

ACADEMIC FREEDOM AS A FUNDAMENTAL RIGHT

Advice Paper *League of European Research Universities (LERU)*

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and comments by the LERU Working Group on Human Rights

Executive summary

This paper sets out the main dimensions and the scope of academic freedom as a fundamental right. 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.

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 (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;
- (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 protect and promote it.

These three dimensions of academic freedom are not mutually exclusive, but on the contrary they mutually 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.

I. BACKGROUND AND AIMS

1. Academic freedom is generally considered a *sine qua non* for the proper functioning of modern universities. 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*, n°). Moreover, even in international texts and conventions in which academic freedom is not explicitly provided for - such as the European Convention on Human Rights - 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. A recent and (in)famous example is offered by the so-called 'Climate Gate' of 2009, when e-mails and documents from the University of East Anglia's Climatic Research Unit were obtained by hacking into a server. Allegations were made by climate change sceptics that the e-mails revealed misconduct within the climate science community with a view to manipulate public opinion in the run up to the world environmental conference in Copenhagen. Another example is related to academic book reviewing: in France the editor of a legal journal is to stand trial for an online book review to which the author of the book in question took offense. This is not to mention the many academics in various parts of the world that are harassed, prosecuted, convicted, and sometimes killed, because of their critical stance towards government politics in their home country or abroad.

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. 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. This lack of clarity is problematic for various reasons. Firstly, when academic freedom remains ill-defined it is difficult to argue coherently for its importance: "[b]efore one can defend academic freedom (...)

it must be defined”¹. Therefore, in order for legal proclamations such as Article 13 of the EU Charter to have a meaningful and positive impact on ensuring academic freedom, the right needs to be clearly conceived. 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 ‘legalised’ or ‘juridified’, it is of great importance for academics and 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. 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.² 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. The foregoing considerations have brought LERU to focus its attention on the issue of academic freedom and to produce the present advice paper. 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. *It aims to present a vision of the main dimensions and the scope of academic freedom.* 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.³

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.*

Before discussing the various aspects of academic freedom, the paper will briefly sketch the current legal framework for academic freedom in national and international law.

¹ B. RAJAGOPAL, “Academic freedom as a human right”, *Academe* 2003, n° 3, 25.

² T. KARRAN, “Academic Freedom in Europe: A Preliminary Comparative Analysis”, *Higher Education Policy* 2007, 289-313.

³ See also: G. BOULTON & C. LUCAS, *What are universities for?*, Leuven, LERU, 2008.

II. ACADEMIC FREEDOM IN NATIONAL CONSTITUTIONS AND INTERNATIONAL LAW

5. 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. 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

6. A significant number of (European) 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. Looking at the constitutional provisions one can distinguish at least three types or approaches, which often occur in combination: (1) a rights approach, subdivided in (a) individual and (b) institutional aspects (2) and a state obligations approach.

1. Rights (and limitations)

a. Individual rights approach

7. 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 Spain, Hungary, Poland, Portugal, and Slovakia.

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 the analysis of academic freedom (*infra* section III).

8. 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”⁴. 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

⁴ Art. 16 Greek Constitution.

Law”⁵ Finally, the Constitution of Spain states 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”⁶

b. Institutional rights approach

9. Less common than the individual rights approach, is the one by which academic freedom is regarded 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

10. 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.

11. Examples of the former include the constitutions of Latvia, Portugal and Slovakia, which respectively proclaim that it is the state’s duty to “protect copyright and patent rights”⁷, that the state shall ensure “legal protection for copyright”⁸ and that “intellectual property rights shall be protected by law”⁹

12. 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”.

⁵ Art. 5 German Basic Law.

⁶ Art. 20.4 Spanish Constitution.

⁷ Art. 113 Latvian Constitution.

⁸ Art. 42 Portuguese Constitution.

⁹ Art. 43 Slovak Constitution.

