

Joseph Zajda *Editor*

# Third International Handbook of Globalisation, Education and Policy Research

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Springer

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Joseph Zajda

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# Chapter 53

## Academic Freedom Between History and Human Rights in a Global Context



Antoon De Baets

**Abstract** This chapter examines the phenomenon of academic freedom from a global, historical and human rights perspective. Its first part presents academic freedom as a right that comes with duties and conditions. Professional norms and duties toward the academic community, the university and society determine its limits. The internal condition under which academic freedom thrives – institutional autonomy – and the delicate balance between academic freedom and institutional autonomy are then analyzed, indicating historical antecedents of both in the process. The external condition for academic freedom lies in the guarantees offered by the state and by society to universities in constitutions, laws and policies. The question of why academics are so often among the first targets of repression is tackled and the external parties exerting improper pressure on them identified. This first part also deals critically with the problem of how to measure academic freedom. The second part examines how academic freedom is related to the broader web of human rights and which of the latter serve as basic conditions for the former. It tries to dissipate the persistent confusion between academic freedom and freedom of expression. This part also contains an appraisal of the most controversial question: how can academic freedom be justified? Four positions about its right to exist are weighed. The outcome of that evaluation leads to the bigger discussion of what exactly the role of universities in a society is. Three unique tasks are identified. Assessing each of them leads to the conclusion that academic freedom is necessary for the university's survival.

Misunderstandings about academic freedom abound.<sup>1</sup> These are partly caused by ignorance but also by the concept itself which on closer scrutiny is very complex. This chapter aims at clarifying the global phenomenon of academic freedom from a

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<sup>1</sup> A Dutch draft of this chapter was prepared at the occasion of the Seventh Hendrik Muller Summer Seminar of the Royal Netherlands Academy of Arts and Sciences that I directed from 22 to 25 June 2015; it was entitled “Academic Freedom and Scientific Integrity.” The text was published as “Academische vrijheid tussen geschiedenis en mensenrechten” (Academic freedom between his-

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historical and human rights perspective. The point of departure is UNESCO's *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (UNESCO 1997).<sup>2</sup> This Recommendation from 1997 is not binding but over the years it has gained worldwide authority as the standard for academic freedom. "Higher-education teaching personnel" means all those involved in teaching and research at universities and other public or private institutions of higher education and all those who provide educational services to students or the community at large (UNESCO 1997, §§ 1e–1f). I shall, however, use "academics" as shorthand for "higher-education teaching personnel" and "universities" for the entire higher education sector. I first introduce academic freedom as a right that comes with duties and discuss the internal and external conditions under which it thrives. Then, I clarify the relationship between academic freedom and the broader web of human rights with the purpose of answering the important question of whether academic freedom has any justification.

### 53.1 Academic Freedom: A Right with Duties

Ask academics randomly what academic freedom means and the answer always is: freedom to teach and do research. That is only part of the answer if we look at the UNESCO definition:

Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies (UNESCO 1997, § 27; United Nations Committee of Economic, Social and Cultural Rights 1999, § 39; see also United Nations Committee of Economic, Social and Cultural Rights 2020).

This definition shows that not only the freedoms to teach and do research are part of academic freedom, but also the right to criticize the own institution and the right of the staff to co-govern. The scope of academic freedom is not limited to the campus; it also includes off-campus activity – on public fora, for example – provided that academics speak or write about the areas of their expertise. If they express themselves off-campus on topics outside their field of expertise, they are *not* protected by academic freedom, although their statements are still protected by their right to free

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tory and human rights) (van Berkel and van Bruggen 2020, pp. 15–32). The collection contains many contributions that discuss the state of academic freedom in The Netherlands and Belgium.

<sup>2</sup>Unanimously adopted by the UNESCO General Conference. The principles of this Recommendation are also used by the United Nations Committee of Economic, Social and Cultural Rights of the United Nations, which monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). All websites mentioned in this chapter were last checked on 16 November 2020.

expression (Barendt 2010, pp. 270–277; Vrielink et al. 2010, §§ 57–58).<sup>3</sup> As we shall see, academic freedom and freedom of expression are not the same thing.

Academic freedom is not absolute. It is limited by professional norms and by duties toward the academic community, the academic institution and society at large. The Swiss philosopher André Mercier once summarized these limitations in the maxim *sagesse oblige* (wisdom obligates) (Mercier 1970, 342). Professional norms limit academic freedom because teaching and doing research is a profession: a type of public service that requires its members to acquire and maintain expert knowledge and specialized skills through rigorous and lifelong study and research (UNESCO 1997, § 6). In this context, UNESCO specifies that academics should use their academic freedom “in a manner consistent with the scholarly obligation to base research on an honest search for truth” (UNESCO 1997, § 33; see also Council of Europe 2012, § 5).

Defining professional norms has a long pedigree. To limit ourselves to the twentieth century: in 1902 John Dewey called truth the essential value in science (Dewey 1976, pp. 55, 66), in 1918 Max Weber argued that intellectual honesty was a minimum duty of the academic (Weber 1992),<sup>4</sup> and in 1942 Robert Merton proposed the so-called CUDOS-formula containing the four core values of science: communalism, universalism, disinterestedness and organized skepticism (Merton 1973). Nowadays, we tend to emphasize Weber’s intellectual honesty although we prefer to call it “scientific integrity.” The opposite of scientific integrity is intellectual misconduct, the most fraudulent of which can be subsumed under the FFP-formula: the fabrication, falsification and plagiarism of data (See, for example, Netherlands Code of Conduct for Research Integrity 2018, p. 23).

