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Challenges to academic freedom as a fundamental right

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Executive Summary

The protection of academic freedom has been a key priority for the League of European Research Universities (LERU) since its creation in 2002. In the daily application of this freedom, its legal ins and outs are of fundamental importance. Reason why LERU in 2010 published a legal paper on academic freedom as a fundamental right.

Twelve years later, LERU presents an update of its 2010 paper, since the protection of academic freedom is still not self-evident¹. We have observed that in the last decade new challenges for academic freedom have emerged. Without any ambition of being complete, reference can be made to tensions concerning deplatforming and so-called “cancel culture”, research funding being increasingly focussed on certain topics (thereby implicitly raising hurdles for research in the less “fashionable” or “less lucrative” areas), the complex impact of social media and artificial intelligence on research and education, the intimidation of scholars by activists (from all sides of the political spectrum), the foreign interference in universities and the related knowledge security issues, etc.

Just like in 2010, this paper therefore sets out again the main dimensions and the scope of academic freedom as a fundamental right, specifically taking into account the developments in legislation and jurisprudence of the last decade. It also aims to indicate how European and national policymakers and legislators can and should take measures to effectively protect, facilitate, strengthen and optimise academic freedom. Special attention hereby is paid at the EU level due to the decision of the Court of Justice of the European Union in case C-66/18, *European Commission v. Hungary* (2020). The focus is on public universities or universities accredited by the state (and thus performing a public function which comes with an obligation to respect fundamental rights).

The paper is based on the assumption that academic freedom is of paramount importance for current and future research as well as for teaching at universities, in Europe and worldwide. Academic freedom is not only seen as a goal in itself. It is important especially since it makes it possible for universities to serve the common good of society through searching for and disseminating knowledge and understanding, and through fostering independent thinking and expression in academic staff and students.

Academic freedom can be considered to comprise the following three aspects:

- (a) Far-reaching individual rights to expressive freedoms for members of the academic community (both staff and students) mainly as free enquirers, including the freedom to study, the freedom to teach, the freedom of research and information, the freedom of expression and publication (including the ‘right to err’), and the right to undertake professional activities outside of academic employment;
- (b) Collective or institutional autonomy for the academy in general and/or subsections thereof (universities, faculties, research units, etc.). Said autonomy implies that departments, faculties and universities as a whole have the right (and obligation) to preserve and promote the principles of academic freedom in the conduct of their internal and external affairs, while they are also protected against undue interferences;
- (c) An obligation for the public authorities to respect and protect academic freedom and to take measures in order to ensure an effective enjoyment of this right and to promote it.

These three dimensions of academic freedom are not mutually exclusive, but on the contrary, they reinforce one another. In case of conflict between the individual and the institutional rights, a careful balancing of rights and interests may be needed, in which special consideration is to be given to the former aspects. Institutional autonomy should not be used by higher education institutions as a pretext to limit the individual rights of higher-education teaching personnel. If restrictions on individual academic freedom are unavoidable, they should not go any further than necessary in order to achieve legitimate institutional academic aims, with means being proportionate to these aims. The state’s role is to guarantee academic freedom: freedom of any kind is not a spontaneous state of affairs, and in order for academic freedom to exist in any meaningful sense it must be respected, protected, ensured and promoted by the public authorities. A failure to fulfil these obligations amounts to a violation of academic freedom.

¹ As illustrated by a.o. the 2022 Free to Think Report of Scholars at Risk: www.scholarsatrisk.org/2022/11/free-to-think-2022-a-global-report-on-academic-freedom/ : the report analyses 391 attacks in 65 countries and territories, between 1 September 2021 and 31 August 2022, underscores the pervasive and urgent problem of attacks on higher education and urges governments, the academic community and civil society to protect at-risk scholars and students and to defend academic freedom.

I. Introduction

1. Academic freedom is generally considered a *sine qua non* for the proper functioning of modern universities. This is obviously also the case for the League of European Research Universities (LERU) and its members. The centrality and importance of the right are not only underlined by its explicit occurrence in many national constitutions. Also, in international conventions explicit and separate references to academic freedom are on the rise. Most notably in the European context, the Charter of Fundamental Rights of the European Union, which in 2009 became binding, explicitly guarantees academic freedom (see *infra*, no. 17 and further). Moreover, even in international texts and conventions in which academic freedom is not explicitly provided for – such as the European Convention on Human Rights (see *infra*, no. 19 and further) – it is self-evidently taken to be implied in ‘mother rights’ such as the freedoms of thought and speech. This central or natural character of academic freedom is indicative of the great significance that is attached to academic research and education.
2. Despite this almost ‘sacrosanct’ character of academic freedom in legal provisions all over the world, the day-to-day reality paints a different picture. In the last years an increasing number of cases have come up in the public forum whereby academics and academic research have come under close scrutiny, from the public and from judicial organs. Some problems may be “traditional” issues illustrating the sometimes fragile position of academic freedom. Think of political or judicial authorities sanctioning professors on account of their statements and research. Other issues may be fairly new, due to changing mind sets and technologies. What comes to mind are controversies about trigger warnings, safe spaces, online-activism and so on.² Universities, research institutions and the international networks dedicated to the promotion of research and

education have stressed, confirmed and re-confirmed, in recent times, the central value of academic freedom. In this regard we can refer, for instance, to the “Magna Charta Universitatum 2020”³, the “Bonn Declaration on Freedom of Scientific Research”, adopted at the Ministerial Conference on the European Research Area on 20 October 2020⁴, and the “Résolution Européenne sur un nécessaire soutien à la liberté académique en Europe”.⁵

3. Such examples point to the importance of academic freedom in today’s world and even more so to the need for a clear conception of it. Reason why LERU already in 2010 published a legal paper on “academic freedom as a fundamental right”, and now, with this paper, presents an update of it.⁶ Indeed, despite the apparent widespread and increasing agreement on the centrality of academic freedom, there is little clarity on what exactly the right entails or should entail.⁷ This lack of clarity is problematic for various reasons.⁸

Firstly, when academic freedom remains under- or ill-defined it is difficult to argue coherently for its importance:⁹ “[b]efore one can defend academic freedom (...) it must be defined”.¹⁰ Therefore, in order for legal proclamations such as Article II-13 of the EU Charter to have a meaningful and positive impact on actually ensuring academic freedom, the right needs to be clearly defined. Not doing so may reduce this crucial right to a mere abstract principle that many can pay lip service to without resulting in meaningful or consistent elaborations in public policies and legislation.

Secondly, in a context in which academic freedom is increasingly ‘codified’ or ‘juridified’ it is of great importance for academics and the universities alike to develop a vision on its dimensions and scope. Neglecting to do so could unwittingly lead to fundamental changes in academic practice as a result of judicial restraints, limits and requirements.

2 J. LACKEY, “Academic Freedom”, in J. LACKEY (ed.), *Academic Freedom*, Oxford, Oxford University Press, 2018, p. 3. See also: F. MAGNI “Trigger Warnings and Academic Freedom: A Pedagogic Perspective” in M. SECKELMANN, L. VIOLONI, C. FRAENKEL-HAEBERLE and G. RAGONE (eds.), *Academic Freedom Under Pressure? A Comparative Perspective*, Cham, Springer 2021, p. 232. Trigger warnings imply that teachers warn students beforehand of the content of the material that will be read or discussed. This content could upset students, could be psychologically or emotionally challenging. Safe spaces indicate spheres where students can feel comfortable and can avoid exposure to content that upsets them. For an analysis of the English state of play, see: I. CRAM and H. FENWICK, “Protecting Free Speech and Academic Freedom in Universities”, *Modern Law Review*, 2018, 825-873.

3 <http://www.magna-charta.org/magna-charta-universitatum>

4 https://www.ria.ie/sites/default/files/bonn_declaration_on_freedom_of_scientific_research.pdf

5 N°72 Sénat (France), 2021-2022, 14 January 2022.

6 J. VRIELINK, P. LEMMENS and S. PARMENTIER, “Academic Freedom as a Fundamental Right” Leuven, League of European Research Universities (LERU), 2010, Advice Paper No. 6, 26 p.

7 E. BARENDT, *Academic Freedom and the Law: A Comparative Study*, Oxford, Hart Publishing, 2010, p. 15.

8 See also: T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, no. 2, 164.

9 *Ibid.*, 164. See also: U. FELT and M. GLANZ, “University Autonomy In Europe: Changing Paradigms In Higher Education Policy”, in X, *Managing University Autonomy - Proceedings of the Seminar of the Magna Charta Observatory*, BUP, 2002, p. 15; L. GERBER, “Inextricably linked’: Shared governance and academic freedom”, *Academe* 2001, no. 3, 23; B. RAJAGOPAL, “Academic freedom as a human right”, *Academe* 2003, no. 3, p. 25.

10 B. RAJAGOPAL, “Academic freedom as a human right”, *Academe* 2003, no. 3, p. 25. See also: B. RAJAGOPAL, “Defending Academic Freedom as a Human Right: An Internationalist Perspective”, *International Higher Education* 2003, no. 33, p. 4.

In order for cases involving interferences with academic freedom to be adequately resolved, it is imperative to develop a coherent and encompassing view on academic freedom that takes into account the specificity of scientific research and the academic enterprise.

Finally, the level of academic freedom in some European states -and across the world- appears significantly lower than in other states.¹¹ For the protection level among these states to be raised, a common vision needs to be established, which should lead to a better assessment of the currently existing differences.

4. In light of the foregoing considerations, this paper aims at clarifying the main dimensions as well as the scope of academic freedom. In this regard we have observed that in the last decade (i.e. since the publication of the 2010 paper) new challenges for academic speech have emerged. Without any ambition of being complete, we highlight growing tensions concerning deplatforming and so-called “cancel culture”, research funding being increasingly focussed on certain topics (thereby implicitly raising hurdles for research in the less “fashionable” or “less lucrative” areas), the complex impact of artificial intelligence on research, and intimidation of scholars by activists (from all sides of the political spectrum). We do not pretend to come up with clear answers¹²; rather we wish to draw the attention to these issues as a starting point for a mapping exercise.
5. The paper is (still) based on the assumption that academic freedom is of paramount importance for current and future research as well as for teaching at universities, in Europe and worldwide. An underlying idea is that academic freedom is not only a goal in itself but that it is important also because (and to the extent that) it makes it possible for universities to serve the common good of society through searching for and disseminating knowledge and understanding, and through fostering independent thinking and expression in academic staff and students.¹³

Furthermore, as will be made clear by a number of examples, the (resulting) multifaceted idea of academic freedom can be ensured only by means of a careful case-by-case implementation, supported by institutions to make this freedom a reality. This does not take away the need for European and national policymakers and legislators to take measures of a more general nature to effectively protect, facilitate, strengthen and optimise academic freedom.

In this regard, the authors like to draw attention to a recent publication of March 2023 on academic freedom in the 27 EU member states, the content of which could not be taken into account for the current policy paper.¹⁴

Before discussing the various aspects of academic freedom (part IV), the paper will first briefly sketch the origins of academic freedom (part II), and its current legal framework in national and international law (part III).

11 T. KARRAN, “Academic Freedom in Europe: A Preliminary Comparative Analysis”, *Higher Education Policy* 2007, no. 3, p. 289-313.

12 On the “health” of academic freedom, see: T. KARRAN, K. BEITER and K. APPIAGYEI-ATUA, “Measuring academic freedom in Europe: a criterion referenced approach”, *Policy Reviews in Higher Education*, 2017, vol. 1, no. 2, 209-239.

13 See also: G. BOULTON and C. LUCAS, *What are universities for?*, Leuven, LERU, 2008.

14 P. MAASSEN, D. MARTINSEN, M. ELKEN, J. JUNGBLUT and E. LACKNER, *State of play of academic freedom in the EU Member States. Overview of de facto trends and developments*, Study written at the request of the Panel for the Future of Science and Technology (STOA) and managed by the Scientific Foresight Unit, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament, PE 740.231, doi: 10.2861/466486.

II. The origins of modern academic freedom

6. The history of academic freedom is a long one and has been traced back to ancient Greece.¹⁵ However, the history of academic freedom *sensu stricto* logically only begins with the advent of the first universities, in the eleventh and twelfth century. In the early universities sharp limits delineated the scope of intellectual inquiry and teaching. Knowledge, research and teaching needed to be consistent with a single system of (religious) truth, and enforcement of this orthodoxy – by ecclesial and worldly leaders – was often severe. For several centuries, university life remained thus bounded: academic freedom and freedom of thought were neither practiced nor professed and little opportunity existed for speculation. Extending inquiry beyond approved limits was subject to charges of heresy.
7. During the Enlightenment the modern idea of academic freedom began to take root,¹⁶ and it was mainly initiated by scholars outside the university, including Hobbes, Kant, Locke, and Voltaire.¹⁷ It was in Prussia under the rule of Frederick the Great¹⁸ that academic freedom began to flourish in the university itself.¹⁹
8. The further development of the concept of academic freedom is generally associated with the figure of Wilhelm von Humboldt.²⁰ Although the extent of his own contribution has been disputed,²¹ the central tenets of Von Humboldt's conception of the university do constitute "the theoretical and organisational paradigm which became the hallmark of the modern university".²²

Von Humboldt instituted reforms at the research university in Berlin in 1818 that centred on the twin-concepts of *Lernfreiheit* and *Lehrfreiheit*. *Lernfreiheit* pertained to the freedom of students to study what they wished and to control their own private lives, and – more generally – to the absence of administrative restraints in the learning situation. *Lehrfreiheit* referred to the freedom of professors to teach in their classrooms, to do research in their areas of expertise and to report their findings thereupon in publications or lectures.²³ *Lehrfreiheit*, just as *Lernfreiheit*, furthermore entailed a "paucity of administrative rules in the teaching situation".²⁴ Also central to the Humboldtian model were the unity of teaching and research (*Einheit von Lehre und Forschung*)²⁵ and the joint pursuit of these by staff and students. Von Humboldt regarded research to be inseparable from good teaching and the latter was therefore to be interactive and research-oriented.

