

# Fundamental Rights in the Shadow of EU Law

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## I. Fundamental Rights Protection or Fundamental Rights Politics?

- EU fundamental rights developed in order to protect citizens against intrusions by EU itself
- today:  
fundamental rights politics of the EU institutions to implement aims linked to fundamental rights  
(„Grundrechtspolitik“ – „politique des droits fondamentaux“)
- re-shaping the European legal order (EU *and* Member States) by means of the EU fundamental rights
- instrumental, not only protective effect
- hidden by debate on human rights federalism
- *Koen Lenaerts/José A. Gutiérrez-Fons:*  
"Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter."
- Bundesverfassungsgericht: "Fachrechtsakzessorietät"

## II. Levels of Fundamental Rights Politics

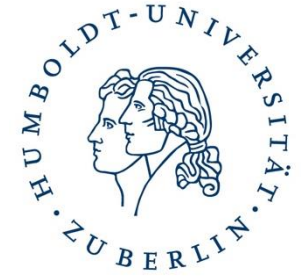
### 1. Legislative Fundamental Rights Politics

- legislation on fundamental rights matters
  - IT-matters (GDPR, DSA, [DMA])
  - anti-discrimination legislation
  - European Media Freedom Act
- application of fundamental rights in Member States according to scope of (secondary) EU law
  - ⇒ EU legislative bodies (Parliament and Council on proposal by the Commission) may steer the scope of EU fundamental rights
- EU fundamental rights are changing their function

## 2. Executive Fundamental Rights Politics

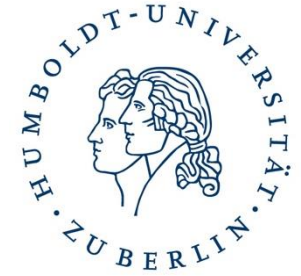
- Fundamental Rights Agency
- fundamental rights supervision by the Commission?
  - infringement proceedings in cases of derogation from fundamental freedoms
  - infringement proceedings based on fundamental rights and Article 2 TEU

# European Commission/Hungary (Case C-769/22)



The Commission claims that the Court should:  
declare that, by adopting the a pedofil bűnelkövetőkkel szembeni szigorúbb fellépésről, valamint a gyermekek védelme érdekében egyes törvények módosításáról szóló 2021. évi LXXIX. törvény (Law LXXIX of 2021 adopting stricter measures against persons convicted of paedophilia and amending certain laws for the protection of children), Hungary has failed to fulfil its obligations under EU law in the following ways:

## European Commission/Hungary (Case C-769/22)



(1) by prohibiting children from accessing content which promotes or portrays gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality, Hungary has infringed Article 3(2) of Directive 2000/31/EC on electronic commerce, Articles 16 and 19 of Directive 2006/123/EC on services in the internal market, Article 56 TFEU and Articles 1, 7, 11 and 21 of the Charter of Fundamental Rights of the European Union, ...

...

(2) by adopting the legislation cited in the first paragraph, Hungary has infringed Article 2 TEU.

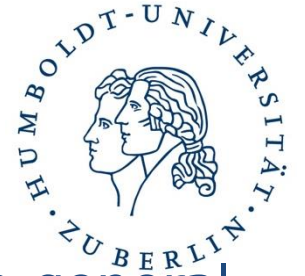
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### 3. Judicial Implementation of Human Rights:

The CJEU as *human rights court*

- a) Interpreting EU Secondary Law in Conformity with the Charter
  - retention of data (La Quadrature du Net and following cases)
  - upload filters

## **CJEU, Case C-401/19, ECLI:EU:C:2022:297 (Poland/Parliament and Council)**



70 In that context, it must be borne in mind that, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Thus, if the wording of secondary EU law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with that law.



### 3. Judicial Implementation of Human Rights:

#### The CJEU as *human rights court*

##### a) Interpreting EU Secondary Law in Conformity with the Charter

- retention of data (La Quadrature du Net and following cases)
- upload filters
- anti-discrimination law (foulard islamique cases)
- private law effect

##### b) „Diffuse“ effects

- rule of law standards
- reinforcing functional subjectivation

##### c) Further effects

- derogating from fundamental freedoms without justification
- direct private law effect

### III. What is Left from Human Rights Federalism?

- margin of appreciation
- convergence