Professionals monitor their colleagues in the fulfillment of duty. Within strict limits, department heads or subject coordinators can impose restrictions on *how* academics teach. Peer review is an integral part of the scientific habit and helps guarantee objectivity and reach provisional consensus. As Thomas Haskell formulated it: “The price of participation in the community of the competent is perpetual exposure to criticism” (Haskell 1996, p. 47). Professional norms enable to draw a line between eccentric but permissible positions and unacceptable incompetence or dishonesty. Pseudoscience (Holocaust denial or creationism, for example) does not meet these norms and can be removed from the protection of academic freedom (Fish 2001).<sup>5</sup>

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<sup>3</sup> More on experts acting outside their field of expertise in Oreskes 2019, pp. 57, 60–61, 263, 265, 274, 278.

<sup>4</sup> Weber typifies “intellektuelle Rechtschaffenheit” as both a duty and a virtue. Originally delivered as a speech at Munich University in 1918, his text was published in 1919 by Duncker and Humboldt, Munich.

<sup>5</sup> See also United States District Court for the District of Utah 2001, C (“free speech”). The discussion of whether knowledge is scientific or not is known as the demarcation debate. See De Baets 2009, 11–14; see also De Baets 2021. Theories which according to the scientific consensus are pseudoscientific do not meet the UN requirement of acceptability because they lack quality: see CESCR 1999, § 6c. Of course, scientific research into pseudoscientific theories is allowed.

The duties toward the academic community are an extension of these professional norms. They prescribe that one respects the academic freedom of one's colleagues and that a fair discussion of contrary views is guaranteed (UNESCO 1997, § 33, also §§ 34–36; CESCR 1999, § 39). Students enjoy academic freedom also, but there is no consensus about its scope (Barendt 2010, p. 37).<sup>6</sup> Historically, a distinction was made in Germany between the *Lehrfreiheit* (freedom to teach) of teachers and the *Lernfreiheit* (freedom to learn) of students. Within the context of *Lernfreiheit*, it is uncontroversial that students should be able to express their thoughts freely. Furthermore, they are entitled to receive quality education. They are allowed to defend controversial opinions in the classroom and have the right to be free from indoctrination and propaganda. They can claim a right to receive an impartial assessment of their work and to have a say in the determination of curricula (UNESCO 1997, §§ 22, 34, 47; AAUP a.o. 1967; AAUP n.d., 2007).

Academics also have duties toward the higher-education institution in which they work because they combine their professional status with an employee status. This combination is special in the sense that UNESCO's definition allows academics (in contrast to most other employees) to criticize their institution and to participate in its governance.<sup>7</sup> Finally, academics have duties toward society at large: like everyone else they have to respect the laws of the country in which they live and work (UNESCO 1997, § 34).<sup>8</sup> And we shall see that human rights (applicable to all members of society) such as the rights to education, to take part in cultural life and to enjoy the benefits of scientific progress entail duties for academics. Taken together, professional norms and duties toward the academic community, the institution and society at large determine the limits of academic freedom (More on the idea of an academic, or scientific, community 2019).

## 53.2 Institutional Autonomy as an Internal Condition for Academic Freedom

The academic freedom of academics can only prosper if the university itself is free from inappropriate outside pressure. To that aim, it needs institutional autonomy – “that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities” (UNESCO 1997, §§ 17–18; CESCR 1999, § 40).

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<sup>6</sup>The same goes for higher-education staff falling outside the lecturer/researcher definition. The question whether secondary-school lecturers enjoy academic freedom is controversial (but see the surprising statement in CESCR 1999, § 38: “[S]taff and students throughout the education sector are entitled to academic freedom”).

<sup>7</sup>In the United States, this is called the “Garcetti reservation,” after Supreme Court of the United States 2006, part III (Justice Souter).

<sup>8</sup>Among the laws of special interest to them are laws regarding the protection of human subjects, intellectual property, privacy, data protection, defamation, and hate speech. See De Baets 2018.

Philosopher and historian Arthur Lovejoy, one of the founders of the American Association for University Professors, argued in 1914 that the university had to be a “self-governing republic of scholars.” (Lovejoy 1913–1914, p. 191). In the famous legal case *Sweezy v. New Hampshire* (1957), Justices Felix Frankfurter and Marshall Harlan formulated the core idea:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study (Supreme Court of the United States 1957, itself quoting a statement of the Open Universities in South Africa).

Institutional autonomy has several dimensions: legal, strategic, organizational, financial, personnel, and academic.<sup>9</sup> A university can rank high on one dimension of institutional autonomy and low on another (Kenessei 2018). It is, however, unclear where the power to exercise institutional autonomy resides: in the governing board, the senate, or the board of trustees.