15 See e.g.: G.R. STONE, "Academic Freedom and Responsibility", *The University of Chicago Record*, 12 October 1995; R. HARRIS, "Freedom of Speech and Philosophy of Education", *British Journal of Educational Studies* 2009, no. 2, 111-126.

16 See e.g.: A.M. STUART, "Academic Freedom: Origins of an Idea", *Bull. Austl. Soc. Leg. Phil.* 1991, no. 1, 1-31; G.R. STONE, "Academic Freedom and Responsibility", *The University of Chicago Record*, 12 October 1995. Some take issue with the (alleged) importance of the Enlightenment for the development of academic freedom. See e.g.: W.J. HOYE, "The Religious Roots of Academic Freedom", *Theological Studies* 1997, 409-428.

17 Many of the most important thinkers of the Enlightenment regarded universities as relics of the Dark Ages (I. MCNEELY, "The Unity of Teaching and Research: Humboldt's Educational Revolution", *Oregon Humanities* 2003, 33).

18 31 May 1740 – 17 August 1786.

19 "Academic freedom", *The Columbia Encyclopedia*, Encyclopaedia Britannica online, 2020 (<https://www.infoplease.com/encyclopedia/social-science/education/concepts/academic-freedom>).

20 2 June 1767 – 8 April 1835. See e.g.: S.R. GOLDSTEIN, "The Asserted Constitutional Right of Public School Teachers to Determine What They Teach", *University of Pennsylvania Law Review* 1976, 1293; T. KARRAN, "Academic Freedom: in Justification of a Universal Ideal", *Studies in Higher Education* 2009, no. 3, 266.

21 The centrality of the Humboldtian influence has been challenged and nuanced by some. Both Paletschek and Asch for example argue it is at odds with historical fact (S. PALETSCHEK, "Verbreitete sich ein 'Humboldt'sches Modell' an den deutschen Universitäten im 19. Jahrhundert?", in R.C. SCHWINGES (ed.), *Humboldt International: Der Export des deutschen Universitätsmodells im 19. und 20. Jahrhundert*, Basel, Schwabe & Co., 2001, 75-104; M. ASH, "Bachelor of what, master of whom? The Humboldt Myth and historical transformations of higher education in German-Speaking Europe and the US", *European Journal of Education* 2006, no. 2, 245-267). Others, such as Nybom, have pointed out that although "[t]he intellectual core and institutional rational of the Humboldtian university concept rested on ideological building blocks which were integral dimensions of German idealistic philosophy, and, consequently, not Wilhelm von Humboldt's own original intellectual inventions" (T. NYBOM, "The Humboldt Legacy: Reflections on the Past, Present, and Future of the European University", *Higher Education Policy* 2003, no. 2, 144) the Humboldtian model remains important nonetheless because of "its continued presence in almost every European discussion on the mission and future of higher education and research" (*ibid.*, 141).

22 T. KARRAN, "Academic Freedom in Europe: Reviewing UNESCO's Recommendation", *British Journal of Educational Studies* 2009, no. 2, 193.

23 W.P. METZGER, "The German Contribution to the American Theory of Academic Freedom", in W.P. METZGER (ed.), *The American Concept of Academic Freedom*, Philadelphia, Ayer Publishing, 1977, 217-218.

24 *Ibid.*, 217-218.

25 I. MCNEELY, "The Unity of Teaching and Research: Humboldt's Educational Revolution", *Oregon Humanities* 2003, 32-35.

Academic freedom also included the right of academic self-governance and institutional autonomy. This was considered indispensable in order to protect the freedoms of teaching and research. Without these aspects “the university, it was thought, would be dangerously vulnerable to government or religious censorship”.²⁶ State authorities were to finance the endeavour, but refrain from intervention in the teaching and research process. In Von Humboldt’s vision doing so would ultimately be in the state’s interest since it would produce well-formed citizens.²⁷

26 W.P. METZGER, “Profession and Constitution: Two Definitions of Academic Freedom in America”, *Texas Law Review* 1987, 1270; T. KARRAN, “Academic Freedom: in Justification of a Universal Ideal”, *Studies in Higher Education* 2009, no. 3, 267-268.

27 I. MCNEELY, “The Unity of Teaching and Research: Humboldt’s Educational Revolution”, *Oregon Humanities* 2003, 34.

III. Academic freedom in national constitutions and international law

9. This section provides a brief overview of some of the main provisions pertaining to academic freedom in national and international law. Historically, the first references to academic freedom appeared in national constitutions in the nineteenth and twentieth century, which subsequently constituted the models for a number of provisions in international recommendations and treaties.²⁸ As such, we will start out by discussing the constitutional approaches (A), followed by the relevant frameworks of the EU (B), the Council of Europe (C), and the United Nations (D).

A. National constitutions

10. A significant number of (European)²⁹ constitutions and basic laws contain specific provisions regarding academic freedom. An even greater number of countries have (also) enacted specific laws relating to universities or the higher education sector.³⁰

Looking at the constitutional provisions one can distinguish at least 3 types or approaches that were already roughly present in the Humboldtian model (cf. *supra*, no. 8), and which often occur in combination: (1) a rights (and/or responsibilities) approach, subdivided in (a) individual and (b) institutional aspects, (2) and a state obligations approach.

1. Rights and/or responsibilities approach

a. Individual rights approach

11. Most constitutions that include provisions on academic freedom formulate this right either in the abstract or as an individual right, often uniting and specifying a number of expressive freedoms (e.g. freedoms of speech, conscience, association, and information). States that take this approach in their constitutions include, amongst others, Spain,³¹ Hungary,³² Poland,³³ Portugal,³⁴ Slovakia³⁵, and Switzerland.³⁶

This individual academic freedom entails a number of aspects. The following main aspects emerge from the various constitutional provisions: a right to study and learn; a right to teach; a right to research; a right to publish and disseminate the results of research (without prior restraints); intellectual property rights vis-à-vis the research. These elements will in part form the basis of our own analysis of academic freedom (*infra* section IV) (cf. *infra*, nos. 26 and further).

12. None of these individual rights is absolute. Academic freedom, like other freedoms, can be limited, provided that there are solid justifications for such limitations. The Greek Constitution, for instance, specifies that “[a]cademic freedom and the freedom to teach do not override the duty to obey the Constitution”.³⁷ Likewise, the Basic Law of the Federal Republic of Germany states that while “[a]rt and science, research and teaching are free”, “[t]he freedom of teaching shall not release any person from allegiance to the Basic Law”.³⁸ Finally, the Constitution of Spain states

28 J. BAERT, “Academische vrijheid, juridisch bekeken”, in X, *Ad Amicissimum Amici Scripsimus, Vriendenboek Raf Verstegen*, Brugge, Die Keure, 2004, 19.

29 The focus of this paper is on constitutions of European states, *inter alia* since approaches towards academic freedom display regional variation.

In North-America, for instance, academic freedom is typically derived from general constitutional guarantees of free speech rather than from a separate right to academic freedom (or free learning, teaching, research, etc.). For a comparison between the United Kingdom, Germany, and the United States, see E. BARENDT, *Academic Freedom and the Law: A Comparative Study*, Oxford, Hart Publishing, 2010.

30 These will for the present purposes remain un-discussed however.

31 Art. 20 Constitution of Spain: “(1) The following rights are recognised and protected (...) (c) academic freedom.”

32 Art. X, part on “Freedom and Responsibility”: “(1) Hungary shall protect the freedom of scientific research and artistic expression, as well as the freedom of learning and - within the framework defined by law - teaching so as to attain the highest level of knowledge possible. (2) The State shall not be entitled to decide on questions of scientific fact. Only scientists shall be entitled to evaluate scientific research. (3) Hungary shall protect the freedom of scientific research and artistic expression of the Magyar Tudományos Akadémia (Hungarian Academy of Sciences), and the Magyar Művészeti Akadémia (Hungarian Academy of Arts). As regards the contents and methods of research and teaching, institutions of higher education shall have sovereignty, whereas their organizational structure shall be governed by an act of Parliament. Within the framework of the relevant legislation, the Government shall determine the financial structure of the State’s higher educational institutions and the Government shall monitor their financial management.”

33 Art. 73 Constitution of the Republic of Poland: “The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone.”

34 Art. 42 Constitution of the Portuguese Republic: “(1) Intellectual, artistic and scientific originality shall not be restricted. (2) This freedom includes the right to originate, produce and disseminate scientific, literary or artistic works, and includes legal protection for copyright.”

35 Art. 43 Constitution of the Slovak Republic: “(1) Freedom of scientific research and freedom of artistic expression shall be guaranteed (...).”

36 Art. 20 Swiss Constitution: “Freedom of research and teaching is guaranteed.”

37 Art. 16 Greek Constitution.

38 Art. 5 German Basic Law.

that the rights to literary, artistic, scientific and technical production and creation and the right to academic freedom “are limited by respect for the rights recognised in (the Part of the Constitution on fundamental rights and obligations), by the legal provisions implementing it, and especially by the right to honour, to privacy, to the own image and to the protection of youth and childhood”.³⁹

b. Institutional rights approach

13. Less common than the individual rights approach, is the one that sees academic freedom as a right with collective dimensions, belonging to institutions (universities, faculties, etc.) rather than to individuals. An example of this can be found in the Constitution of Finland, which finds the institutional autonomy of universities sufficiently important to merit separate mention. Section 123 of the Finnish Constitution states that “universities are self-governing, as provided in more detail by an Act”. Likewise, Article 38 (2) of the Estonian Constitution provides that “[u]niversities and research institutions are autonomous within the restrictions prescribed by law”.

2. State obligations

14. In a number of constitutions and basic laws academic freedom is formulated, not (only) in terms of a right of individuals or institutions, but (also) in terms of an obligation of the state. The obligation is one of respecting, safeguarding and promoting that freedom. Within this approach an additional distinction can be made between provisions that refer only to the state’s duty to protect intellectual property rights (such as copyrights and patent rights) in the context of research, and provisions that refer to obligations of a more general nature.
15. Examples of the former include the constitutions of the republics of Latvia, Portugal and Slovakia, which respectively proclaim that it is the state’s duty to “protect copyright and patent rights”⁴⁰ or to ensure “legal protection for

copyright”,⁴¹ and that “[i]ntellectual property rights shall be protected by a law”.⁴²

16. State obligations of a more general nature can be found – for instance – in the constitutions of Greece, Italy and Malta. Article 16 of the Constitution of the Hellenic Republic states that the “development and promotion [of art and science, research, and teaching] constitutes a state obligation”. Article 9 of the Italian Constitution and Article 8 of that of Malta state that respectively the republic and the state “shall promote the development of culture, and scientific and technical research”.

B. EU Charter of Fundamental Rights

17. The most significant reference to academic freedom in the context of the European Union, is to be found in Article II-13 (‘Freedom of the arts and sciences’) of the Charter of Fundamental Rights of the European Union (Charter):

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

The explanatory memorandum is extremely short on this point. It simply indicates that the right “is deduced primarily from the right to freedom of thought and expression”, and that “it is to be exercised having regard to Article 1 and may be subject to the limitations authorised by Article 10 of the European Convention on Human Rights”.

18. As such, the freedom of the arts and sciences under Article 13 of the Charter is linked mainly to the freedoms of thought (Article 10)⁴³ and expression (Article 11).⁴⁴ Furthermore, the freedoms set out in Article 13 must be exercised – according to the drafters’ intentions – within the framework of limitations as the freedom of expression, as provided by Article 10.2 of the European Convention on Human Rights⁴⁵, while also respecting Article 1 of the Charter, on human dignity.⁴⁶ The latter covers ethical issues

39 Art. 20.4 Spanish Constitution.

40 Art. 113 Latvian Constitution.

41 Art. 42 Portuguese Constitution.

42 Art. 43 Slovak Constitution.

43 Article 10 (Freedom of thought, conscience and religion) of the Charter: “1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”

44 Article 11 (Freedom of expression and information) of the Charter: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.”

45 Article 10 (Freedom of expression) ECHR: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

46 Article 1 of the Charter: “Human dignity is inviolable. It must be respected and protected.”

in the field of scientific research in particular. In previous discussions on the Charter reference was also made to Article 19.2 of the International Covenant on Civil and Political Rights (ICCPR)⁴⁷ and to the jurisprudence of the European Court of Human Rights on the issue of academic speech and freedom (*infra*, nos. 20 and 46 et seq.).

Given the very general wording of Article 13 and the only limited explanation in the explanatory memorandum, the notion of academic freedom remains open to interpretation.⁴⁸ This is all the more so, given the current absence of a meaningful body of jurisprudence providing further guidance. Of course, the case of the Central European University, which had to close doors under Hungarian Law and had to move to Vienna, led to an interesting infringement procedure initiated by the European Commission. The CJEU's judgment of 6 October 2020 was path-breaking as it was the first case in which the Court explicitly dealt in substance with the concept of "academic freedom".⁴⁹

It is sometimes argued⁵⁰ that the weakness of Article 13 is the lack of competence of the EU in the field of (higher) education.⁵¹ Pursuant to Article 6 TFEU, the Union has "competence to carry out actions to support, coordinate or supplement the actions of the Member States" in the field of "e) education, vocational training, youth and sport".

