously deficient provision. Article 2 of the Spanish *Organic Law on Universities* of 2001, 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. Paragraph 2 goes on to mention various aspects covered by autonomy, broadly encompassing all four elements of autonomy. 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. Externally, university autonomy should be buttressed by guaranteeing the sanctity of university premises, a principle long since recognised by human rights bodies.³² Article 55(1) of Croatia’s *Act on Science and Higher Education* of 2013 thus emphasises that “[t]he premises of the university shall be inviolable.”

Concerning the assessment of institutional autonomy in detail (C.2.) in terms of compliance with certain key requirements on organisational, 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 results for overall performance regarding the stated key indicators

³² Regarding the Committee on Economic, Social and Cultural Rights, see Beiter, *supra* note 9, at pp. 599–600.

reveal Austria, Estonia, Finland, Ireland, Malta and the U.K. to be the top performers. Wallonia (Belgium), Cyprus, the Czech Republic, Bavaria (Germany), Greece, Hungary, Romania, Slovakia and Spain are found at the bottom of the table, with all other HE systems somewhere in-between.³³

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. The state should merely supervise whether legal requirements have been complied with, but not review decisions on their merits. 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. 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, 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. Most of the HE systems examined may be considered to be in "partial compliance," about one fifth in "full compliance," in respect of indicator C.3.

³³ See also Thomas Estermann et al., *University Autonomy in Europe II: The Scorecard* (Final Report, European University Association, Nov. 2011), pp. 20–52, for an assessment of compliance by European states in the light of various technical indicators on institutional autonomy, including those chosen under C.2.

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 emphasising 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 2014 of North Rhine-Westphalia (Germany), 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)). In sum, one HE system may be held to be in “full compliance,” five in “partial compliance,” and all the others in “non-compliance,” in respect of indicator C.4.³⁴

³⁴ See Eurydice, *supra* note 21, at p. 85, on accountability measures for private funds in HE in Europe.

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

Country	Percentage & Score /20 in brackets
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)

4.4. The protection of academic self-governance in HE 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. Although it is in the interest of enhanced institutional autonomy to leave the regulation of many aspects in this context to institutions of HE themselves, essential features of the right to self-governance, 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.

Thirty HE systems having been assessed, the HE Acts of only 3 contain an express and adequate provision on self-governance, 12 an express, but in certain respects problematic or incomplete, and 15 no express provision. An example of an express and adequate provision on self-governance would perhaps be that in Section 26 of the Latvian *Law on Institutions of Higher Education* of 1995, referring to “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,” “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,” and “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% – of the members of the senate (or its equivalent) should be representatives of academic staff. Students should, however, also be adequately represented. Article 12(1) of the *University of Cyprus Law* 1989 to 2013, for example, contains provisions of such a nature as will ensure that there will always be at least 80% representatives of academic staff on the senate.

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. Article 20(2) of the Spanish *Organic Law on Universities* of 2001, for example, states that “[t]he rector shall be elected ... from among officials of the body of university professors active in it.” 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. Regarding the particular manner rectors are

chosen, the models employed are highly varied. As under Articles 6 and 11 of the Wallonian *Loi sur l'organisation de l'enseignement universitaire par l'Etat* of 1953 (Belgium), academic staff may be entitled to directly elect the head of the institution (the vote of academic staff weighing 75%). As under Section 10(2) of Slovakia's *Act on Higher Education Institutions* of 2002, academic staff may be entitled to take part in the rector's election indirectly through the senate (or its equivalent). 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, many introduced in the wake of "new university management" policies *en vogue* since the 1990s. Customarily, all or the majority of the members of these boards are external, representing a variety of – including government and corporate – interests. The bodies sometimes merely perform a supervisory function, but in many cases they play a decisive role in strategic decision-making.³⁵ 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. The board roughly comprises 50% external members, appointed by the government, and 25% representatives of academic staff and students, respectively.³⁶ What has been stated regarding the particular

³⁵ See Eurydice, *supra* note 21, at pp. 33–42, or Estermann et al., *supra* note 33, at pp. 20–29, attesting to these developments, but commenting on them neutrally.

³⁶ Swedish *Higher Education Act* of 1992, ch. 2, § 4; Swedish *Higher Education Ordinance* of 1993, ch. 2, §§ 1, 7a, 7b, 8, 11.

manner rectors are chosen may also be observed in as far as their dismissal is concerned. Some HE systems leave the powers in this respect to academic staff. In Estonia, the university council (being the equivalent of a senate) may thus, by virtue of Section 14(3)(18) of the *Universities Act* of 1995, adopt a vote of no-confidence in the rector. Nevertheless, also in this respect the trend is for those systems in which the rector is chosen by a board to grant the latter also the competence to dismiss the rector. Thus, in Denmark or Lithuania, the board appoints/elects the rector and dismisses him or her.