It is a fatal fallacy to confuse academic freedom and institutional autonomy. Institutional autonomy is not a goal on its own, its basic rationale being the protection of academic freedom. At first sight, it may surprise that UNESCO’s definition of academic freedom – through the rights of criticism and co-governance, protects academics against their own universities. On closer scrutiny, however, this is not so strange because in practice institutional autonomy and academic freedom often have a tense relationship (UNESCO 1997, §§ 20, 22c; Council of Europe 2012, § 8). The reason is that, in exercising the four tasks identified by Frankfurter and Harlan, universities sometimes take very controversial decisions that put academic freedom under pressure. One can think of their powers to dismiss staff, to not promote personnel, to suspend subjects and disciplines, to reorganize or close departments, to reallocate personnel, and to associate or merge with other institutions. All these operations potentially cause much tension among staff members (and students as well). As a rule, efficient governance has a tense relationship with academic freedom (For an illustration, see van Galen 2019). If the principle that institutional autonomy should be at the service of academic freedom is not heeded, the tension between both can degenerate into institutional autonomy becoming a threat to academic freedom.

Historically speaking, this classic tension can only be understood if one realizes that institutional autonomy and academic freedom emerged separately. In the Middle Ages universities had much autonomy but their academics little freedom. These academics largely adapted to the prevailing political and religious traditions and dogmas. The idea of freedom of research arose later: in the seventeenth century, its precursor was called *libertas philosophandi* (freedom to philosophize). The idea became substantial only in late eighteenth-century Germany, where it was known as

<sup>9</sup> Strategic autonomy means the right to determine long-term goals; personnel autonomy covers recruitment, salary, dismissal, and promotion; academic autonomy encompasses programs, quality control, teaching language, and admission of students.

*Lehrfreiheit* (Sutton 1953).<sup>10</sup> Seven centuries after the first Western university was founded, both ideas – *Lehrfreiheit* (academic freedom) and institutional autonomy – merged into Wilhelm von Humboldt's view when in 1810 he formulated the idea of the autonomous research university (von Humboldt 1903, von Humboldt 1970. See also Shils 1991, pp. 6, 18–20; Altbach 1991, pp. 29–33; Fellman 1973–1974; Haskell 1996, p. 54; Carlson 2017, pp. 57–69; Labrie 2020). If institutional autonomy has existed without any substantial academic freedom for centuries, there have been, of course, also many cases in which the institution defended the academic freedom of its staff and students in moments when its own autonomy was under pressure. This means that there can be institutional autonomy without academic freedom and (some) academic freedom without institutional autonomy (see also Spannagel et al. 2020, p. 16).

Alongside the duty to protect the academic freedom of their staff and students, universities have another essential duty: public accountability to the government and to society at large. They should prove how exactly they protect academic freedom, how they spend public funds entrusted to them, and how they assure quality in teaching and integrity in research (UNESCO 1997, §§ 22–24). No autonomy without accountability. Both have to be in balance (UNESCO 1997, § 22; CESCR 1999, § 40).

Over the last decades, critics have complained that the balance between institutional autonomy and academic freedom and the balance between institutional autonomy and public accountability have both been disrupted, the former in favor of autonomy, the latter at its expense. These critics of “the university system” identify a series of worrying trends, including:

- the restriction of on-campus freedom of expression, including requirements to create *safe spaces* or issue *trigger warnings* when sensitive subjects are treated or to annul invitations to controversial speakers (*no-platforming*);
- the fragmentation of the academic community into identitarian communities;
- the perception of students as paying customers;
- the culture of cheap grades and diploma inflation;
- the surveillance, privacy and copyright aspects of online learning;
- the short-sighted career focus of many studies, the lack of broad education and the structurally problematic position of the social sciences and humanities;
- the perception of the university as a corporation and its personnel as “stakeholders” or “human resources”;
- the demise of tenure as a procedural guarantee for academic freedom;
- the steadily increasing numbers of temporarily employed without financial security, whose free expression is restrained by fear of job loss and the associated dangers of meek obedience, arbitrariness, patronage and corruption;
- the aberrant task load and work pressure of academics;

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<sup>10</sup>The *libertas philosophandi* can be traced back to Baruch Spinoza (1670), Tommaso Campanella (1622), and probably earlier.

- the inefficient competition to obtain research funds and the Matthew effect in distributing them;
- the problem of how universities and their scientists should share intellectual property profits;
- the permanent threat of budget cuts and output-related funding;
- the increasing improper importance of rankings, free-market principles and entrepreneurship;
- the excesses of a managerial culture with its quantification craze and micro-regulation;
- the bureaucratic accreditations with their disproportionate performance agreements and questionable quality indicators;
- the difficulty of measuring science's social impact;
- the confusion about the possibilities and limits of citizen science;
- the confusion between the social relevance of science and following fashions;
- the problems of individual and collective, small-scale and large-scale abuse of science (pseudoscience, sham science, fake science, facsimile science), including predatory "scientific" journals;
- and, finally, loss of trust in science or denial of science among sectors of public opinion (UNESCO 1997, §§ 43a, 45–46; Oreskes 2019, *passim*; Halffman and Radner 2015; Lorenz (Ed.), 2008).<sup>11</sup>

Now that the duties of academics and universities toward government and society (as well as the risks that accompany them) have been clarified, let us look at the government and society at large, who have duties toward academics and universities as well.