Thus, education is not a core competence of the EU: the Union has a weak competence, that is secondary to the Member States' competences.

Since the Charter of Fundamental Rights only applies to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (Article 51 of the Charter), one may have the impression that it is of little use to the protection of academic freedom.

Such a fear, however, may be exaggerated. In the first place, the Central University case illustrates that Article 13 can be usefully applied when academic freedom is endangered. In this case, the CJEU observed that Hungary's restrictive legislation interfered with its commitments under GATS/WTO and Article 49 TFEU (Freedom of Establishment). As GATS is part of EU law⁵², the Charter could be usefully invoked. This is, of course, all the more so, with regard to Article 49 TFEU.⁵³

At this point, we could also add that the EU has competence in the field of scientific research. Should a problem occur with regard to academic freedom in connection with specifically scientific research, the link with Article 13 of the Charter would be established through Article 179 TFEU (on research)⁵⁴.

47 Art. 19.2 ICCPR: "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

48 T. KARRAN, "Academic Freedom in Europe: Time for a Magna Charta?", *Higher Education Policy* 2009, no. 2, 167.

49 CJEU (GC), 6 October 2020, *European Commission v. Hungary*, C-66/18, ECLI:EU:C:2020:792.

50 A.o. in the answers of EC Commissioner Mariya Gabriel to the questions of MEP Christian Ehler ("Legal tools to protect academic freedom", E-003927/2021; "Academic freedom in the European Research Area (ERA)", E-002715/2022).

51 On this point, S. SCHIEDERMAIR, "Freedom of Research and Academic Teaching in the European Union" in M. SECKELMANN, L. VIOLONI, C. FRAENKEL-HAEBERLE and G. RAGONE (eds.), *Academic Freedom Under Pressure? A Comparative Perspective*, Cham, Springer 2021, p. 28, although the author believes Article 13 is a "fortress against further attacks on academic freedom" (p. 32). See equally: G. TOGGENBURG, "The 13th of all EU-r rights: the freedom of arts and sciences and how the Charter contributes", <https://www.eurac.edu/en/blogs/eureka/the-13th-of-all-eu-r-rights-the-freedom-of-arts-and-sciences-and-how-the-charter-contributes>.

52 CJEU (GC), 6 October 2020, *European Commission v. Hungary*, C-66/18, § 71 ECLI:EU:C:2020:792. This conclusion was reached on the following grounds: "69. The Court has repeatedly held that an international agreement entered into by the Union is, from its entry into force, an integral part of EU law (see, in particular, judgments of 30 April 1974, Haegeman, 181/73, EU:C:1974:41, paragraphs 5 and 6; of 21 December 2011, Air Transport Association of America and Others, C-366/10, EU:C:2011:864, paragraph 73; and Opinion 1/17 (EU-Canada CET Agreement) of 30 April 2019, EU:C:2019:341, paragraph 117). 70. In the present case, the Agreement establishing the WTO, of which the GATS is part, was signed by the Union and then approved by it, on 22 December 1994, by Decision 94/800. It entered into force on 1 January 1995."

53 In case C-391/20, the CJEU (GC) held that "Article 49 TFEU must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, in so far as such legislation is justified on grounds related to the protection of its national identity, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued" (CJEU (GC), 7 September 2022, *Boriss Cilevičs and Others*, C-391/20, ECLI:EU:C:2022:638).

54 Article 179 TFEU reads:

1. The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties.
2. For this purpose the Union shall, throughout the Union, encourage undertakings, including small and medium-sized undertakings, research centres and universities in their research and technological development activities of high quality; it shall support their efforts to cooperate with one another, aiming, notably, at permitting researchers to cooperate freely across borders and at enabling undertakings to exploit the internal market potential to the full, in particular through the opening-up of national public contracts, the definition of common standards and the removal of legal and fiscal obstacles to that cooperation.
3. All Union activities under the Treaties in the area of research and technological development, including demonstration projects, shall be decided on and implemented in accordance with the provisions of this Title."

So whenever there is a link with the EU's competences (freedom of establishment, freedom of services, scientific research,...), Article 13 comes into play.⁵⁵ Article 13 can even be applied in cases where the discussions concern rights and obligations covered by international agreements to which the EU is party, as the GATS example shows. In that scenario, those rights and obligations are part and parcel of EU law. Thus, the Charter can be relied on.⁵⁶

Although it appears to us that through this mechanism, quite some issues of academic freedom are covered by EU law (and therefore the Charter), we cannot exclude that in some situations no links with EU law can be established, in which case the Charter cannot be applied.

The most straightforward way to tackle this problem would be a revision of the TFEU. The Union could be given the competence to protect academic freedom. The European Parliament and the Council could then adopt the necessary measures to protect and promote academic freedom.

Other options include, firstly, that the EU could use existing competences on freedom of establishment/services to set a minimum floor of protection of academic freedom so as to allow and facilitate the free movement of academic services (i.e. to abolish obstacles to freedom of expression that result from differences in standards of protection). The creation of a minimum level of protection would allow to bring within the scope of EU law even purely internal situations concerned within this new minimum level.

Secondly, the existing competence on research could also be used to promote academic freedom, though that can only be done within the limits of the provisions in art. 179 TFEU et seq.

C. Council of Europe and European Convention on Human Rights

19. Academic freedom figures centrally in the activities of the Council of Europe. The Committee of Ministers, for instance, adopted in 2000 a recommendation underlining aspects of academic freedom in academic research.⁵⁷ The Parliamentary Assembly of the Council of Europe adopted in 2006 a recommendation exhorting the Committee of Ministers to "strengthen its work on academic freedom and university autonomy as a fundamental requirement of any democratic society".⁵⁸ A number of specific treaties are also relevant in this regard.⁵⁹

20. Though academic freedom is not explicitly provided for in the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has – on several occasions – brought issues regarding academic freedom within the ambit of the Convention. It tends to do so, more specifically, under Article 10, which guarantees freedom of expression.⁶⁰

In *Sorguc v. Turkey* the ECtHR explicitly referred to the aforementioned Recommendation 1762 and emphasised "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".⁶¹ Other case law of the Strasbourg Court will be addressed in the following section (IV), in which the scope of academic freedom is delineated.⁶²

⁵⁵ We admit that the identification of a link is often fiercely debated and, obviously, always depends on the existence of an EU competence. The link with EU law may not be easy to establish (i) in relation to the freedoms of establishment/services if there is no cross-border link and (ii) in relation to research in the absence of legislation.

⁵⁶ It is important to mention, moreover, that the protection of academic freedom in Europe is nowadays part of the ERA (European Research Area) Action Plan 2022-2024 (action 6) :

https://ec.europa.eu/info/sites/default/files/research_and_innovation/strategy_on_research_and_innovation/documents/ec_rtd_era-policy-agenda-2021.pdf.

⁵⁷ Recommendation R (2000) 8 of the Committee of Ministers of 30 March 2000 on the research mission of universities.

⁵⁸ Recommendation 1762 (2006) of the Parliamentary Assembly of 30 June 2006 on 'Academic Freedom and University Autonomy'.

⁵⁹ European Convention on the Equivalence of Diplomas leading to Admission to Universities (ETS no. 015) of 11 December 1953; European Convention on the Academic Recognition of University Qualifications (ETS no. 032) of 14 December 1959; Protocol to the European Convention on the Equivalence of Diplomas leading to Admission to Universities (ETS no. 049) of 3 June 1964; European Convention on the General Equivalence of Periods of University Study (ETS no.138) of 6 November 1990; Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS no. 165) of 11 April 1997. See also Recommendation R (2000) 8 of the Committee of Ministers of 30 March 2000 on the research mission of universities.

⁶⁰ The Court has – on occasion – also pronounced itself on other dimensions of academic freedom, e.g. that minority language rights also hold in academic contexts (ECtHR, 23 July 1968, nos. 1474/62, 1677/62, 1769/63, 1994/63 en 2126/64, *Case relating to certain aspects of the laws on the use of languages in education in Belgium*).

⁶¹ ECtHR, 23 June 2009, no. 17089/03, *Sorguç v. Turkey*, § 35. See also ECtHR, 15 April 2014, no. 40877/07, *Hasan Yazici v. Turkey*, § 55; ECtHR, 27 May 2014, nos. 346/04 and 39779/04, *Mustafa Erdogan and Others v. Turkey*, § 40.

⁶² At present, an important case is pending before the Strasbourg Court: in *Kamuran Akin and 42 Others v. Türkiye*, no 72796/16 (communicated on 23 June 2021), Turkish academics argue that they have been dismissed because of their criticism on the Turkish authorities.

D. United Nations⁶³

1. International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights

21. As far as the normative context of the UN is concerned, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are of importance for the issue of academic freedom.

22. In the ICCPR, academic freedom is generally considered to be included in the guarantee of free speech, proclaimed in Article 19. Academic freedom can thus be subject to the limitations and restrictions provided by that provision.⁶⁴

The ICESCR on the other hand expressly recognizes academic freedom as part of a human right to education⁶⁵ and progress, in its Article 15:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

23. The UN Committee on Economic, Social, and Cultural Rights emphasised that the “right to education can only be enjoyed if accompanied by the academic freedom of staff and students”. It also indicated that “staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom”.⁶⁶

As such, both the ICESCR and the Committee see the recognition of academic freedom as particularly relevant for the protection of economic, social, and cultural rights such as education and societal progress.

2. UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel

24. Dissemination of knowledge is one of the missions entrusted to the United Nations Educational, Scientific and Cultural Organization (UNESCO), as a means of creating solidarity between peoples and contributing to international peace. UNESCO has addressed the issue of academic freedom on several occasions. For the present discussion the most significant result is a statement adopted as official policy by the UNESCO General Conference in 1997 entitled ‘Recommendation concerning the Status of Higher-Education Teaching Personnel’ (UNESCO Recommendation).⁶⁷

The Recommendation is not legally binding. It does however reveal a certain international consensus on the meaning of academic freedom and its corresponding responsibilities, as well as on the link between academic freedom and collegial self-government. Moreover, the Recommendation is not “a stand alone document but is well-embedded in other international regulations”,⁶⁸ as is illustrated by the

63 An analysis from a specific UN perspective can be found in the “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David KAYE (2020). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/197/86/PDF/N2019786.pdf?OpenElement>

64 Art. 19: “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a. For respect of the rights or reputations of others; b. For the protection of national security or of public order (ordre public), or of public health or morals.”

65 The right to education is itself also provided for separately in Articles 13 and 14 ICESCR.

66 General Comment 13 (1999), The right to education (Article 13 of the International Covenant on Economic, Social and Cultural Rights), para. 38.

67 For the full text of the Recommendation, see <http://unesdoc.unesco.org/images/0011/001132/113234mb.pdf>.

The recommendation was the result of extensive consultation with academic and legal experts, NGOs (including the International Labour Organisation), and member states. For an extensive analysis of the recommendation, see: T. KARRAN, “Academic Freedom in Europe: Reviewing UNESCO’s Recommendation”, *British Journal of Educational Studies* 2009, no. 2, 191-215.

See for related previous UNESCO recommendations: Recommendation against Discrimination in Education, 1960; Recommendation concerning the Status of Teachers, 1966; Recommendation on Education for International Understanding and Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, 1974; Recommendation on the Status of Scientific Researchers, 1974; Revised Recommendation concerning Technical and Vocational Education, 1974; Declaration on Race and Racial Prejudice, 1978; Recommendation on the Recognition of Studies and Qualifications in Higher Education, 1993.

The following UNESCO conventions are (indirectly) relevant as well: Convention against Discrimination in Education, 1960 (and the Protocol thereto, 1962); Universal Copyright Convention, 1952 (revised 1971); Convention on Technical/Vocational Education, 1989.

68 T. KARRAN, “Academic Freedom in Europe: Reviewing UNESCO’s Recommendation”, *British Journal of Educational Studies* 2009, no. 2, 194. See also: K. BEITER, *The Protection of the Right to Education by International Law*, Leiden/Boston, Martinus Nijhoff, 2005, 278.

references it contains to various other international texts.⁶⁹ Finally, the UNESCO and the International Labour Organisation have set up a system of periodic scrutiny and a mechanism to report infringements.⁷⁰

25. The Recommendation affirms that “the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom” and that “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”. Broadly speaking, the main points covered by the Recommendation and worth mentioning are the following:
 - a. **Institutional autonomy** – this notion refers to “that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities” (§ 17).
 - b. **Individual rights and freedoms** – “the principle of academic freedom should be scrupulously observed. Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, 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” (§ 27).
 - c. **Self governance and collegiality** – “Higher-education teaching personnel should have the right and opportunity (...) to take part in the governing bodies (...) while respecting the right of other sections of the academic community to participate, and they should also have the right to elect a majority of representatives to academic bodies within the higher education institution. (...) Collegial 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” (§§ 31 and 32).
 - d. **Tenure** – “Tenure or its functional equivalent, where applicable, should be safeguarded as far as possible even when changes in the organization of or within a higher education institution or system are made, and should be granted, after a reasonable period of probation, to those who meet stated objective criteria in teaching, and/or scholarship, and/or research to the satisfaction of an academic body” (§ 46).

69 Its preamble refers to article 25 of the UDHR, to article 13(2)(c) of the ICESCR, to the Convention against Discrimination in Education and to the UNESCO/ILO Recommendation concerning the status of teachers.