B. EU Charter of Fundamental Rights (2000, revised in 2007)

13. The most significant reference to academic freedom in the context of the European Union is to be found in Article 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".

14. 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) and expression (Article 11). Furthermore, the freedoms set out in Article 13 must be exercised - according to the drafters' intentions - within the framework of limitations of the freedom of expression, as provided by Article 10.2 of the European Convention on Human Rights, while also respecting Article 1 of the Charter, on human dignity. The latter covers ethical issues 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) and to the jurisprudence of the European Court of Human Rights on the issue of academic speech and freedom (*infra*, n^{os} and).

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. This is all the more so, given the current absence of a body of jurisprudence providing further guidance.

C. Council of Europe, and European Convention on Human Rights (1950)

15. 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.¹⁰ 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".¹¹

¹⁰ Recommendation R (2000) 8 of the Committee of Ministers of 30 March 2000 on the research mission of universities.

¹¹ Recommendation 1762 (2006) of the Parliamentary Assembly of 30 June 2006 on 'Academic Freedom and University Autonomy'.

16. 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 under Article 10, which guarantees freedom of expression.

D. United Nations

1. International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966)

17. 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.

18. 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.

The ICESCR on the other hand expressly recognises academic freedom as part of a human right to education¹² and progress, in its Article 15:

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

19. The UN Committee on Economic, Social, and Cultural Rights (ESCR) 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”.¹³

¹² The right to education is itself also provided for separately in Articles 13 and 14 ICESCR.

¹³ General Comment 13 (1999), The right to education (Article 13 of the International

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

2. UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997)

20. 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)¹⁴.

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"¹⁵, as is illustrated by the references it contains to various other international texts. Finally, the UNESCO and the International Labour Organisation have jointly set up a system of periodic scrutiny and an expert mechanism to report on infringements.

21. 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

Covenant on Economic, Social and Cultural Rights), § 38.

¹⁴ For the full text of the Recommendation, see <http://unesdoc.unesco.org/images/0011/001132/113234mb.pdf>.

¹⁵ T. KARRAN, "Academic Freedom in Europe: Reviewing UNESCO's Recommendation", *British Journal of Educational Studies* 2009, 194; K. BEITER, *The Protection of the Right to Education by International Law*, Leiden/Boston, Martinus Nijhoff, 2005, 278.

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).

III. DIMENSIONS AND SCOPE OF ACADEMIC FREEDOM

22. What are the several dimensions and the exact scope of academic freedom? These issues constitute the focus of the third section of this paper. It provides a concept of academic freedom that may serve as a common denominator in the European context, certainly not the smallest common denominator but rather based on an aspirational model. Such an approach is necessary for any definition of “academic freedom to possess more than mere ornamental significance”.¹⁶ At the same time, the 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.

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

A. Dimensions

23. The preceding section showed that there are a number of ways in which to understand the nature and dimensions of academic freedom. The first is to conceive it as an individual right, combining in particular the expressive freedoms that members of the academic community (both staff and students)

¹⁶ T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, 168. See also F. ROCHFORD, “Academic freedom as insubordination: the legalisation of the academy”, *Education and the Law* 2003, 250.

have as individuals: e.g. freedom of opinion and expression and freedom of association. 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. 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.¹⁷ 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 do 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.

24. 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. Academic freedom should serve to achieve these ends.

25. 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.¹⁸ 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.

B. Scope

26. 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.

1. Rights

a. Scope as an individual right

27. Academic freedom as an individual right refers to a system of

¹⁷ See, e.g., the approach adopted by the UN Committee on ESCR in its General Comment 13, mentioned above (footnote 13).

¹⁸ S.H. ABY and J.C. KUHN (eds.), *Academic Freedom: a Guide to the Literature*, Westport, Greenwood Press, 2000, vii.

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), and (v) the right to undertake professional activities outside of academic employment.

i. Freedom to study

28. 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 and the right to freely develop (and change) one's own opinion.

i.1. Right to education

29. The right to education is an important aspect of the freedom to study; it is not only important 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.