### **53.3 State and Societal Guarantees as an External Condition for Academic Freedom**

State duties toward society, including its universities, are usually split into a duty to respect, a duty to protect and a duty to fulfill. Applied to our context, the duty to respect means that the government abstains directly and indirectly from inappropriately interfering with the universities. The duty to protect requires governments to prevent third parties – private persons and groups – from applying improper pressure upon universities on the one hand and to protect society against the abuses and harmful effects of science and technology on the other. The duty to fulfil is a positive duty implying that the government must facilitate academic freedom through legal, administrative, financial, promotional, and other measures (UNESCO 1997, §§ 19, 22; CESCR 1999, §§ 46–50; UNESCO and others 2009, §§ 14–16; United

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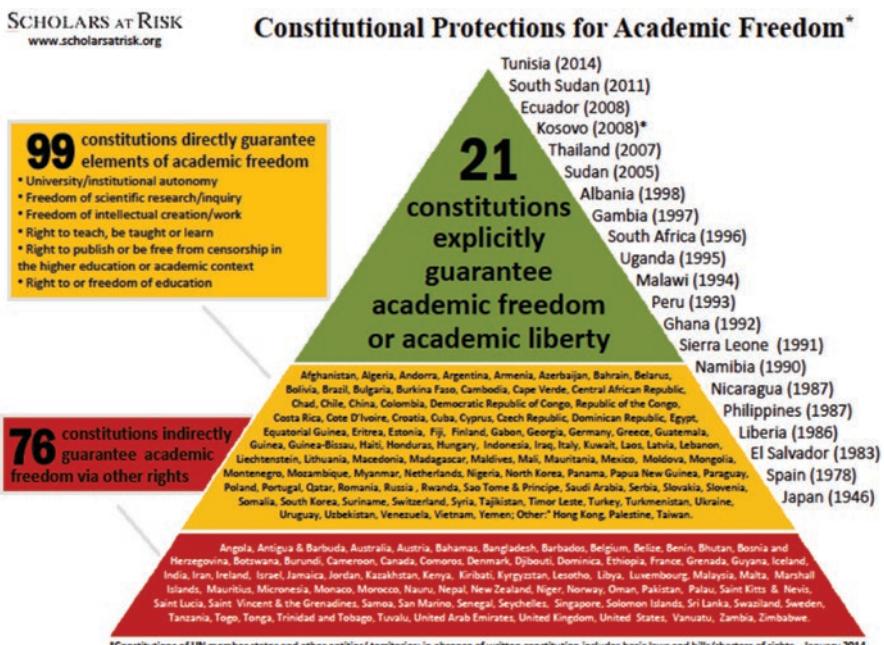
<sup>11</sup> See also the part "The Threat Within," in Ignatieff and Roch (Eds.), 2018, pp. 75–110. For a discussion of problems such as speech codes, (no-)platforming, safe spaces, trigger warnings, etc., see PEN America 2016, pp. 8–9.

Nations General Assembly 1975; UNESCO 1999; Vrielink et al. 2010, §§ 10–12, 77–84).

Given that the state is required to operate on behalf of society, the three state duties can also be regarded as societal guarantees for academic freedom. The UNESCO Recommendation, however, goes further: it claims that academic freedom can only prosper “if the environment … is conducive, which requires a democratic atmosphere; hence the challenge for all of developing a democratic society” (UNESCO 1997, § 27). The Recommendation explicitly recommends a democratic political system. This choice for democracy does not necessarily mean that the risk of external pressure on academics is smaller there, but it embodies the idea that criticism of outside pressure is expressed quicker, suppressed less, and accommodated better in democracies.

Paradoxically enough, many democracies do not have better constitutional guarantees for academic freedom than other political systems, as a graph by Scholars at Risk (an international NGO to protect the academic freedom and human rights of academics) reveals (Fig. 53.1).

In 2014, Scholars at Risk divided all constitutions of the world into three groups: constitutions that *explicitly* guaranteed academic freedom through mention of the term (21 countries), constitutions that *directly but not explicitly* guaranteed academic freedom, by mentioning some of its constituent elements such as “freedom of scientific inquiry” or “right to teach” (99 countries), and constitutions that *indirectly*



**Fig. 53.1** Constitutional protections for academic freedom in the world. (Source: Scholars at Risk 2014)

guaranteed academic freedom either by referencing the general rights essential to the exercise of academic freedom such as free expression or by referencing human rights treaties (76 countries).

The graph invites comment. Against the expectations, the list of 21 countries with explicit guarantees for academic freedom is not very reassuring; among them are notorious violators of academic freedom, as is shown in Scholars at Risk's annual world report on academic freedom, *Free to Think* (Scholars at Risk 2015–2020; see also Kinzelbach et al. 2020, p. 9; Spannagel et al. 2020, pp. 2–3). Another observation is that several countries in this group (Spain, Japan, El Salvador, South Africa, Tunisia...) introduced explicit constitutional guarantees for academic freedom only *after* long periods of repression, ostensibly because their universities had been among its first casualties at the time. A final note is that most consolidated democracies, including some where academic freedom was introduced early, only provide indirect guarantees for academic freedom. This remarkable state of affairs is probably due to two circumstances: their constitutions have not been updated for a long time, and their citizens have known long periods of stability that may make it less urgent for them to press for direct guarantees than for citizens with recent memories of academic repression.

The history of universities is scattered with breaches of academic freedom and institutional autonomy by the state and other parties. According to Edward Shils – the founder of *Minerva*, an important journal about higher education – the single most frequent form of repression against academics is unfair dismissal. Academics appear especially vulnerable to such dismissal after critical performances on off-campus public fora (Shils 1991, p. 12; Shils 1997, pp. 154–155, 159). This is an important argument to place expertise-related activities of academics outside the campus within the orbit of academic freedom.