70 This monitoring is entrusted to the Joint ILO-UNESCO Committee of Experts on the Application of the Recommendation concerning Teaching Personnel (CEART). See: <http://www.ilo.org/public/english/dialogue/sector/techmeet/ceart>. Sessions Reports can be found on : <https://www.ilo.org/global/industries-and-sectors/education/ceart/lang--en/index.htm>

IV. Dimensions and scope of academic freedom

26. As the preceding section already suggests, academic freedom is multifaceted and there are a number of different ways in which it can be (and is) understood, both as far as its nature and dimensions are concerned as well as regarding its scope. This third section of the paper attempts to provide a definition of academic freedom that might serve as a common denominator in the European context.⁷¹ In so doing LERU does not opt for a smallest common understanding, but rather for an aspirational model. Such an approach is necessary for any definition of “academic freedom to possess more than mere ornamental significance”.⁷² At the same time, LERU’s aim is not to provide a comprehensive or immutable definition, but rather to offer a preliminary proposal that may serve as a basis for further discussion and refinement.⁷³

We will begin by outlining the right’s nature or main dimensions (A), followed by a discussion of its scope (B).

A. Dimensions

27. The first approach or dimension is to conceive of academic freedom as an individual right, combining in particular the expressive freedoms that members of the academic community (both staff and students) have as individuals: e.g. freedom of opinion and expression and freedom of association.⁷⁴ A second way to understand academic freedom is to look at it as a right with more collective dimensions, i.e. as an institutional right of autonomy for the academy in general or subsections thereof (faculties, research units, etc.). The other side of this freedom is the obligation for the public authorities to respect academic freedom and to take measures in order to ensure an effective enjoyment of that right and to protect it (See infra,

State obligations, no. 87.) The focus, as far as the obligations are concerned, on public authorities has to do with the fact that this paper discusses academic freedom as a fundamental right: the state, through its various organs, is the primary duty bearer in the context of fundamental rights.⁷⁵ This does not mean that individuals and private entities do not have duties and responsibilities. If necessary, it is for the state to take the appropriate steps to ensure that individuals and private entities show respect for academic freedom.

These different dimensions of academic freedom need not be thought of as mutually exclusive. Quite the contrary: a model of academic freedom that aims to do justice to the complex and nuanced nature and needs of the academic structures and practice should include all three aspects.

28. University teaching and academic research serve the common good of society through searching for and disseminating knowledge and understanding, and through fostering independent thinking and expression in academic staff and students. For LERU, academic freedom should serve to achieve these ends.

29. In this perspective academic freedom should be understood as a right comprising a complex set of relationships between individual teachers and researchers, students, research units, faculties, university administrations, communities and governmental bodies.⁷⁶ As academic freedom exists in order to protect and promote the entire academic practice, its individual aspects should be thought of in inextricable combination with its institutional aspects as well as with issues of state obligations.

71 It may be noted that attempting to define academic freedom is considered ill advised by some authors. The reasons for this diverge. Some suggest that academic freedom cannot and should not be boiled down to a (legal) essence, but that it is best understood as an ethical practice instead (see e.g.: J. SCOTT, “Academic Freedom as an Ethical Practice”, in L. MENAND (ed.), *The Future of Academic Freedom*, Chicago, University of Chicago Press, 1996, 177; W. TIERNEY, “Academic freedom and organisational identity”, *Australian Universities Review* 2001, no. 1, 12). Others are of the opinion that it is a “deeply misleading assumption (...) that there exists some unproblematic conception of academic freedom that is philosophically coherent and that will conduce to outcomes in particular cases which all parties will feel to be just and equitable” and that therefore any endeavour to come to a definition is bound to fail and should be avoided” (see e.g.: L. MENAND, “The Limits of Academic Freedom”, in L. MENAND (ed.), *The Future of Academic Freedom*, Chicago, University of Chicago Press, 1996, 5).

72 T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, no. 2, 168. See also: F. ROCHFORD, “Academic freedom as insubordination: The legalisation of the academy”, *Education and the Law* 2003, no. 4, 250.

73 For a similar and more detailed attempt, see: T. Karran, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, no. 2, 163-189. Many of Karran’s thoughtful proposals have been incorporated in the following.

74 For an approach that focuses on the collective dimension: S. DEA, “The Evolving Social Purpose of Academic Freedom”, *Kennedy Institute of Ethics Journal*, 2021, 199-222.

75 See, e.g., the approach adopted by the UN Committee on ESCR in its General Comment 13, mentioned above (footnote 65).

76 S.H. ABY and J.C. KUHN (eds.), *Academic Freedom: a Guide to the Literature*, Westport, Greenwood Press, 2000, vii.

B. Scope

30. What is the scope and content of academic freedom and what should properly be the general relationship (or even hierarchy) between its three dimensions? This section provides a general outline of the scope and content of academic freedom, subdivided in (1) rights, both individual and institutional, and (2) corresponding state obligations. In doing so we attempt to base our analysis, to the extent that this is possible, on relevant case law of international and national courts.

1. Rights

a. Scope as an individual right

31. Academic freedom as an individual right refers to a system of complementary rights and obligations entitled to teachers and students, mainly as free enquirers.⁷⁷ It includes at least the following and interrelated aspects: (i) the freedom to study, (ii) the freedom to teach, (iii) the freedom of research and information, (iv) the freedom of expression and publication (including the right to err), and (v) the right to undertake professional activities outside of academic employment.

i. Freedom to study

32. The freedom to study is first and foremost a right of *students* in the academic context. The main components of this right are the right to education (i.1) and the right to freely develop (and change) one's own opinion (i.2).

i.1. Freedom of and right to education

33. The freedom of education is an important aspect of the freedom to study. It should be noted that it is important not only for students themselves, but also for educational institutions, such as universities, since few if any individuals are able to rise to the level of academic researcher in the absence of systematic and intensive supervision and guidance by others. As such – aside from the articles mentioned in section I – additional provisions such as Article 2 Protocol No. 1 ECHR⁷⁸ and Article 13 ICESCR⁷⁹ are specifically relevant in this regard.

34. Said articles explicitly acknowledge the right of parents to ensure education and teaching in conformity with their own religious, philosophical and moral convictions. The state however is not obliged to provide education that coincides with (every) individual citizen's convictions. What is regarded as a state duty is to provide at least a *minimum* in educational facilities, including higher education. Both articles also guarantee a general right of access to every type and every level of education.⁸⁰ This right can only be restricted by admission requirements that are objectively justified on the basis of the education level or the limited availability of certain educational facilities at a given time.⁸¹

Prospective students have a right to selection criteria that are transparent and to a selection procedure that is open and well-documented. Where the option is chosen to select applicants on the basis of their academic abilities, the selection procedure should ensure that applicants who satisfy the conditions for admission have a right to be admitted.⁸² Affirmative action for students from demonstrably under-represented or disadvantaged groups may however be exercised (see also *infra*, no. 78).

77 S. FULLER, "The Genealogy of Judgement: Towards a Deep History of Academic Freedom", *British Journal of Educational Studies* 2009, no. 10, 165.

78 Art. 2 Protocol No. 1 ECHR: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

79 Art. 13 ICESCR: "1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."

80 The "accessibility" of education is generally considered to be one of four essential features of the right to education, the other aspects being "availability", "acceptability" and "adaptability". See K. TOMASEVSKI, Special Rapporteur of the UN Commission on Human Rights on the Right to Education, *Preliminary report*, E/CN.4/1999/49, para. 50, introducing the "4-A scheme"; Committee on ESCR, General Comment 13, mentioned above (footnote 65), para. 6.

81 P. ZOONTJENS, *Vrijheid van wetenschap. Juridische beschouwingen over wetenschapsbeleid en hoger onderwijs*, Zwolle, Tjeenk Willink, 1993, 39; T. KARRAN, "Academic freedom in Europe: time for a Magna Charta?", *Higher Education Policy* 2009, no. 2, 171.

82 Consult ECtHR, 7 February 2006, no. 60856/00, *Mürsel Eren v. Turkey*, § 48.

35. Finally, methods of evaluation and assessment in higher and university education should be appropriate and suitable to the curriculum and the level of the courses, and the examination method should be made known to students from the outset of a course. Marks should reflect the academic ability that the students demonstrated in the assessment tasks, and students should have a right to receive feedback about their assessment. Internal and external appeals systems should be in place for students who believe their assessment to have been biased or otherwise unjust or inaccurate.⁸³

Lastly, students who successfully conclude a particular type of higher education are entitled to receive some sort of official recognition from the State for this (see the case-law of the ECtHR, *infra*, no. 93).

i.2. Right to freely develop one's own opinion

36. Being granted access to and receiving systematic information during a higher education is by itself an insufficient condition in order to yield a fruitful academic formation. Universities are more than just vocational schools that produce specialised workers. An additional requirement, at the very least, of academic education is that it encourages individuals educated to develop their own opinions and views on what is being taught.

Overly directive forms of teaching, that are tantamount to indoctrination or that otherwise leave no space for students to form their own opinions about the subject matter, should therefore be avoided by the teaching staff.

ii. Freedom to teach

37. Academic freedom also includes the freedom to teach. This presupposes and includes the right of an individual to be able to choose for the profession of (academic) teacher and to have equal opportunities in gaining access to the profession. Barriers of a formal and of a *de facto* nature should therefore be identified and removed. In this regard, special attention should be paid to the underrepresentation of women and certain minority groups as a result of exclusionary or (directly or indirectly) discriminatory practices or regulations. More generally, appointments should take place by means of an open, well documented and transparent

selection process, based on the candidates' teaching and research excellence, expertise and experience.⁸⁴ Where a university's ethos is based on religion or belief, it may require individual teachers (and researchers) to act in good faith and with loyalty to that ethos, in conformity with Article 4.2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

38. Subject to the proviso that the general contents of courses are set by the competent bodies of the University, the freedom to teach further entails that individual teachers can determine what is taught, based on their professional opinion (subject matter), and how it is taught (method of teaching).⁸⁵ This freedom, however, is not absolute. It is obvious that it can be limited. The exercise of it also entails certain responsibilities.

39. To start with the latter: it is each academic teacher's responsibility to ensure that his or her subjects and methods are suited to the level at which a course is taught and that both are made known in advance to students. Moreover, as regards content and mode of delivery, the teaching should constitute (and remain) an accurate and balanced reflection of current thinking in the relevant discipline: bias, distortion, misrepresentation and omissions – especially in their deliberate forms – should be avoided. The latter also goes for stigmatizing, derogatory or discriminatory statements and comments about individuals or groups, unless they are somehow directly related to or justified because of the choice of subject matter. The expression or defence of controversial beliefs that *are* relevant to the subject matter should not be prohibited save for any evidence of (incitement to) violent or disruptive results (*infra*, no. 63).⁸⁶ Finally, teaching personnel should pursue new knowledge and “maintain and develop the knowledge of their subject through scholarship and improved pedagogical skills” (UNESCO Recommendation, § 4).⁸⁷

40. The *limits* of the freedom are at least twofold. Firstly, the individual freedom to teach finds limits in the *rights of students*. Reference was already made to stigmatizing, derogatory and discriminatory statements in general, but these are especially unacceptable when aimed at particular students (or at other staff members).⁸⁸

83 T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, 172.

84 *Ibid.*, 171. See also UNESCO Recommendation, para. 25.

85 Teaching involves some interaction with students, and for that reason can be part of the “private life” of both the teacher and his or her students. See, with respect to covert video surveillance of the teaching activities of university professors by their dean, ECtHR, 28 November 2017, no. 70838/13, *Antovic and Mirkovic v. Montenegro*, § 44.

86 G. BADLEY, “A Place From Where to Speak: the University and Academic Freedom”, *British Journal of Educational Studies* 2009, no. 10, 154.

87 See also § 6 of the Recommendation: “Teaching in higher education is a profession: it is a form of public service that requires of higher education personnel expert knowledge and specialized skills acquired and maintained through rigorous and lifelong study and research; it also calls for a sense of personal and institutional responsibility for the education and welfare of students and of the community at large and for a commitment to high professional standards in scholarship and research.”

88 However, the mere fact that the general teachings of an academic staff member cause someone offense, is not a sufficient reason to forbid him from saying it. It should really concern the conscious and malicious targeting of individuals or groups.

Furthermore, teachers must avoid forms of indoctrination, that leave no space for the students to determine their own positions vis-à-vis that which is taught (cf. *supra*, no. 36). It comes down to what Fuller describes as “clearing a space so that the student can freely decide what to believe – or at least what is important to learn”.⁸⁹

A second cluster of limits consists in the inherent tension between the individual freedom to teach and its more collective or institutional aspects.⁹⁰ Individual teachers are members of a department, a faculty and a university as a whole (*infra*, nos. 75-76).

The individual's freedom is therefore limited and partially determined by that of the institutional context(s) in which he or she works. Nevertheless, higher education teaching personnel should “play a significant role in determining the curriculum” (UNESCO Recommendation, § 28), and individual teachers continue to possess the freedom to follow their own academic insights without being forced to conform to pre-determined political, philosophical, religious or epistemological points of view: “[h]igher-education teaching personnel should not be forced to instruct against their own best knowledge and conscience or be forced to use curricula and methods contrary to national and international human rights standards” (*ibid.*).

iii. Freedom of research

41. Freedom of research is a key aspect of academic freedom. In a sense, freedom of research is a continuation of the freedom to study, as both freedoms are partially concerned with gathering and ordering information and knowledge. However, the freedom of research has an important additional dimension in comparison with the right to study: it starts where gathering and ordering information are guided by a presupposed goal, usually even by one or more explicit research questions.⁹¹ The freedom of research has a number of dimensions, amongst which research autonomy (in e.g. the choice of topic, method and mode of analysis), the right to information, and the protection of sources.

iii.1. Research autonomy

42. An important aspect of the freedom of research is a minimum of research autonomy that includes the choice of topic, the choice of method, the mode of analysis and the right to draw (preliminary) conclusions from one's findings.