30. International human rights law acknowledges the right of parents to ensure education and teaching in conformity with their own religious, philosophical and moral convictions. It also guarantees a general right of access to every type and every level of education.¹⁹ 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.²⁰

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.²¹ Affirmative action for students from demonstrably under-represented or disadvantaged groups may however be exercised (see also *infra*, n°).

31. 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

¹⁹ 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, § 50, introducing the "4-A scheme"; Committee on ESCR, General Comment 13, mentioned above (footnote 13), § 6.

²⁰ 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, 171.

²¹ Consult ECtHR, *Mürsel Eren v. Turkey*, 7 February 2006, § 48.

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.²²

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*, n°).

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

32. 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, must therefore be avoided by the teaching staff.

ii. Freedom to teach

33. Academic freedom also includes the freedom to teach. This presupposes and includes an individual right 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. Special attention should be paid to the underrepresentation of women and certain minority groups as a result of exclusionary or 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.²³ 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.

34. 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). This freedom, however, is not absolute. It is obvious that it can be limited. The exercise of it also entails certain responsibilities.

35. 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 the 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

²² *Ibid.*, 172.

²³ T. KARRAN, "Academic freedom in Europe: time for a Magna Charta?", *Higher Education Policy* 2009, 171. See also UNESCO Recommendation, § 25.

in the relevant discipline: bias, distortion, misrepresentation and omissions - especially in their deliberate forms - should be avoided. The latter also goes for stigmatising and derogatory or discriminatory statements and comments about individuals or groups, unless they are somehow directly related to or justified because of the choice of the 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*, n°).²⁴ 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).

36. The *limits* of the freedom are at least twofold. Firstly, the individual freedom to teach finds limits in the *rights of students* and any stigmatising, derogatory and discriminatory statements aimed at particular students (or other staff members) are unacceptable.²⁵ Furthermore, teachers must avoid forms of indoctrination that leave no space for the students to determine their own positions vis-à-vis what is taught (cf. *supra*, n°).

A second cluster of limits consists in the inherent tension between the individual freedom to teach and the collective or institutional aspects of that freedom. Individual teachers are members of a department, a faculty and a university as a whole²⁶ (*infra*, n°^{os} -). The individual’s freedom is therefore limited and partially determined by 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 (*ibid*).

iii. Freedom of research

37. Freedom of research is a key aspect of academic freedom. It 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, as the former involves gathering and ordering information guided by a presupposed goal and even one or more explicit research questions. The freedom of research has a number of dimensions, amongst which research autonomy, the right to information and the protection of sources.

²⁴ G. BADLEY, “A Place From Where to Speak: the University and Academic Freedom”, *British Journal of Educational Studies* 2009, 154.

²⁵ 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.

²⁶ 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*, n°), 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*, n° 20) would have it.

iii.1. Research autonomy

38. A minimum of research autonomy 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 the individual's right to study and the right to freely develop one's own opinion.

39. Again, this freedom can be limited, for instance by institutional considerations (*infra*, n°). 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. If and when specific requirements about the subject or topic of research, the method and the mode of analysis are in place, they should be clearly established and mutually agreed upon beforehand. In case of external funding, the respective rights of sponsors and researchers over the output should be made clear as well.²⁷

Another set of limitations includes those of a legal and ethical nature, 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.

40. All in all, the essence of research autonomy means that a researcher may not be forced, against his or her 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

41. In order for researchers to obtain the data relevant for academic research, the enjoyment of the right to information is indispensable. As it is insufficient for researchers to base themselves on information that is commonly known or generally or easily accessible, a robust and enforceable access to information is required in order to produce high-quality research.

42. Legally speaking the right to information is accepted as a corollary of the freedoms of speech and opinion. Article 10 ECHR, for example, expressly includes the freedom "to receive (...) information and ideas without interference by public authority and regardless of frontiers".²⁸ The ECtHR interprets this freedom to include the freedom to receive information of public interest that is held by public authorities.