The question that insistently comes back each time is this: Why are universities and academics so often among the first targets of repression by intolerant regimes? I see three reasons (World University Service 1990, pp. 5–7; Commager 1964). The first is that academics are trained in questioning dogmas and ideologies at all levels, including and above all at the political level, and in voicing critical opinions. Sometimes, this turns universities into bastions of protest against authoritarianism and into centers of cosmopolitanism. The second reason is that academics educate the younger generations, including the future leadership of the country, which triggers a desire for official control over curricula, especially in countries where large parts of the populations are young. The final reason is that time and again teacher trade unions and student movements act as progressive forces of reform and change in national politics. It is this explosive cocktail of criticism, education of talented youth and political action that transforms academics and students into prime targets of intolerant – and sometimes of democratic – regimes.

The next obvious question is which external parties in particular exert improper pressure on academics and universities. This is, first of all, the state. As Catherine Stimpson formulated it:

Authorities can strip individuals of their passports, visas, rights to speech on any media, livelihoods, freedoms, and life itself. Authorities can strip institutions of their money (that power of the purse), accreditation (that power of the license), physical security (that power of violence and force), and legal identity (that power of dissolution) (Stimpson 2018, p. 64).

It is not surprising that the International Covenant on Economic, Social and Cultural Rights contains a guarantee against this temptation in article 15.3: “The States Parties … undertake to respect the freedom indispensable for scientific research and creative activity.” And the UNESCO Recommendation “[e]xpress[es] concern regarding the vulnerability of the academic community to untoward political pressures which could undermine academic freedom.” (UNESCO 1997, preamble; CESCR 1999, § 38). Political pressure can adopt many guises between the extremes of mediocre laws and active repression. The line between legitimate and illegitimate intervention is thin. Legal philosopher Ronald Dworkin described it as follows:

[O]nce political officials have established a university, fixed its academic character and its budget, and appointed its officials, they may not dictate how those they have appointed should interpret that character or who should teach what is to be taught, or how (Dworkin 1996, pp. 183, 191; see also Council of Europe 2012, § 7).

Next to political entities, economic and financial circles like to be associated with the prestige of science in order to achieve commercial goals. In some cases, enterprises exploit contract research to suit their own needs, censor unwelcome messages, or sponsor endowed chairs with willing chair holders (Köbben and Tromp 1999). Publishers can exert unreasonable power over access to scientific journals. And military, patriotic or religious pressure on academics to conform to the powers that be is as old as higher education itself. Finally, public opinion itself may impose demand exaggerated accountability burdens. More profoundly, anti-intellectual currents in society can diminish the willingness of politicians to afford universities their legitimate freedom to act. In short, external threats are as dangerous as internal ones.

### 53.4 Measuring Academic Freedom

In line with the difficulty to unpack the concept of academic freedom, there is the problem of measuring it consistently across countries and time. Until recently, roughly four approaches co-existed, each relying on different datasets: monitoring and counting individual attacks on academic freedom, self-reporting of institutions about academic freedom, surveying academics and students about academic freedom, and examining constitutional guarantees for academic freedom. None of these approaches is seen as entirely satisfactory, especially if one wants to measure trends (Spannagel et al. 2020, pp. 1–4). In March 2020, therefore, a consortium consisting of the Global Public Policy Institute in Berlin, Scholars at Risk in New York, and the V-Dem Institute in Gothenburg presented a new Academic Freedom Index,

based on a fifth dataset: experts (1810 scholars in 180 countries) who assessed five indicators of the realization of academic freedom over the last century (1900–2019) (Kinzelbach et al. 2020, pp. 7–8; Spannagel et al. 2020, pp. 6–13):<sup>12</sup>

- *Freedom to research and teach:* To what extent were scholars free to develop and pursue their own research and teaching agendas without interference?
- *Freedom of academic exchange and dissemination:* To what extent were scholars free to exchange and communicate research ideas and findings?
- *Institutional autonomy:* To what extent did universities exercise institutional autonomy in practice?
- *Campus integrity:* To what extent were campuses free from politically motivated surveillance or security infringements?
- *Freedom of academic and cultural expression:* Was there academic freedom and freedom of cultural expression related to political issues?

In presenting the index and its indicators for the entire period 1900–2019 (Kinzelbach et al. 2020, p. 10), the authors concluded:

Overall, we see a small dip in global levels on all academic freedom indicators during World War I (1914–1918) and a very substantial dip during World War II (1939–1945). Furthermore, all indicators show a slow degradation between the early 1960s and the late 1970s – likely associated with repressive policies in the Soviet Union, the installment of several military dictatorships in Latin America, as well as Cold War-related pressures on academia in other parts of the world. The 1980s are a period of slow improvements, which accelerate in the early 1990s with the third wave of democratization before stabilizing at a relatively high level (though not at the top of the scale). Since 2013, we see a slight decline in several variables (Spannagel et al. 2020, p. 13; see also Kinzelbach et al. 2020, p. 10).

With the important exception that it apparently does not reflect the manifold attacks on academic freedom by scores of authoritarian regimes during the interwar period, this general overview is a credible overall assessment (which may be refined in the future). The authors further report that the third indicator, institutional autonomy, was generally at moderate levels (roughly at 1.8–2.3 on a scale ranging from 0 to 4), but as an institutional process less subject to extreme fluctuations than the other indicators (Kinzelbach et al. 2020, pp. 9–10). Countries that respected institutional autonomy reasonably or highly also tended to have high levels of freedom to research and teach (the first indicator) (Spannagel et al. 2020, p. 16; Kinzelbach et al. 2020, pp. 20–21).