These freedoms flow directly from an individual's right to study and the right to freely develop one's own opinion.

43. Again, this freedom can be limited, for instance by institutional considerations (*infra*, nos. 75-76). Article 15 ICESCR – for example – is generally interpreted in such a way that the freedom of individual researchers is conditioned by the limits of the specific academic or research setting they are working in, like a research unit or faculty, a research programme or project, etc. The choice of object or topic of research, the choice of method and the mode of analysis can all be predicated – to a large extent – on requirements formulated by the scientific leadership in a specific context. If and when such limitations are in place however, they should be clearly established and mutually agreed upon beforehand. In case of external funding, the relative rights of the sponsors and the researchers over the output should be made clear as well.⁹²

Another set of limitations includes those of a legal and ethical nature (e.g. research integrity), which can both be either general in nature or specific to a certain discipline or field of research. Special care and precautions should be taken if research involves experiments on living beings, especially on humans and animals. There can also be certain rules that require one to objectively justify, either internally or externally, one's choice of topic/subject and methods.

44. All in all, the essence of research autonomy means that a researcher may not be forced, against his will or conscience, to research a particular topic, to do research according to a specific method or with a particular mode of analysis, let alone to arrive at certain predetermined conclusions.

iii.2. Right to information

45. In order to obtain the data that are relevant for academic research, the right to information is indispensable. It will often be insufficient for researchers to base themselves on information that is commonly known or generally or easily accessible. Therefore, a robust and enforceable access to information is required in order for (academic) researchers to be able to perform high-quality research.

46. Legally speaking the right to information is accepted as a corollary of the freedoms of speech and opinion. Article 10 ECHR (cf. *supra*, no. 20), for example, expressly includes the freedom “to receive (...) information and ideas without interference by public authority and regardless of frontiers”.⁹³

89 S. FULLER, “The Genealogy of Judgement: Towards a Deep History of Academic Freedom”, *British Journal of Educational Studies* 2009, no. 10, 170.

90 This tension can take on a particular form in religiously affiliated schools and universities. While these universities can require staff to demonstrate an attitude of good faith towards their foundations (see *supra*, no. 37), it is nonetheless equally important for these institutions to remain “morally and intellectually independent of all political or religious authority”, as Recommendation 1762 of the Parliamentary Assembly of the Council of Europe (*supra*, nos. 19-20) would have it.

91 P. ZOONTJENS, *Vrijheid van wetenschap. Juridische beschouwingen over wetenschapsbeleid en hoger onderwijs*, Zwolle, Tjeenk Willink, 1993, 49.

92 T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, no. 2, 174.

93 Likewise, Article 19 ICCPR (cf. *supra*, no. 22) protects the “freedom to seek, receive (...) information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

The ECtHR interprets this freedom to include the freedom to receive information that is held by public authorities. In *Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*, for instance, the Court noted the important role played by the media and other independent monitors in creating “forums for public debate” and stressed that interference with the ability of such groups to obtain information of public interest must be able to withstand the “most careful scrutiny”. According to the ECtHR governments have an obligation “not to impede the flow of information”, at least on matters of public concern.⁹⁴

47. The freedom to receive information, as an element of the freedom of expression, is considered by the ECtHR to apply only to information that the information holder wishes or may be willing to impart to others. According to the ECtHR, that freedom does not impose a duty on the state to grant access to public documents.⁹⁵ This gap has been filled by the Member States of the Council of Europe, that in 2009 adopted a Convention on Access to Official Documents. In a landmark case, the Court brought some nuances to the table:

“The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression, in particular “the freedom to receive and impart information” and where its denial constitutes an interference with that right.”⁹⁶

However, it follows from the Court’s case-law that academic researchers, who complain of a general ban on access to information, without indicating to what extent this ban would have had a concrete impact on their research, cannot qualify as victims of an Article 10 violation.⁹⁷

iii.3. Protection of research data and sources⁹⁸

48. In order to do research in an unimpeded manner it is necessary for researchers to not just gain access to certain data, but also to have one’s own research data protected against undue disclosure to third parties, including even fellow researchers, or public authorities. This aspect too is covered by Article 10 ECHR. In the case of *Goodwin v. United Kingdom* the European Court found that protection of sources is an essential component of media freedom.⁹⁹ The ECtHR has affirmed this decision ever since, broadening it to cover situations of search and seizure, compelled testimony and the protection of (used and unused) research materials. Whereas the ECtHR observed in 2010 that researchers may have a similar interest to that of journalists in protecting their sources, the Grand Chamber seemed to downplay this aspect in 2012.¹⁰⁰

While maximum openness should be encouraged, forced disclosure – especially prior to publication – should only take place if the following conditions are met: when it is ordered after prior (judicial) review by an independent authority, after alternative avenues have been exhausted and with proper weight given to freedom of research. Another approach, which would leave more room for authorities or third parties to gain access to data held by researchers, could lead to sources being deterred from disclosing information to academic researchers. This is especially true with respect to research based on information collected under promises of confidentiality made to participants in the research. As is stated in the Helsinki Declaration, adopted by the World Medical Association (1964), “every precaution must be taken to protect the privacy of research subjects and the confidentiality of their personal information ...” (principle 23).¹⁰¹

49. The above-mentioned conditions do not take away the fact that researchers and research units may have to show that their research is based on information that has been carefully collected or checked. This may sometimes imply a need to show openness with respect to their data.

94 ECtHR, 14 April 2009, no. 37374/05, *Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*.

95 ECtHR, 7 July 1989, no. 10454/83, *Gaskin v. United Kingdom*; ECtHR, 19 February 1998, no. 14967/89, *Guerra and others v. Italy*; ECtHR (GC), 19 October 2005, no. 32555/96, *Roche v. United Kingdom*.

96 ECtHR (GC), 8 November 2016, no. 18030/11, *Magyar Helsinki Bizottság v. Hungary*, § 156. See also: ECtHR, 1 December 2015, nos. 48226/10 and 14027/11, *Cengiz and Others v. Turkey*; ECtHR, 29 January 2019, no. 24973/15, *Cangi v. Turkey*.

97 ECtHR, 4 May 2021, nos. 41139/15 and 41146/15, *Akdeniz and Others v. Turkey*.

98 On the specific question of the interplay between GDPR and academic research: M. MOURBY, H. GOWANS, S. AIDINLIS, H. SMITH and J. KAYE, “Governance of academic research data under the GDPR—lessons from the UK”, *International Data Privacy Law*, 2019, 192-206.

99 ECtHR, 27 March 1996, no. 17488/90, *Goodwin v. United Kingdom*.

100 ECtHR, 2 November 2010, no. 41723/06, *Gillberg v. Sweden*, § 122; ECtHR (GC), 3 April 2012, no. 41723/06, *Gillberg v. Sweden*, §§ 95-96. For the Grand Chamber one of the considerations was that since the researcher was an employee of a university, the data were the property of the university.

101 In the *Gillberg* case, mentioned in the previous footnote, an administrative court ordered a professor -specialized in child and adolescent psychiatry- to disclose privacy-sensitive research material, based on interviews with children and their parents, to a researcher of another university and to a paediatrician. The professor subsequently was convicted by a criminal court because of his refusal to comply with the administrative court’s order. Before the ECtHR his complaint relating to the initial order could, unfortunately, not be examined on the merits, as the ECtHR held that it was filed out of time. As to the criminal conviction, the ECtHR held that it was not arbitrary or disproportionate for a court to impose a criminal sentence on a person who wilfully refuses to execute a final court order.

The ‘climate gate’ conflict, from 2009, can serve as an illustration of these principles. In a case that received wide media attention, e-mails and documents from the University of East Anglia’s (UEA) Climatic Research Unit (CRU) were obtained through hacking of a server.¹⁰² Allegations were made by climate change sceptics that the e-mails revealed misconduct within the climate science community: there were assertions of a lack of disclosure and openness and even of data manipulation. Both the UEA and the CRU issued rebuttals of the allegations.¹⁰³ Independent inquiries subsequently rejected the allegations of manipulation, but the UEA and CRU were criticised for a “consistent pattern of failing to display the proper degree of openness”.¹⁰⁴ As a matter of principle, the researchers and the university could claim to be able to refuse release of the data and information in question. However, given the importance of the debate on climate change to citizens in all places of the world, they failed to recognise the weight of the countervailing public interest attached to obtaining disclosure of these data and information. Furthermore, in this case, it would probably have been conducive to the immediate invalidation of the main allegations made against the researchers and the university if they had displayed more openness about *inter alia* their data and analyses.¹⁰⁵

50. Particular attention should be drawn to the special case of ‘whistle blowing’ in relation to the protection of data and sources, including prematurely publicised data. The justification that individuals will mostly give for this behaviour includes ethical considerations, such as the need to uncover conscious (research) fraud or the research being likely to constitute a threat for the wellbeing of individuals or society at large. No single solution can be offered for such cases: the overriding interest should be carefully weighed on a case-by-case basis. It should be clear however that even secrecy provisions – that are often included in contracts, especially when it concerns policy research – cannot always be accorded an overriding let alone absolute weight.

iv. Freedom of publication

51. Freedom of research and academic freedom in general are meaningless unless they entail the right to publicly express and publish his or her opinions and conclusions. This should be possible both within the scientific community and to the larger public, and should involve the avenues and methods one sees fit. At the very least researchers should be free to dispose of their research (iv.1), and enjoy (academic) freedom of expression (iv.2).

iv.1. Freedom to dispose of one’s research

52. Following the provision of Article 15 ICESCR that all are “to enjoy the benefits of scientific progress and its applications” researchers must be free to dispose of their research data, results and conclusions. Clearly, intellectual property rights are a very important aspect of this, subject to generally accepted limitations and transferability.¹⁰⁶

The starting point in this regard should be that it is the creator of an academic or scientific work that is normally entitled to these rights, and it is the state’s duty to afford the necessary protection. These rights should include the (conditional) right *not* to publish (or to prohibit the publication of) things one no longer agrees with or – conversely – to proceed with the publication if the work was intended to be published, but if e.g. a funding agency has failed to effectively provide the means for publication of a certain sort.

iv.2. (Academic) freedom of expression and speech

53. Free speech is an indispensable part of individual academic freedom. However, the freedom of expression and speech that are specific to academic freedom do differ in a number of important ways from the generic freedom of speech. Unlike the latter, ‘academic’ freedom of speech finds its foundation in the (presumed) quality of the opinion and its (potential) contribution to the general interest. For that reason, it should enjoy a higher degree of protection than many other opinions and expressions.
54. At the same time, this higher level of protection has a limited or at least circumscribed scope as it (only) concerns “the freedom to hold and express any belief, opinion or theoretical position and to espouse it in an appropriately academic manner”.¹⁰⁷ It therefore cannot be invoked as a justification for assaulting people with slogans and swear-words. Academic freedom of expression implies the right to present, refer and argue for or against any claim or belief, and to do so by presenting reasoning, evidence, et cetera. It is important to note that academic freedom of expression, understood in that sense, does entail a ‘right to err’: the mere fact that an academic opinion might be false (or even demonstrably is false) does not in itself deprive it from (a high degree of) protection.

The protection level differs according to the context and nature of the speech. In this respect one can make a distinction between ‘intra-mural speech and/or pure academic speech’, ‘extra-mural speech’, and finally ‘off-topic speech’.

102 The Norfolk Constabulary conducted a criminal investigation of the server breach, finally closing it in July of 2012 due to having no realistic prospect of identifying the offenders and launching criminal proceedings within the time constraints imposed by the law. See press release of 18 July 2012, <https://web.archive.org/web/20120719071718/http://www.norfolk.police.uk/newsevents/newsstories/2012/july/ueadatabreachinvestigation.aspx?>

103 See for an overview: <http://www.uea.ac.uk/mac/comm/media/press/CRUstatements>.

104 *The Independent Climate Change E-mails Review*, <http://www.cce-review.org/>, July 2010.

105 Compare: *ibid.*

106 Although – as mentioned – they should not in principle be forced to publicize their data or findings prematurely.

107 R. BARROW, “Academic Freedom: Its Nature, Extent and Value”, *British Journal of Educational Studies* 2009, no. 2, 180.

Intra-mural speech and/or purely academic speech

55. Academic freedom of expression of course firstly and most importantly covers 'intra-mural speech' or 'pure academic speech', i.e. expert utterances within the university or academic context in pursuit of teaching and research excellence. It can be both the *context* or the *individual(s)* involved that determine whether someone's utterances or writings enjoy the high level of 'pure academic speech' protection.

The former implies that on-campus utterances by external speakers (including non-academics) as part of the process of scholarly debate also enjoy the high-level protection of academic freedom: attempts to restrict the discourse – however controversial – of invited speakers should therefore be met with a staunch commitment to free speech principles.

The fact that the quality of the *individual* involved is relevant too, can be illustrated inter alia by an opinion of the former European Commission of Human Rights from 1983. The applicant, a researcher at Cambridge University, served a prison sentence because of violent behaviour during a university degree-giving ceremony at Cambridge University. While in prison, he unsuccessfully tried to send pieces of academic writing. The Commission unanimously concluded that the "complete prohibition on the applicant's sending academic writings out of prison constituted a violation of Art. 10 of the Convention".¹⁰⁸

56. It follows from the foregoing that courts should be generally reluctant to award civil claims (e.g. in tort actions) or to come to criminal convictions (e.g. for insults or libel) in strictly 'internal' academic matters.