²⁷ T. KARRAN, "Academic freedom in Europe: time for a Magna Charta?", *Higher Education Policy* 2009, 174.

²⁸ Likewise, Article 19 ICCPR (cf. *supra*, n°) 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".

BOX 1:

In *Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*, for instance, the ECtHR in 2009 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.²⁹

43. 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.³⁰ This gap has been filled by the Member States of the Council of Europe, who in 2009 adopted a Convention on Access to Official Documents.

iii.3. Protection of research data and sources

44. In order to do research in an unimpeded manner it is necessary for researchers not just to gain access to certain data but also to have their own research data protected against undue disclosure to third parties, including even fellow researchers, or public authorities. This aspect seems to be covered by Article 10 ECHR. In the case of *Goodwin v. UK* the ECtHR found that the protection of a journalist’s sources is an essential component of media freedom.³¹ 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. Recently the ECtHR observed that researchers may have a similar interest to that of journalists in protecting their sources.³²

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,

²⁹ ECtHR, *Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*, 14 April 2009.

³⁰ ECtHR, *Gaskin v. United Kingdom*, 7 July 1989; ECtHR, *Guerra and others v. Italy*, 19 February 1998; ECtHR, *Roche v. United Kingdom*, 19 October 2005.

³¹ ECtHR, *Goodwin v. United Kingdom*, 27 March 1996.

³² ECtHR, *Gillberg v. Sweden*, 2 November 2010, § 122.

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).³³

The above-mentioned conditions do not take away the fact that researchers and research units may sometimes 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.

BOX 2

The recent ‘climate gate’ conflict 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. 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.³⁴ 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”.³⁵ 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.³⁶

45. 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 their 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

³³ 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 willfully refuses to execute a final court order.

³⁴ See for an overview: <http://www.uea.ac.uk/mac/comm/media/press/CRUstatements>.

³⁵ *The Independent Climate Change E-mails Review*, July 2010.

³⁶ Compare: *The Independent Climate Change E-mails Review*, July 2010.

research - cannot always be accorded an overriding let alone absolute weight.

iv. Freedom of publication

46. Freedom of research and academic freedom in general are meaningless unless they entail the right for the researcher 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. Such requirement entails at the very least that researchers are free to dispose of their research, and that they enjoy (academic) freedom of expression.

iv.1. Freedom to dispose of research

47. 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.

The creator of an academic or scientific work is normally entitled to these rights, and the state has the duty to provide the necessary protection (*infra*, n^o). These rights 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

48. Free speech is an indispensable part of the individual academic freedom. Unlike the generic freedom of speech for all, ‘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.

49. At the same time, this higher level of protection has a limited 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”.³⁷ It therefore cannot be invoked as a justification for assaulting people with slogans and swearwords. 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.

³⁷ R. BARROW, “Academic Freedom: Its Nature, Extent and Value”, *British Journal of Educational Studies* 2009, 180-181.

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 purely academic speech’, ‘extra-mural speech’, and finally ‘off-topic speech’.

Intra-mural speech and/or pure academic speech

50. 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.

Box 3

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”.³⁸

51. 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. Exceptions can be accepted in cases of flagrant and malicious misrepresentations or personal attacks.

³⁸ ECommHR (report), T. v. UK, 12 October 1983.

Box 4

In practice, national courts and tribunals in Europe have mostly refused to curtail ‘pure’ academic speech. 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.”

Despite the less than subtle language, the Tribunal of Utrecht did not find fault in the review, due to the fact that the review stayed within the broad limits of what was acceptable in academic debate.³⁹

Box 5

For a present-day example in this category reference can be made to a controversy about another book review. In France the editor of a European legal journal will stand trial for a(n 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 requested 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 Paris court accusing the editor of criminal libel.⁴⁰

In this case it seems that (academic) free speech should prevail since the review appears to fall well within the (wide) range of what is allowed.