<sup>12</sup>The data themselves are at <https://www.v-dem.net/en/data/data/v-dem-dataset/>; the graphing tools at <https://www.v-dem.net/en/analysis>

### 53.5 Academic Freedom and Human Rights

Threats to and violations of academic freedom make us want to understand how academic freedom is related to the broader web of human rights. Although human rights loom large in the UNESCO Recommendation (UNESCO 1997, § 26, also §§ 17, 22, 28, 34, 75), academic freedom itself is no human right. Human rights are universal, academic freedom is not. This is the reason why the concept of academic freedom is not mentioned in the world's two most important human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Instead, article 15.3 of the ICESCR stipulates the state duty to respect the "freedom indispensable for scientific research." This phrase can indisputably be summarized as "freedom of scientific research" but the question is whether this latter phrase can be further condensed into the phrases "freedom of research," "scientific freedom" or "academic freedom." "Freedom of scientific research" is *narrower* than "freedom of research" in that not all research is scientific. "Freedom of scientific research" is also *narrower* than "scientific freedom" because science encompasses more than research activity alone; scientific freedom also includes the freedom to teach implied in the right to education (article 13 of the ICESCR). Finally, "freedom of scientific research" is also *narrower* than academic freedom for the same reason: academic freedom does not only encompass freedom of scientific research but also freedom to teach. At the same time, however, "freedom of scientific research" is also *larger* than academic freedom because science can be carried out outside higher education institutions. Depending on the angle, "freedom of scientific research" is narrower or larger than academic freedom (see also De Baets 2020).<sup>13</sup>

The conceptual confusion between these terms is all the more a reason to gain a better understanding of the relationship between academic freedom and human rights. This relationship can be described in a straightforward way: human rights constitute direct conditions or indirect preconditions for academic freedom, regardless of whether they are viewed from the perspectives of academics, society or the state.<sup>14</sup> In the following overview, only those human rights that constitute direct determinants of academic freedom are listed (Table 53.1):

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<sup>13</sup>In that contribution, I also discuss the term "intellectual freedom," which is a part of the freedom of thought. As described in article 18.1–18.2 and 19.1 of the International Covenant on Civil and Political Rights (ICCPR), freedom of thought is universal (like freedom of expression) and non-derogable (unlike freedom of expression which can be restricted and derogated). According to article 4.2 of the ICCPR, article 18 of the ICCPR is non-derogable; according to article 18.3 of the ICCPR, manifesting a belief – but *not* holding it – can be restricted (under firm conditions). Consistent with this, article 19.1 of the ICCPR stipulates that everyone has the right to hold opinions without interference. See also United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression 2020, § 16.

<sup>14</sup>My approach is not monolithic (as is Klaus-Dieter Beiter's who infers academic freedom unilaterally from the right to education), but pluralistic: see our discussion in *University values: a bulletin on international academic freedom, autonomy & responsibility* (2011–2015).

**Table 53.1** Human rights as basic conditions for academic freedom

<i>A. Human rights from an academic's perspective</i>	
The right to leave one's country and return	art. 12 ICCPR
The right to privacy (especially non-interference with correspondence)	art. 17 ICCPR
The right to reputation	art. 17 ICCPR
The right to freedom of thought	art. 18 ICCPR
The right to freedom of expression	art. 19 ICCPR
The right to peaceful assembly	art. 21 ICCPR
The right to free association	art. 22 ICCPR
The right to benefit from copyright	art. 15.1c ICESCR
<i>B. Human rights from a societal perspective</i>	
The right not to be subjected without one's free consent to medical or scientific experimentation	art. 7 ICCPR
The right to education	art. 13 ICESCR
The right to take part in cultural life	art. 15.1a ICESCR
The right to enjoy the benefits of scientific progress and its applications	art. 15.1b ICESCR
<i>C. State duties</i>	
The duty to prohibit war propaganda by law	art. 20.1 ICCPR
The duty to prohibit hate speech by law	art. 20.2 ICCPR
The duty to prohibit discrimination by law	art. 26 ICCPR
The duty to improve scientific knowledge about food in the struggle against hunger	art. 11.2 ICESCR
The duty to promote science and culture	art. 15.2 ICESCR
The duty to respect freedom of scientific research	art. 15.3 ICESCR
The duty to recognize the benefits of international cooperation in the scientific field	art. 15.4 ICESCR

From the perspective of academics and universities, some rights on the list appeal more to individual academic freedom, others more to institutional autonomy. Articles 21 and 22 of the ICCPR in particular protect university autonomy (but they also support teacher trade unions and student associations). From the perspective of society, some human rights (for example the right to education) create duties for academics. Other rights have a tense relationship, for example articles 15.1b (the right of everyone to enjoy the benefits of scientific progress and its applications) and 15.1c (the right of academics to benefit from copyright) of the ICESCR.