In practice, national courts and tribunals in Europe have mostly refused to curtail 'pure' academic speech, and they have been doing so for decades already. A clear example in this regard is offered by an early twentieth century Dutch case, which concerned a scathing review in a specialised journal by a lecturer in private law of a book by a colleague on contract law. The colleague had brought charges against the review due to the following passages that it contained:

*"[T]he author has aimed too high. He lacks the precision of thinking and the precision of writing required to inform even beginners. (...) For in the end sloppiness of writing finds its cause in sloppiness of thinking. When this occurs so frequently and in so severe a manner such as here, it betrays a sheer incapacity to express oneself that will prove insurmountable even if the author were to double his efforts."*¹⁰⁹

Despite the less than subtle language, the Tribunal of Utrecht did not find fault in the review, due to the fact that it stayed within the broad limits of what is acceptable in academic debate.¹¹⁰

For an additional example in this category reference can be made to a controversy about another book review. In France the editor of a European legal journal stood trial for an online book review (written by a specialised academic, not by the editor himself) to which the author of the book in question took exception due to alleged falsehoods and misrepresentations. The author had demanded that the editor would take the review offline and refrain from publishing it. The editor declined, addressing (and rebutting) the author's criticisms of the review, but he did offer to publish the author's response alongside the review. The author refused this solution and filed a complaint in a French court accusing the editor of criminal libel.¹¹¹

In this case it seems clear that (academic) free speech should prevail since the review appears to fall well within the (wide) range of what is allowed. This is also what happened: although the court settled the case mainly on jurisdiction (holding that there had been no evidence that the site had been consulted in France within 3 months of the publication of the book review), it also held there had been abuse of the right to sue, stating that there had been 'forum shopping', and that the plaintiff ought to have known that she had no chance on the merits, and that the review was moderate and expressed a scientific opinion.¹¹²

Academic free speech not only requires courts to respect and honour it in individual cases, but it also presupposes a respectful attitude amongst academics themselves concerning academic discourse and publications; such an attitude implies the avoidance of court cases altogether, except by way of an *ultimum remedium* in cases of flagrant and malicious misrepresentations or personal attacks amounting to slander or libel.

57. The possibility for speakers to express opinions freely in an academic context may require protective measures, not only by the state authorities, but also by the university. This may be particularly true when a speaker is the object – or will likely become the object – of interferences by protesters attempting to disturb or silence him or her (regardless of whether the speaker is him- or herself an academic). Such protests should be met with decisive action, which should be aimed at protecting the speaker and enabling him or her to bring his or her message.

108 ECommHR (report), 12 October 1983, no. 8231/78, *T. v. United Kingdom*.

109 Translated from (old) Dutch: "de schrijver heeft te hoog gegrepen. Hij mist de scherpte van denken, en de scherpte van zeggen, die noodig zijn, de eerste beginnenden te kunnen voorlichten op het veeltijds zoo moeilijke terrein der verbintenissen (...) [W]ant tenslotte vindt slordigheid van zeggen hare oorzaak in slordigheid van denken. Treedt zij zoo veelvuldig en in zoo hevige mate op als hier, dan verraadt zij een onvermogen tot uiting, dat ook door meerdere inspanning van den schrijver niet zou kunnen worden overwonnen" (Tribunal of Utrecht, 1 June 1927, *NJ* 1928).

110 Tribunal of Utrecht, 1 June 1927, *NJ* 1928.

111 J. WEILER, "Book Reviewing and Academic Freedom", *European Journal of International Law* 2010, no. 4, 967-976.

112 Tribunal de Grande Instance de Paris, 3 March 2011. See: <https://www.ejiltalk.org/in-the-dock-in-paris-%E2%80%93-the-judgment-by-joseph-weiler-2/>

However, in responding to such incidents the university and the state authorities should respect basic prerequisites of proportionality and reasonableness.

The latter point is illustrated by an ECtHR ruling that upheld the Article 10 ECHR rights of students protesting in favour of university freedoms in Türkiye, during an opening ceremony and during the speech of the Chancellor of Istanbul University. The applicants were forcibly removed from the conference hall by policemen and taken to the police station. The ECtHR noted that the applicants' protests took the form of shouting slogans and raising banners, thereby impeding the proper course of the opening ceremony and the Chancellor's speech. As such, the ECtHR viewed their actions to amount "to an interference with the Chancellor's freedom of expression and [to cause] disturbance and exasperation among some of the audience, who had the right to receive the information being conveyed to them". Against this background, the ECtHR considered that the decision to remove the applicants from the university hall, even though it interfered with *their* freedom of expression, could be deemed proportionate to the aim of protecting the rights of others. However, the ECtHR concluded that Article 10 had nonetheless been violated:

[T]he Court observes that the applicants did not resort to insults or violence. Moreover, (...) they were not likely to cause serious public disorder. (...) The Court considers that the applicants' protest could have been countered by less draconian measures, such as denying them re-entry into the conference hall, rather than resorting to the extreme measures of arrest and detention, even for a few hours. In these circumstances, the Court finds that the authorities' response was disproportionate to the aims of preventing public disorder or protecting the rights of others. It was not therefore 'necessary in a democratic society'.¹¹³

58. Finally, the exercise of academic freedom naturally requires respect for the rights of third parties, as is exemplified by the requirements to ensure the anonymity of research participants and to respect intellectual property rights. It goes without saying that forgery, plagiarism and misleading manipulation or partial reporting of research data and results are not permitted.¹¹⁴

*Extra-mural speech*¹¹⁵

59. Academic freedom of speech covers, apart from 'internal' utterances, extra-mural interventions by academics in their areas of expertise (e.g. in the media or during debates with the general public), albeit to a slightly lesser degree.

Again, this is not a freedom without limits. However, content limitations should in principle apply only to speech and expressions that are likely to lead to violent or disruptive results.

By and large, this is in line with the ECHR, as applied by the ECtHR. The case law shows a high level of protection for 'academic speech' in relation to matters of public interest, as long as it does not (clearly) amount to hate speech or other unprotected speech.¹¹⁶ A university professor, who had not been allowed to participate in television programmes by his superiors, received disciplinary sanctions for nevertheless taking part in the events. The ECtHR found a violation of his academic freedom, since the domestic courts did not conduct a proper review of the necessity of the decisions in light of the concrete circumstances.¹¹⁷

60. In 1998 the ECtHR upheld the right of a laboratory researcher who had published a controversial paper concluding that the "measurable effects on human beings of food treated with microwaves, as opposed to food not so treated, include changes in the blood which appear to indicate the initial stage of a pathological process such as occurs at the start of a cancerous condition". At the request of an association of manufacturers and suppliers of household electrical appliances a domestic court had ordered the researcher to refrain from making "unfair comments" on microwave ovens in publications and public speeches, from "stating that food prepared in microwave ovens was a danger to health (...) and from using the image of death in association with microwave ovens". The ECtHR was of the opinion that "the effect of the injunction was partly to censor the researcher's work and substantially to reduce his ability to put forward in public views which have their place in a public debate (...)". It went on to state:

It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas (...). Consequently, there has been a violation of Article 10.¹¹⁸

61. Another infringement of Article 10 was found in a Liechtenstein case in which the president of the Administrative Court had in a lecture made constitutional arguments, which had led to a decision not to reappoint him. The judge, more specifically, expressed the opinion that the Constitutional Court was competent to decide on the interpretation of the Constitution in case of disagreement between the Prince (Government) and the Diet (Landtag, Parliament).

¹¹³ ECtHR, 13 April 2009, no. 31451/03, *Açık and others v. Turkey*.

¹¹⁴ T. KARRAN, "Academic freedom in Europe: time for a Magna Charta?", *Higher Education Policy* 2009, no. 2, 171.

¹¹⁵ It should be noted, however, that sometimes "extramural" is used to indicate speech on matters going beyond the expertise of the academic. See: E. BARENDT, *supra*, note 7, chapter 9. We use the term "off-topic speech" for this kind of discourse.

¹¹⁶ D. VOORHOOF, "The Legal Framework of Freedom of Academic Expression", Third University Foundation Ethical Forum, Brussels, 25 November 2004.

¹¹⁷ ECtHR, 19 June 2018, no. 20233/06, *Kula v. Turkey*. See, for a similar case: ECtHR, 8 November 2022, no. 74729/17, *Ayuso Torres v. Spain*.

¹¹⁸ ECtHR, 25 August 1998, no. 25181/94, *Hertel v. Switzerland*. See also: ECtHR, 26 September 1995, no. 17851/91, *Vogt v. Germany*. In the latter case the dismissal of a secondary school teacher due to her (communist) political activities was considered a disproportionate interference with her freedom of opinion. For a recent case, with a different outcome, ECtHR, 29 November 2022, no. 80450/17, *Godenau v. Germany*.

The lecture and the viewpoint about the supremacy of the Constitutional Court were highlighted in newspaper coverage. Soon after the lecture the Prince (i.e. the head of State) addressed a letter to the judge in question, expressing his disagreement with this interpretation of the constitutional powers in Liechtenstein and announcing his intention not to reappoint the judge as president of the Administrative Court. The ECtHR was of the opinion “that the announcement by the Prince of his intention not to reappoint the applicant to a public post constituted a reprimand for the previous exercise by the applicant of his right to freedom of expression and, moreover, had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future”. An interference with the judge’s right to freedom of expression as secured in Article 10 § 1 of the Convention was thus established. As for the (un)justified nature of this interference, the Court stated the following:

*The Court observes that the lecture by (the judge) formed part of a series of academic lectures at a Liechtenstein research institute (...) In the applicant’s view his statement was an academic comment on the interpretation (...) of the Constitution, while according to the Government it was a highly political statement involving an attack on the existing constitutional legal order (...). The Court holds that questions of constitutional law, by their very nature, have political implications (...). There is no evidence to conclude that the applicant’s lecture contained any remarks on pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince (...). Even allowing for a certain margin of appreciation, the Prince’s action appears disproportionate to the aim pursued. Accordingly, the Court holds that there has been a violation of Article 10 of the Convention.*¹¹⁹

62. It is in the nature of things that Article 10 ECHR cuts both ways where extra-mural utterances of academics are concerned: third parties, dissatisfied with what an academic has said or written, may exercise their freedom of expression and criticise the academic’s point of view. Such “debate” may be healthy for the academic as well, at least as long as it stays within certain limits.

Two Norwegian policemen had severely criticised a professor of criminal law who had reported on cases of police brutalities. The policemen subsequently were convicted because of their statements, which were considered to have a defamatory character. The Norwegian Supreme Court upheld the conviction, holding that the statements amounted to accusations against the professor of falsehood, dishonest motives and fabricated allegations of police brutality, which called his integrity into question without justification. The ECtHR, however, found the conviction by the domestic court to constitute a violation of Article 10 ECHR. The ECtHR underlined that “while there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court, the same must apply to speech aimed at countering such allegations since they form part of the same debate”. It went on to hold that “a degree of exaggeration should be tolerated in the context of such a heated public debate of affairs of general concern where on both sides professional reputations were at stake”, and concluded as follows: “(...) the Court is not satisfied that the litigious statements exceeded the limits of permissible criticism for the purpose of Article 10 of the Convention (...). The statements in question essentially addressed the issue of the truth of allegations of police violence and the admittedly harsh language in which they were expressed was not incommensurate with that used by the injured party who, since an early stage, had participated as a leading figure in the debate (...). Accordingly, the Court finds that the resultant interference with the applicants’ exercise of their freedom of expression was not supported by sufficient reasons in terms of Article 10 and was disproportionate to the legitimate aim of protecting the reputation of (the injured party)”.¹²⁰

63. The ECtHR allows states a great deal of latitude in tackling issues of hate speech and Holocaust denial and minimisation and considers Article 10 ECHR not to provide protection for these types of speech, regardless of the personal characteristics of the person expressing these kinds of opinions.¹²¹ A sanction for a university professor who, precisely in a context of antisemitism at university, was sanctioned by the disciplinary bodies on account of discriminatory language and declarations which could be interpreted as denialist, does not violate Article 10.¹²²

119 ECtHR (GC), 28 October 1999, no. 28396/95, *Wille v. Liechtenstein*. A violation of Article 10 was found to exist as well in a case in which an ophthalmologist had discussed the latest laser operation techniques in a public interview. Disciplinary measures were taken against the ophthalmologist due to the ‘promotional’ side effects of the interview. The ECtHR again found that the interference “did not achieve a fair balance between the interests at stake, namely the protection of health and the interests of other medical practitioners and the applicant’s right to freedom of expression and the vital role of the press” (ECtHR, 17 October 2002, no. 37928/97, *Stambuk v. Germany*). See also: ECtHR, 27 May 2014, nos. 346/04 and 39779/04, *Mustafa Erdoğan and Others v. Turkey*.

120 ECtHR (GC), 25 November 1999, no. 23118/93, *Nilsen and Johnsen v. Norway*.

121 See e.g.: ECtHR, 24 June 2003, no. 65831/01, *Garaudy v. France*; ECtHR (decision), 18 May 2004, no. 57383/00, *Seurot v. France*; ECtHR, 12 July 2005, no. 59997/00, *Müslüm Gündüz v. Turkey*. See generally on hate speech and academic freedom: C.R. SUNSTEIN, “Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems”, in L. MENAND (ed.), *The Future of Academic Freedom*, Chicago, University of Chicago Press, 1996, 93-118.