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.

52. 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 (see *infra*, n^{os} and). 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

³⁹ Tribunal of Utrecht, 1 June 1927, *NJ* 1928.

⁴⁰ J. WEILER, “Book Reviewing and Academic Freedom”, *European Journal of International Law* 2010, 967-976. The case against the editor (J. WEILER) is still pending.

decisive action, which should be aimed at protecting the speaker and enabling him or her to bring his or her message. However, in responding to such incidents the university and the state authorities should respect basic prerequisites of proportionality and reasonableness.

Box 6

A 2009 ECtHR ruling upheld the Article 10 ECHR rights of students protesting in favour of university freedoms in Turkey, 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'."⁴¹

53. 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.⁴²

Extra-mural speech

54. 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 limits should in principle apply only to speech and expressions that are likely to lead to violent or disruptive results.

⁴¹ ECtHR, *Açık v. Turkey*, 13 January 2009.

⁴² T. KARRAN, "Academic freedom in Europe: time for a Magna Charta?", *Higher Education Policy* 2009, 171.

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.⁴³

Box 7

In 1998, for instance, 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.”⁴⁴

⁴³ D. VOORHOOF, “The Legal Framework of Freedom of Academic Expression”, Third University Foundation Ethical Forum, Brussels, 25 November 2004.

⁴⁴ ECtHR, *Hertel v. Switzerland*, 25 August 1998. See also ECtHR, *Vogt v. Germany*, 26 September 1995. In the latter case the dismissal of a secondary school teacher because of her (communist) political activities was considered a disproportionate interference with her freedom of opinion.

Box 8

Another infringement of Article 10 was found in a Liechtenstein case in which the president of the Administrative Court in a lecture for a research institute made constitutional arguments. 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). 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.”⁴⁵

55. 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.

⁴⁵ ECtHR, *Wille v. Liechtenstein*, 28 October 1999. 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, *Stambuk v. Germany*, 17 October 2002).

Box 9

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).”⁴⁶

56. As mentioned, 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.⁴⁷

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*, n°).

⁴⁶ ECtHR, Nilsen and Johnsen v. Norway, 25 November 1999.

⁴⁷ See e.g.: ECtHR, Garaudy v. France, 24 June 2003; ECtHR, Müslüm Gündüz v. Turkey, 23 December 2003; ECtHR, Seurot v. France, 18 May 2004.

Off-topic speech

57. 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.

58. Academics should be careful 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.⁴⁸ 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

59. 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.

⁴⁸ T. KARRAN, "Academic freedom in Europe: time for a Magna Charta?", *Higher Education Policy* 2009, 171.

Box 10

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 recently 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. 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. 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”.⁴⁹

b. Scope as an institutional right

60. 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).

61. 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 would lack 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 or she is a member of the academic community and institution(s).

There may exist a tension between the (substantive) institutional aspects of academic freedom and the individual aspects of that freedom, described above: in some cases institutional and individual academic freedom will reinforce one another, in other cases these freedoms may conflict with each other. 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.

62. In the following subsections the required independence and distance from the state, indispensable for institutional academic freedom, will be touched

⁴⁹ Constitutional Court, n° 157/2009, 13 October 2009, B.7.1.

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, but also accountability

63. 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 universities' autonomy, as far as their intellectual life is concerned, threaten to undercut the conditions required in order to achieve the goals served by academic freedom.

64. 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)). 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).

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

65. 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).⁵⁰

⁵⁰ 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.

66. 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 the threat of punitive action.

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).

iii. Substantive institutional academic freedom

67. In exercising their institutional academic freedom or autonomy, faculties and universities should not only include their staff in the decision-making process, but they should also attempt to do this in a way that maximally promotes (or at least respects) the individual aspects of academic freedom.