The most important observation, however, is that there is a special relationship between academic freedom and the right to free expression (article 19 of the ICCPR). Many academics think that academic freedom is the freedom to say everything, others think that it is the same as freedom of expression or that it is freedom of expression in an academic setting. These assumptions are false. Important differences exist between both, as is seen in the following table (Table 53.2):

**Table 53.2** Differences between the right to freedom of expression and academic freedom

	Freedom of expression	Academic freedom
Basis	ICCPR (1966), art. 19.	ICCPR (1966), art. 7, 12, 17–22, 26. ICESCR (1966), art. 11, 13, 15. UNESCO, <i>Recommendation</i> (1997), § 27.
Human right?	Yes.	No, but some human rights are its direct conditions.
Scale	Universal.	Not universal: only for academics and students in universities.
Scope (persons/groups)	Individual.	<i>Individual</i> : academic freedom for academics; right to learn for students. <i>Collective</i> : university autonomy.
Scope (expression/conduct)	Facts and opinions (expressed in spoken and written language, in symbols, in images and objects).	Discipline-related facts and opinions on- and off-campus. Conduct such as experimenting, organizing conferences and debates, etc.
Limits to the right	<i>For the state aiming at limiting opinions</i> : restrictions are provided by law and are necessary for respect of the rights or reputations of others; for the protection of national security or of public order (ordre public), or of public health or morals (ICCPR art. 19.3). The right is temporarily derogable in time of public emergency (ICCPR art. 4.1). <i>For the person expressing the opinion</i> : no war propaganda, hate speech or discrimination (ICCPR arts. 20, 26).	<i>For the state aiming at limiting opinions</i> : same as for freedom of expression. <i>For the person expressing the opinion</i> : same as for freedom of expression, <i>plus</i> : – The opinion should satisfy professional norms, <i>including</i> : – The opinion has to be subjected to peer review.
Epistemology	Protects, within these limits, the expression of (all) opinions and (all) true and (most) untrue statements of fact.	Protects, within these limits, opinions and facts that are provisionally true and possibly untrue. Does not protect opinions or facts which after academic debate are held to be definitely unfounded (opinions) or false (facts).

(continued)

**Table 53.2** (continued)

	Freedom of expression	Academic freedom
Rights-related duties	<p><i>For all:</i> special duties and responsibilities (ICCPR art. 19.3).</p> <p><i>For states:</i> the duty to respect the limits of the right.</p>	<p><i>For all:</i> the duty to respect the academic freedom of other academics and students, to ensure fair discussion of contrary views, to honestly search the truth (UNESCO Recommendation, § 33). <i>plus:</i></p> <p><i>For academics:</i> duties to the academic community, to the university, to society.</p> <p><i>For universities:</i> duty to respect academic freedom; duty of public accountability.</p> <p><i>For states:</i> duties to respect, protect, fulfil.</p>

On balance, academic freedom is more restricted than freedom of expression in almost all respects, except one: it does not only comprise expression but also conduct such as laboratory work or the organization of conferences (and freedom of expression does not, at least not in principle). Academic debates are actually more restricted, in the sense of more regulated, than public debates, as was clearly seen by moral philosopher Bernard Williams:

[I]n institutions that are expressly dedicated to finding out the truth, such as universities, research institutes, and courts of law, speech is not at all unregulated. People cannot come in from outside, speak when they feel like it, make endless, irrelevant, or insulting interventions, and so on; they cannot invoke a right to do so, and no-one thinks that things would go better in the direction of truth if they could (Williams 2002, p. 217).

A similar idea was developed by legal scholar Robert Post:

Disciplines are grounded on the premise that some ideas are better than others; disciplinary communities claim the prerogative to discriminate between competent and incompetent work ... Disciplines do not create expert knowledge through a market place of ideas in which content discrimination is prohibited and all ideas are deemed equal (quoted by Wallach Scott 2018, pp. 18–19).

Freedom of expression is a necessary but not a sufficient condition for academic freedom (De Baets 2011; Shils 1991, pp.18, 20–21; Shils 1997, p. 155; Dworkin 1996, pp. 184–185; Barendt 2010, pp. 17–22; for the difference in practice, Scholars at Risk 2020, pp. 8–9.) The same is true for other human rights. We are ready now to answer the most controversial question: how can academic freedom be justified?

### 53.6 The Justification for Academic Freedom

Academic freedom's right to exist has been passionately defended and fiercely attacked. By and large, four positions can be distinguished, the last of which I shall defend:

*Academic freedom has no right to exist*

- Position 1: Academic freedom is unnecessary because it is not a right but a privilege that should be abolished.
- Position 2: Academic freedom is unnecessary because human rights already offer all guarantees.

*Academic freedom has a right to exist*

- Position 3: Academic freedom is the right to freely practice the academic profession.
- Position 4: Academic freedom is a combination of human rights and the right to freely practice the academic profession.

According to the first position, academic freedom is not a right but a privilege that is no longer justifiable: a university is an institution like any other and its specialty, knowledge production, does not need specific protection. It is better, therefore, to abolish academic freedom and its historical corollary, tenure. This is an anti-intellectualist position which is increasingly popular today. The second position stands in sharp contrast to the first but arrives at the same conclusion from entirely different premises: academic freedom is superfluous because the guarantees it promises are already covered by international human rights treaties (Ziman et al. 1986, p. 10).<sup>15</sup> Both positions do not take into account the special role of the university.

The other positions do imply a discussion of the university role. The third looks at academic freedom as the right to freely practice the academic profession necessary to properly fulfil the specific tasks of higher education. The particularity of these tasks is that they are open-ended and do not have predefined goals (Rorty 1996, p. 27; Fish 2001, pp. 520–524; Fish 2008). The last position argues that academic freedom, while it has its roots in human rights, is an *additional* guarantee necessary to perform the special role society expects academics to play.