122 ECtHR (decision), 7 June 2011, no. 48135/08, *Gollnisch v. France*.

Although the ECtHR as such clearly allows states to sanction individuals e.g. where speech concerns ethnic or other minorities, it seems that in this regard restraint on the level of state authorities is required, at least where academic speech is concerned. In the light of the importance of free inquiry and publication of results thereof, states ought to be very cautious not to give rise to undesirable chilling effects by being overly eager to prosecute and convict academics who engage in controversial speech or research. As mentioned, the limits on free speech and expression in this context should mainly be justified by the presence of (malicious) incitement to violent or disruptive results (*supra*, no. 39).¹²³

Off-topic speech

64. Speech falling outside of an academic's field(s) of expertise is not covered by academic free speech. It is argued that academic freedom should not include the right to use the authority of the university to promote one's private views on matters that are outside of one's academic speciality area. Such speech may, of course, claim the protection of regular freedom of expression.
65. Academics would therefore do best to avoid a controversial matter that is unrelated to their subject or – when doing so – they should make it clear that they are not speaking in their professional capacity or on behalf of their institution.¹²⁴ They should still be able however to speak or write in public without fear from institutional censorship or discipline. Neither staff nor students should be sanctioned, disadvantaged, or subject to less favourable treatment by the university, for the exercise of their freedom as private citizens (UNESCO Recommendation, § 26).
- v. *Right to undertake professional activities outside of academic employment*
66. The UNESCO Recommendation states that academic staff and higher-education teaching personnel “have a right to undertake professional activities outside of their employment” and “particularly those that enhance their professional skills or allow for the application of knowledge to the problems of the community, provided such activities do not interfere with their primary commitments to their home institutions in accordance with institutional policies and regulations or national laws and practice where they exist”. The requirement that such activities ‘do not interfere’ with the commitment to academics’ home institutions

leaves space for interpretation and thus for restrictions of this (sub)right. It seems, however, that a highly restrictive interpretation of ‘interference’ is warranted: academic research and teaching benefit from a wide diversity of experiences amongst the staff, and limitations of outside professional activities should be applied by universities only in cases in which these other activities unequivocally and significantly interfere with one's academic responsibilities.

Reciprocally, this right also generally implies that the fact that a professional is at the same time active as an academic, cannot be held against him or her in that professional context, save in highly exceptional circumstances.

67. An interesting case in line with the proposed restrictive view of what does or does not amount to an ‘interference’, comes from Belgium. There the Constitutional Court had to determine whether one of its members could sit in a case notwithstanding the fact that he had *inter alia* done academic research on the issue under review.¹²⁵ The question submitted to the Court concerned the interpretation of the legislation regarding state financing of political parties, to the extent that the law allows funding to be withheld if a political party is demonstrably racist in nature or if its views and actions otherwise constitute a clear violation of the ECHR.¹²⁶ The university research unit of which the judge was a member had as one of its main research topics ‘the fight against the extreme right’. The Court ruled that the judge did not have to withdraw from the case, pointing out that “the university is a privileged place of academic freedom that entails the principle according to which teachers and researchers, in the very interest of the advancement of knowledge and of the diversity of opinion, must enjoy a very wide-ranging freedom in order to conduct research and to express their opinion in the course of performing their duties”.¹²⁷

b. Scope as an institutional right

68. Many aspects of academic freedom are not merely individual in nature, but also have a collective or institutional dimension that is often referred to as ‘institutional autonomy’. It implies that departments, faculties and universities as a whole have the right to preserve and promote the principles of academic freedom in the conduct of their internal and external affairs. The specific nature of this institutional autonomy “may differ according to the type of establishment involved” (UNESCO Recommendation, § 17).

123 G. BADLEY, “A Place From Where to Speak: the University and Academic Freedom”, *British Journal of Educational Studies* 2009, no. 10, 154.

124 T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, no. 2, 171.

125 Aside from this the judge in question also had academic ties with one of the lawyers in the case: they had been connected to the same research unit.

126 Referring to Articles 19 (free speech) and 24 (freedom of education) of the Belgian Constitution and to previous case law in which the Court had referred *inter alia* to Art. II-13 of the EU Charter of Fundamental Rights.

127 Translation of: “[L]’université est un lieu privilégié de la liberté académique, qui traduit le principe selon lequel les enseignants et les chercheurs doivent jouir, dans l’intérêt même du développement du savoir et du pluralisme des opinions, d’une très grande liberté pour mener des recherches et exprimer leurs opinions dans l’exercice de leurs fonctions” (Constitutional Court, no. 157/2009, 13 October 2009, B.7.1). Compare: Constitutional Court, no. 167/2005, 23 November 2006, B.18.1.

69. On the one hand, the guarantee of institutional autonomy is a *sine qua non* for the individual rights of academics to teach, research, publish and participate in public debate. Without the institutional ‘back-up’ of university and faculty structures, tenure, et cetera, individual academics could not exercise the freedoms described above. Individual academic freedom presupposes the wider academic and institutional context: an individual has academic freedom only because and insofar as he is a member of the academic community and institution(s).¹²⁸

On the other hand, however, (substantive) institutional aspects of academic freedom exist in an inherent tension with its individual aspects, described above: in some cases, institutional and individual academic freedom will reinforce one another, in other cases these freedoms may conflict with each other.¹²⁹ Too much institutional autonomy could thus lead to the negation of the individual freedom of individual academics. Again, it is a balance of rights and interests that will have to be struck. A helpful consideration here could be that while individual academics enjoy a considerable freedom to speak and publish, this does not necessarily give them the right to speak on behalf or in the name of their department or university.

70. In the following subsections the required independence and distance from the state, indispensable for institutional academic freedom, will be touched upon first. Secondly, the way in which institutional matters and policy should be decided upon procedurally will be discussed. Finally, a number of institutional dimensions of academic freedom, and the way in which they relate to the individual aspects of that freedom, will be discussed.

i. The university vis-à-vis the state: autonomy and accountability

71. Academic freedom as institutional autonomy requires a sufficient degree of independence or freedom from government control and from the state in general. Without autonomy in this sense universities cannot function. External interferences by authorities with the university’s autonomy, as far as its intellectual life is concerned, threaten to undercut the conditions required in order to achieve the goals served by academic freedom.¹³⁰ The UNESCO Recommendation more specifically details that the university should be autonomous from the state as “a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions” (*ibid.*, § 18).

72. However, rights and freedoms carry with them “duties and responsibilities” (Article 10 ECHR). Universities should properly account for the (often substantial) financial investments made by the state. In line with the UNESCO Recommendation, “[h]igher education institutions should endeavour to open their governance in order to be accountable”, particularly “where public funds are appropriated for higher education institutions” (*ibid.*, § 22 and § 10(c)).¹³¹ The systems of institutional accountability should “be based on a scientific methodology and be clear, realistic, cost-effective and simple”; furthermore “in their operation they should be fair, just and equitable”, and both the methodology and the results should be open (*ibid.*, § 23).

128 R. BARROW, “Academic Freedom: Its Nature, Extent and Value”, *British Journal of Educational Studies* 2009, no. 2, 181.

129 M. FINKIN, “On ‘Institutional’ Academic Freedom”, *Texas Law Review* 1983, no. 5, 818.

130 *Ibid.*, 829 and 854.

131 The Recommendations details that higher education institutions should – more specifically – be accountable for: “(a) effective communication to the public concerning the nature of their educational mission; (b) a commitment to quality and excellence in their teaching, scholarship and research functions, and an obligation to protect and ensure the integrity of their teaching, scholarship and research against intrusions inconsistent with their academic missions; (c) effective support of academic freedom and fundamental human rights; (d) ensuring high quality education for as many academically qualified individuals as possible subject to the constraints of the resources available to them; (e) a commitment to the provision of opportunities for lifelong learning, consistent with the mission of the institution and the resources provided; (f) ensuring that students are treated fairly and justly, and without discrimination; (g) adopting policies and procedures to ensure the equitable treatment of women and minorities and to eliminate sexual and racial harassment; (h) ensuring that higher education personnel are not impeded in their work in the classroom or in their research capacity by violence, intimidation or harassment; (i) honest and open accounting; (j) efficient use of resources; (k) the creation, through the collegial process and/or through negotiation with organizations representing higher-education teaching personnel, consistent with the principles of academic freedom and freedom of speech, of statements or codes of ethics to guide higher education personnel in their teaching, scholarship, research and extension work; (l) assistance in the fulfilment of economic, social, cultural and political rights while striving to prevent the use of knowledge, science and technology to the detriment of those rights, or for purposes which run counter to generally accepted academic ethics, human rights and peace; (m) ensuring that they address themselves to the contemporary problems facing society; to this end, their curricula, as well as their activities, should respond, where appropriate, to the current and future needs of the local community and of society at large, and they should play an important role in enhancing the labour market opportunities of their graduates; (n) encouraging, where possible and appropriate, international academic co-operation which transcends national, regional, political, ethnic and other barriers, striving to prevent the scientific and technological exploitation of one state by another, and promoting equal partnership of all the academic communities of the world in the pursuit and use of knowledge and the preservation of cultural heritages; (o) ensuring up-to-date libraries and access, without censorship, to modern teaching, research and information resources providing information required by higher-education teaching personnel or by students for teaching, scholarship or research; (p) ensuring the facilities and equipment necessary for the mission of the institution and their proper upkeep; (q) ensuring that when engaged in classified research it will not contradict the educational mission and objectives of the institutions and will not run counter to the general objectives of peace, human rights, sustainable development and environment.”

In line again with the Recommendation, universities should design and implement appropriate systems of accountability, including quality assurance mechanisms, however “without harming institutional autonomy or academic freedom”. Organisations representing teaching personnel should participate in the planning of such systems. “Where state mandated structures of accountability are established, their procedures should be negotiated, where applicable, with the institutions of higher education concerned and with the organisations representing higher-education teaching personnel” (*ibid.*, § 23).

ii. *Self-governance and participation in decision-making*

73. “Self-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education”, as § 21 of the UNESCO Recommendation has it. Since universities employ individuals who themselves enjoy academic freedom, these individuals should decide on institutional issues and policy issues – as much as possible – in a democratic way, particularly with respect to those decisions that may limit individual freedoms. In order for such decisions to have legitimacy and support, and in line with the UNESCO Recommendation, academic staff should have “the right to take part in the governing bodies” of faculties and universities and “the right to elect a majority of representatives to academic bodies”, “while respecting the right of other sections of the academic community to participate” (*ibid.*, § 31).¹³²

74. To this end staff, as well as students, must also have the right to voice critique and opinions on the educational policies and priorities within their institutions without imposition or threat of punitive action (*ibid.*, § 31).

Finally, and again in line with the UNESCO Recommendation, the importance of collegiality in this context is stressed: academic staff should fulfil their professional obligations and responsibilities in a collegial manner. The principles of collegiality 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 (*ibid.*, § 32). Such collegial 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” (*ibid.*).

iii. *Substantive institutional academic freedom*

75. In exercising institutional academic freedom or autonomy, faculties and universities should always attempt to do this in a way that maximally promotes (or at least respects) the individual aspects of the right. Working conditions and infrastructure, for instance, “should be such as will best promote effective teaching, scholarship, research and extension work and enable higher-education teaching personnel to carry out their professional tasks” (*ibid.*, § 7). Amongst other things, staff and students should “have access to libraries which have up-to-date collections reflecting diverse sides of an issue, and whose holdings are not subject to censorship or other forms of intellectual interference” (*ibid.*, § 11). They should also have access “without censorship, to international computer systems, satellite programmes and databases required for their teaching, scholarship or research” (*ibid.*).

76. As mentioned above, academic freedom as institutional autonomy can conflict with the academic freedom of individual teachers and researchers (*supra*, no. 40). On this issue the UNESCO Recommendation generally states that “[a]utonomy should not be used by higher education institutions as a pretext to limit the rights of higher-education teaching personnel” provided for in the recommendation or in other international standards (*ibid.*, § 20). Where and when restrictions on individual academic freedom prove unavoidable, they should not go any further than necessary in order to achieve legitimate institutional academic aims, with means being proportionate to these aims. Below a number of examples of such conflicts are discussed, related to specific dimensions of both individual and institutional academic freedom.

iii.1. *Right to study*

77. Institutional academic freedom firstly entails the right to determine the criteria for the admission of students (and to apply those criteria in particular cases) and to determine codes of conduct and other regulations that apply to students whenever they are on campus or otherwise making use of the university infrastructure.

78. Regarding the first issue, as mentioned above, universities and faculties should select students – to the extent that a choice needs to be made –, through an open, well-documented and transparent selection process (*supra*, no. 34).¹³³

¹³² In a number of European states, however, universities have decision-making bodies that partially or even pre-dominantly are made up of external representatives and not by academic staff (T. KARRAN, “Academic Freedom in Europe: Reviewing UNESCO’s Recommendation”, *British Journal of Educational Studies* 2009, 204). It is clear that in such situations there is a need for counterbalancing safeguards.

¹³³ T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, no. 2, 171-172.

Challenges to academic freedom as a fundamental right

By way of exception, institutions can employ affirmative action measures for students from demonstrably under-represented groups. Such measures should be of a temporary nature and they must be discontinued when their objectives are achieved.¹³⁴

79. As for codes of conduct and other regulations concerning the behaviour and speech of students, universities should – in the light of the ultimate aims of academic freedom – limit themselves strictly to regulating and restricting conduct that demonstrably has a significantly disruptive influence on academic activities and/or that leads to disorderly conduct.