As mentioned above, academic freedom as institutional autonomy can conflict with the academic freedom of individual teachers and researchers (*supra*, n°). 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

68. 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.

69. 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*, n°).⁵¹

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.

⁵¹ T. KARRAN, “Academic freedom in Europe: time for a Magna Charta?”, *Higher Education Policy* 2009, 171-172.

70. 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.⁵² 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.

Box 11

The ECtHR addressed this 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”.⁵³ 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.⁵⁴ 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.”⁵⁵

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.

⁵² Taking care, even in those cases, to opt for the least burdensome solution for all those involved, which minimally impacts their individual rights.

⁵³ ECtHR, *L. Sahin v. Turkey*, 10 November 2005, § 111.

⁵⁴ Neither of Article 9 ECHR (right to freedom of religion), nor of Article 10 ECHR (freedom of speech).

⁵⁵ ECtHR, *L. Sahin v. Turkey*, 10 November 2005, § 116.

iii.2. Freedom to teach

71. 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.

72. As for who may teach this right of institutions is limited in that it should firstly respect procedural requirements.

Box 12

The ECtHR has, for instance, ruled that the rights of teaching personnel cannot be unduly restricted by the 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.⁵⁶

73. Secondly, persons should in principle be appointed solely on the basis of their teaching and research excellence, expertise and experience (*supra*, n°). 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.⁵⁷

⁵⁶ ECtHR, Lombardi Vallauri v. Italy, 20 October 2009.

⁵⁷ Subject to a reservation in the case of universities based on a certain ethos (see *supra*, n°).

Box 13

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 whether 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, that a person denying or minimising the Holocaust is in some way a very poor historian. 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.⁵⁸

74. 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*, n^o) 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*, n^o).

iii.3. Freedom of research and freedom of publication

75. 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

⁵⁸ Compare: R. BARROW, "Academic Freedom: Its Nature, Extent and Value", *British Journal of Educational Studies* 2009, n^o 2, 186.

by such measures.

Box 14

In a Canadian University 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.⁵⁹

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.

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.⁶⁰ 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*, n^{os} -).

2. State obligations

76. 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 state, through its various organs. A failure to fulfil these obligations would amount to a violation of academic freedom.

a. Obligation to respect and protect

77. 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. 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

⁵⁹ *Ibid.*, 184.

⁶⁰ *Ibid.*

and academics, such as the right of academics to engage in cross border co-operation or to form trade unions.

78. 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.

Box 15

In May 2010 the provocative artist Lars Vilks came to speak at Uppsala University in Sweden. The artist had angered some Muslims by depicting the Prophet Muhammad as a dog and was there to give a lecture about the limits of artistic freedom. During the lecture Vilks was assaulted by Muslims in the audience, and the police intervened to detain and/or pepper-spray some unruly members of the crowd.

79. The active protection of individual freedoms is highly relevant in the context of the right to publication as well. A right 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 publicise them in the manner that one sees fit. A proper protection of (academic) intellectual rights and copyrights are amongst these conditions (*supra*, n°).

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

80. 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.

81. As to the right to study and to teach in an academic context, it is the "responsibility of the states for the provision of 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 ECtHR derives this obligation from Article 2 of Protocol No. 1 to the ECHR.⁶¹

82. 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.

IV. CONCLUSIONS

83. Academic freedom is not only a goal in itself. 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 is therefore important both for universities and researchers. This freedom comprises individual and institutional rights, and entails various obligations for the public authorities.

84. Academic freedom includes 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) A collective or institutional right of autonomy for the academy in general or subsections thereof (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.

85. Academic freedom as an individual right refers to a system of complementary rights of teachers and students, mainly as free enquirers. It

⁶¹ ECtHR, *Belgian Linguistic Case*, 23 July 1968, § 4. See also UNESCO Recommendation, § 16, and the UNESCO Recommendation on the Recognition of Studies and Qualifications in Higher Education of 1993.

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.

86. Secondly, 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. 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.

87. 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.