In some of the HE systems assessed, the rector and the senate (or its equivalent) retain responsibility for strategic decision-making. This is so, e.g., in Bulgaria, the Czech Republic, Hungary, Latvia or Romania. As has been pointed out, however, increasingly, provision is 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 set-up. It may well be asked to what extent the principles of self-governance and collegiality permit “managerial” governance structures being introduced in HE institutions. Strengthening the rector’s (rectorate’s) powers, or providing for a board making available external expertise 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, to ensure the system of governance does not become “detached” from the academic staff whom it should serve.³⁷ It is submitted that academic staff should thus retain the power to elect the rector from among their midst, and, where appropriate, express a lack of confidence in him or her. Academic staff should further ideally have at least 50% representation on the board.³⁸ An arrangement in terms of which there are principally external members on the board, and academic staff are in a position to determine most of these, would perhaps still pass muster, but only at the level of “partial compliance” (see, e.g., Austria³⁹). In Portugal, the general council (replacing general assembly and senate) has a majority of representatives of academic staff, and at least 30% external members.⁴⁰ 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

³⁷ To this effect, see the *Hamburgisches Hochschulgesetz* case, *supra* note 16, paras. 88–95.

³⁸ See Lewis Elton, “Collegiality and Complexity: Humboldt’s Relevance to British Universities Today”, *Higher Education Quarterly* 62 (2008), p. 232 (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), and p. 233 (emphasising that the vice-chancellor should be the “university’s first servant”). See also Michael Shattock, “Re-balancing Modern Concepts of University Governance”, *Higher Education Quarterly* 56 (2002), p. 240 (arguing in support of “moving back to a more evenly balanced approach to governance – the ‘shared governance’ concept”).

³⁹ Austrian *Universities Act* of 2002, § 21(6) (50% of the board members “determined” by academic staff, 50% by the government).

⁴⁰ Portuguese *Law on the Legal Status of Institutions of Higher Education* of 2007, Art. 81.

further one to nine co-opted members among the members who could potentially be teachers at the institution.⁴¹

The above enquiry has been replicated at the level of the units of HE institutions (faculties and departments). A number of the HE systems assessed (Austria, Flanders (Belgium), Wallonia (Belgium), Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Portugal, Sweden and the U.K.) fail to regulate the right of self-governance at the unit level whatsoever, or they do so in a clearly insufficient way.

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

Country	Percentage & Score /20 in brackets
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 (11,5)
7. Czech Republic, Slovenia	55 (11)

⁴¹ *Education Reform Act* of 1988, sched. 7A, para. 3 (composition of governing body).

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)

4.5. 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 should envisage permanent contracts/commencement on a tenure-track. HE systems whose laws are in compliance with this requirement include, amongst others, Flanders (Belgium), Bulgaria or France. Article V.28 of the *Flemish Codification of the Decretal Provisions concerning Higher Education* of 2013 (Belgium) 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.” 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.⁴² 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, as is the case in Austria,⁴³ but it may also be subject to rather lax requirements in this regard, as is the case in the Czech Republic.⁴⁴ Whereas cases such as that of Austria should be held to constitute instances of “partial 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), there being little or no prospect of permanent contracts being concluded. The Estonian *Universities Act* of 1995, in Section 39(1), thus states that “[t]he positions of regular

⁴² In Austria, in terms of the *Collective Agreement for Employees of Universities* of 2013, permanent contracts are to be concluded with professors and associate professor. Such security of employment should, however, already be available under parliamentary legislation and not depend on volatile collective bargaining.

⁴³ Austrian *Universities Act* of 2002, § 109(1), (2).

⁴⁴ Czech *Labour Code* of 2006, § 39.

teaching and research staff at a university shall be filled for up to five years by way of public competition” 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” (§ 39¹(2))!

None of the HE Acts examined containing a full-fledged safeguard clause in this regard, the HE legislation of roughly a third of the HE systems assessed either contains provisions purporting to prohibit dismissals of academic staff on operational grounds (restructuring, down-sizing, reorganisation or economic difficulties) or laying down some protective standards for cases where such dismissals take place. 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.”⁴⁵ Article 50 of the Portuguese *Law on the Legal Status of Institutions of Higher Education* of 2007 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 a

⁴⁵ See the Irish *Universities Act* of 1997, § 3, for a definition of the term “officer.”

number of HE systems, all or at any rate senior members of the academic staff are civil/public servants/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). Such status entailing prohibition of dismissal exists 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.⁴⁶

Adequate provision for advancement of academic staff to a higher position based on an objective assessment of competence should be made. Some of the HE systems assessed do so through a tenure-track system.⁴⁷ A tenure-track system of this nature entailing promotion from researcher to associate professor is thus envisaged in Article 24(5) of the Italian *Law of 30 December 2010, No. 240, on Rules on the Organisation of Universities, Academic Staff and Recruitment, as well as Governance to Enhance the Quality and Efficiency of the University System*. Other HE systems create

⁴⁶ See Christoph Demmke & Timo Moilanen, *The Future of Public Employment in Central Public Administration: Restructuring in Times of Government Transformation and the Impact on Status Development* (Study Commissioned by the Chancellery of the Prime Minister of the Republic of Poland, Nov. 2012), p. 49.

⁴⁷ For an overview of tenure-track systems (most of them not based on general legislation) in some 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).

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 Internationalisation of Higher Education Institutions* of 2011 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 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 2009 providing 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,” those of 16 other HE systems in “non-compliance.”

**Table 5 – Country Ranking – Protection of Job Security
 (including “Tenure”) in Relevant Legislation**

Country	Percentage & Score /20 in brackets
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)

4.6. Overall results

The following table shows the overall country ranking for the legal protection of the right to academic freedom in Europe.

Table 6 – 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
18. Cyprus	53 D
<i>Average</i>	52,79 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