In some areas this would imply that academic institutions should not go as far as e.g. the ECtHR would seem to allow state authorities to go. The Court addressed a particular institutional aspect of academic freedom in the case of *Sahin v. Turkey* in which it held that “it is established that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others”.¹³⁵ The case concerned a prohibition of the (Islamic) headscarf at Istanbul University. In a much-discussed decision the ECtHR did not find a breach of the ECHR.¹³⁶ Referring to the secular context of the Turkish state, the ECtHR ruled *inter alia*:

*[I]t is the principle of secularism, (...) which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.*¹³⁷

As in the case of controversial speech or (potential) ‘hate speech’ by academics, here too it is submitted that even though the ECtHR seems to accept that states (and university authorities) can, within their margin of appreciation, restrict student conduct or attire – at least in some societal contexts –, such restrictions should nonetheless be avoided.

In the light of freedom of opinion in general and academic freedom in particular, coercion should be refrained from as

much as possible. It seems that only if a given conduct or attire – religious or otherwise – can be demonstrated to have a significantly disruptive influence or lead to disorderly conduct, should universities consider to ‘institutionally’ limiting students’ rights in any way. The challenge will be, in such cases, to opt for the least burdensome solution for all those involved.

iii.2. Freedom to teach

80. Generally speaking, institutional academic freedom also entails the right for a university and parts thereof to promote an own, specific educational viewpoint. This includes the right to determine, within certain limits, who may teach, what may be taught, and how it should be taught.¹³⁸

81. As for who may teach: this right of institutions is limited in that it should *firstly* respect procedural requirements. The ECtHR has, for instance, ruled that the rights of teaching personnel cannot be unduly restricted by a Faculty Board of a Catholic university. The ECtHR did so in an indirect way. It had to examine a complaint related to court proceedings concerning a faculty decision that refused to examine an academic’s application for a teaching position. That decision was merely based on the view expressed by the ecclesiastical authorities that the applicant’s studies and teaching were incompatible with the Faculty’s Catholic outlook. Neither the university, nor the domestic court gave any reasons of their own, supporting such view. By not stating adequate reasons, the court had denied to the applicant a fair trial.¹³⁹

82. *Secondly*, persons should in principle be appointed solely on the basis of their teaching and research excellence, expertise and experience (*supra*, no. 37). To put it differently, any decision not to appoint someone should, everything else being equal, be based exclusively on his or her lack of academic merit.¹⁴⁰

The case of David Irving can serve as an interesting illustration in this regard, due to the issues that it raises. Irving is an historian who believes the generally accepted figures about the number of Jews killed during the Holocaust to be greatly exaggerated. While one can argue that persons such as Irving should have the right to express their views, a university should in any event have the right not to *appoint* him on the ground that there is a consensus among historians, based on solid academic research,

134 *Ibid.*, 171-172.

135 ECtHR (GC), 10 November 2005, no. 447774/98, *Leyla Şahin v. Turkey*, § 111.

136 Neither of Article 9 ECHR (right to freedom of religion), nor of Article 10 ECHR (freedom of speech).

137 ECtHR (GC), 10 November 2005, no. 447774/98, *Leyla Şahin v. Turkey*, § 116.

138 This formula is taken from the US Supreme Court that more specifically ruled that the institutional aspects of academic freedom entail “four essential freedoms”, namely “to determine for itself on academic grounds who may teach, what may be taught, and how it shall be taught, and who may be admitted to study” (*Sweezy v. New Hampshire*, 354 U.S. 234, 262-263 (1957) (Felix Frankfurter, Justice)).

139 ECtHR, 20 October 2009, no. 39128/05, *Lombardi Vallauri v. Italy*.

140 Subject to a reservation in the case of universities based on a certain ethos (see *supra*, no. 37).

that a person denying or minimising the Holocaust is in some way a very poor historian.¹⁴¹ That does leave universities with the problem of drawing the line between academic idiosyncrasy and minority views, on the one hand, and poor academic views, on the other. There are no easy or generally valid answers to be found here, but peer groups should be able to honestly determine the difference between both.

It becomes more difficult if someone develops his or her controversial views only *after* being appointed. In that case a much greater degree of reticence on the part of the faculty and university institutions may be appropriate. If a person's academic abilities initially were considered sufficient and his or her newly developed views remain based on reasoning and evidence, then that person should enjoy the academic freedom to defend those views, offending as they may be.¹⁴²

83. As for the aspects of what may be taught in universities and how it should be taught, institutional academic freedom more specifically entails the (collective) right to determine the contents of particular courses and the manner in which they are taught, supervised or assessed. Institutional guidelines and limitations in this regard should however be – as much as possible – democratically established by the faculty staff collectively (*supra*, no. 40) and be based on objective academic criteria. The individual academic staff responsible for a specific course must also play a predominant role in the determination of the curriculum, the assessment standards, and other academic matters of the course (*supra*, no. 38).

iii.3. Freedom of research and freedom of publication

84. Even more so than is the case with the freedom to teach, the institutional dimensions of the freedom of research and the freedom of publication should not take precedence over their individual aspects. This does not preclude these freedoms from having certain collective and institutional dimensions, but where and when these dimensions conflict with individual dimensions, a special consideration is to be given to the latter.

As such, a majority vote among members of a department precluding or forbidding the use of some phraseology or condemning particular viewpoints, would constitute an infringement of the academic freedom of the minority, to the extent that the right to express certain academic views would be curtailed by such measures.¹⁴³

85. In this regard, we can refer to a case in a Canadian university where a research psychologist came to, or was thought to have come to, the conclusion that blacks on average have lower IQ's than whites. Several colleagues argued this researcher ought to be forbidden to continue his research and to write further on this topic.¹⁴⁴ Such a course of action cannot be accepted in the light of academic freedom, since – offensive as these views may be – this offensiveness in and of itself cannot justify institutional restrictions either on the research itself or on the publication of its results.

86. However, this case also touches on the freedom to teach. It raises the question whether – even though an academic as the one in the Canadian case must be allowed to continue with his research and publications – it is reasonable to expect students to put up with being taught by such a person, especially if the student population includes black students. These are valid concerns and insofar as there is reason to suppose that a teacher will treat a student unfairly because of his or her views, it may be not only appropriate but also necessary for the institution to act in order to ensure that the teacher does not or cannot act unfairly.¹⁴⁵ Once that is ensured, however, the mere fact that a student finds views offensive – understandable as that may be – should not be accepted as a reason for prohibiting the teacher to express these views in an academic context (*supra*, nos. 39-40).

2. (State) obligations

87. For academic freedom to exist in any meaningful sense, it must – like all freedoms – be respected, protected, ensured and promoted by the state, in its own actions, through its various organs and by ensuring that third parties, including private actors do not violate it.¹⁴⁶ A failure to fulfil these obligations would amount to a violation of academic freedom.¹⁴⁷

a. Obligation to respect and protect

88. States are firstly to respect academic freedom in all of its dimensions discussed above (art. 13 EU Charter; art. 15 § 3 ICESCR). As such, states are themselves to refrain from arbitrary interferences and undue restrictions of both individual and institutional academic freedom.

141 R. BARROW, "Academic Freedom: Its Nature, Extent and Value", *British Journal of Educational Studies* 2009, no. 2, 185.

142 Compare: R. BARROW, "Academic Freedom: Its Nature, Extent and Value", *British Journal of Educational Studies* 2009, no. 2, 186.

143 *Ibid.*, 178.

144 *Ibid.*, 184.

145 *Ibid.*

146 E.W. VIERDAG, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", in *Netherlands Yearbook of International Law*, 1978, Alphen aan de Rijn, T.M.C. Asser, 102.

147 Compare: Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights, para. 6.

The UNESCO Recommendation specifically refers to “untoward political pressures, which could undermine academic freedom” due to the “vulnerability of the academic community” for such pressures (UNESCO Recommendation, preamble). The obligation to respect may also have implications of a wider scope. The state should, e.g., refrain from interfering in associational freedoms of universities and academics, such as the right of academics to engage in cross border co-operation or to form trade unions.

89. Secondly, the state’s duty to protect academic freedom requires that states take steps, by means of legislation or otherwise, that preclude third parties, in particular private individuals and entities, from interferences with any of the dimensions of academic freedom.

On the level of individual academic freedom, one might think for instance of police protection for certain (controversial) speakers on campus, including invited speakers, so that they are able to speak despite protest or the threat of violence.

An example of this took place in Sweden, at Uppsala University in May 2010. The provocative artist Lars Vilks – who had angered some Muslims by depicting the Prophet Muhammad as a dog – was there to give a lecture about the limits of artistic freedom. During the lecture Vilks was assaulted and police were forced to detain and/or pepper-spray some unruly members of the crowd.¹⁴⁸

90. Active protection of individual freedoms is also highly relevant in the context of the right to publication, which rests in significant part on the state’s duty to create the (legal) conditions for respecting the freedom to dispose of the data one has obtained from one’s own research and to publicize them in the manner that one sees fit. A proper protection of (academic) intellectual rights and copyrights are amongst these conditions (*supra*, no. 52): “The intellectual property of higher-education teaching personnel should benefit from appropriate legal protection, and in particular the protection afforded by national and international copyright law” (*ibid.*, § 12).
91. As for institutional aspects of academic freedom that require active protection, the UNESCO Recommendation points to the obligations of states “to protect higher education institutions from threats to their autonomy coming from any source” (*ibid.*, § 19).

b. Obligation to ensure and promote

92. State obligations go beyond the obligation to respect and protect academic freedom: states also have the obligation to ensure and promote it. This means that states must actively create, establish and maintain the conditions for the optimal realisation of academic freedom. This implies, to begin with, that states should adopt or amend national legislation and procedures in order to ensure recognition of this right in the national legal order. Furthermore it includes the obligation to adopt appropriate legislative, administrative, budgetary, promotional and other measures towards the full realisation of academic freedom in all its dimensions.

93. As to the right to study and to teach in an academic context, it is the responsibility of the states to provide “higher education in fulfilment of Article 13 § 1 (c) ICESCR”. The state should enable academic institutions to provide education and promote learning. It should furthermore ensure that academic education is generally accessible and that it reflects and guarantees a minimum level of the diversity of opinion present in society at large.

States are also obliged to grant students who successfully conclude a particular form of higher or university education some sort of official recognition for this. The European Court of Human Rights derives this obligation from Article 2 Protocol No. 1 ECHR.¹⁴⁹

94. States finally have a duty to ensure and promote the freedom of research, in order for everyone “[t]o enjoy the benefits of scientific progress and its applications” (Art. 15 § 1(b) ICESCR). In order to achieve the full realisation of this right, states must take steps, including those “necessary for the conservation, the development and the diffusion of science” (Art. 15 § 2 ICESCR). At the international level, states have an obligation to encourage and develop “international contacts and co-operation in the scientific and cultural fields” (Art. 15 § 4 ICESCR). This obligation can be fulfilled, e.g., by facilitating and promoting cross-border co-operation among academics.

148 Heed must be paid however to the proportionality of such protective measures. See in this regard the ECtHR case of *Açik v. Turkey*, discussed above (*supra*, no. 57).

149 ECtHR, 23 July 1968, nos. 1474/62, 1677/62, 1769/63, 1994/63 and 2126/64, *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, § 4. See also UNESCO Recommendation, para. 16, and the UNESCO Recommendation on the Recognition of Studies and Qualifications in Higher Education of 1993.

V. Conclusions

95. For LERU, academic freedom is not only a goal in itself. It is indispensable for the universities' core mission to aspire for scientific knowledge and to understand the common good of society through searching for and disseminating knowledge and understanding, and through fostering independent thinking and expression in academic staff and students.

Academic freedom is therefore important both for universities and researchers. This freedom comprises individual and institutional rights, and entails various obligations for the public authorities.

96. Academic freedom includes for LERU the following three aspects:

- (a) An individual right to the expressive freedoms for members of the academic community (both staff and students) as individuals, e.g. freedom of opinion and expression and freedom of association
- (b) An institutional right of autonomy for the academy in general or subsections thereof (universities, faculties, research units, etc.)
- (c) A corresponding obligation for the public authorities to respect academic freedom, to take measures in order to ensure an effective enjoyment of this right, and to protect it.

These three dimensions of academic freedom are not mutually exclusive, but on the contrary (should) mutually reinforce one another.

97. Academic freedom as an individual right refers to a system of complementary rights of teachers and students, mainly as free enquirers. It includes at least the following and interrelated aspects:

- (i) The freedom to study,
- (ii) The freedom to teach,
- (iii) The freedom of research and information,
- (iv) The freedom of expression and publication (including the right to err),
- (v) The right to undertake professional activities outside of academic employment.

98. Secondly, many aspects of academic freedom are not merely individual in nature, but also have an institutional dimension that is often referred to as 'institutional autonomy'. It implies that departments, faculties and universities as a whole have the right to preserve and promote the principles of academic freedom in the conduct of their internal and external affairs. This institutional autonomy is a sine qua non for the individual rights of academics to teach, research, publish and participate in public debate. If and when this institutional dimension of academic freedom conflicts with its individual dimension(s), a balance between both dimensions will have to be struck, in which special consideration should be given to the latter.

99. Finally, it is clear that freedom of any kind is not a spontaneous state of affairs. For academic freedom to exist in any meaningful sense it must be respected, protected, ensured and promoted by the public authorities. A state has legal obligations with respect to academic freedom, and any failure to fulfil its obligations amounts to a violation of academic freedom.

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