Thus, the proponents transfer the academic freedom discussion to a more general level, the level at which the particular role of the university is discussed (Shils 1991, pp. 20–22; World University Service 1990, pp. 7–10; Barendt 2010, pp. 50–72). In

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<sup>15</sup>The authors think that “With only one exception – the lack of a right to enter a country of which one is not a citizen, for professional scientific purposes – *all the rights necessary for the free and effective pursuit of science are already covered by the existing international code of human rights law*” (italics in original). If we accept that the right to visit other countries is included in the right to liberty of movement (article 12 of the ICCPR) combined with the state duty “to recognize the benefits to be derived from ... international contacts and co-operation in the scientific ... fields (article 15.4 of the ICESCR), even this exception can be eliminated.

itself a major and never-ending debate, the role of the university is usually seen as consisting of three types of tasks:

- The first task is to develop a culture of criticism and creative thinking independent of fashion and public opinion (Dworkin 1996, pp. 185, 187, 189–191, 197). As the philosopher Immanuel Kant said in 1784 already: *Sapere aude* (dare to be wise) (after Horace; Kant 1991, p. 54.).
- The second task is to advance knowledge through the search for and transmission of important truths about reality (among many others, UNESCO 1997, preamble; Dewey 1976, p. 55; Weber 1992; Shils 1997, pp. 3–5; Wallach Scott 2018). This task recognizes the crucial role of fundamental research. Fundamental research requires “a right to err” – a right to develop ideas which may prove to be unfruitful or false in the end (Vrielink et al. 2010, §§ 27, 49, 87; this idea can be traced back to Mill 1865).
- The third task is to train experts and future leaders, to encourage politically active citizenship, to promote democratic institutions and to advance socio-economic welfare (among many others, Drenth 2013, p. 70.).<sup>16</sup>

Most think that the special role of the university consists of critical thinking, the search for truth and the advancement of knowledge, and multiple services to society. If we compare these three tasks with the reasons why academics and students are among the first targets of repression by intolerant regimes – summarized above as criticism, education of talented youth and political action – we note that the first task (critical thinking) and some elements included in the third (train experts and future leaders, encourage politically active citizenship, promote democratic institutions) are the most sensitive.

Several objections can be raised against this triple view of the tasks of the university. For example, all of them can be performed outside higher education. While this is true, proponents reply, nowhere does this happen with the same intensity and critical mass necessary to make a decisive difference. Others point to a contradiction: the first two tasks (critical thinking and the advancement of knowledge) require distance and long-term thinking, while the third needs close contact with society. Proponents answer that rather than a contradiction, this is a tension which can be constrained by the academic ethic.

In this discussion about the role of the university among proponents of academic freedom, the third differs from the fourth in that it avoids big words about human rights in formulating this role. In responding to this objection, the fourth position argues that it is difficult to understand how universities can fulfil their role with any depth without permanent reference to human rights as direct conditions for academic freedom. And it is a hard fact that repressive regimes often directly attack the

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<sup>16</sup>The third task is supported by UNESCO 1997, § 33 (also § 10), which stipulates that “Teaching, research and scholarship ... should, where appropriate, respond to contemporary problems facing society as well as preserve the historical and cultural heritage of the world.” The preamble of the UNESCO *Recommendation* says that higher education and research themselves “constitute an exceptionally rich cultural and scientific asset.”

human rights of academics rather than their academic freedom in particular with the sole purpose of curbing the latter. Not taking human rights explicitly into account, then, is to miss the entire value infrastructure of academic freedom.

Finally, academic freedom proponents also argue that their positions can be tested empirically, for example by investigating the following theses:

- Historically, the introduction of academic freedom at universities has stimulated their growth (Shils 1991, p. 22).
- The highest-ranked universities are known for high degrees of academic freedom (Altbach 2009, p. 2).
- Universities with high degrees of academic freedom show more quality in teaching and research than the others (Barendt 2010, p. 72).
- Violations of academic freedom and institutional autonomy have always resulted in intellectual relapse and consequently in socio-economic stagnation (Parliamentary Assembly of the Council of Europe 2006, § 4.3).

Claims such as these can be proved convincingly, proponents argue, and the accumulated evidence leads to a single conclusion: academic freedom is justified and it represents added value.

### 53.7 Conclusion

Like the ship of Theseus, the university has been renovated thoroughly many times over the centuries while sailing in order to keep it seaworthy and protect it against the storms. Past results, however, are no guarantee for the future. The impression arising from the above analysis is that academic freedom and university autonomy are under fire today in unprecedented ways, from the inside as well as from the outside, either through direct attacks or indirect pressure. The question is how long the classical research university will survive. Are we not witnessing the end of an institution which has prospered for many centuries throughout the world and which has provided plenty of services to society – in spite of a turbulent and sometimes shameful history? A university without academic freedom and university autonomy is devoid of its special character. I do not yearn for the good old times that have never existed and I am keenly aware of the myopic tendency to perceive one's own time as unique. And yet I see a Faustian moment. One can only hope that our great-grandchildren, when asked their opinion about the university, do not feel compelled to answer: “I think it would be a good idea.”<sup>17</sup>

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<sup>17</sup> After Mahatma Gandhi (“What do you think of Western civilization?” “I think it would be a good idea”).

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