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Yearning to Belong: Finding a Home for the Right to Academic Freedom in the U.N. Human Rights Covenants

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YEARNING TO BELONG: FINDING A “HOME” FOR THE RIGHT TO ACADEMIC FREEDOM IN THE U.N. HUMAN RIGHTS COVENANTS

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Abstract

Academic freedom is generally considered a human right, both nationally and internationally. However, no legally binding international human rights instrument—neither at the global nor the regional level—provides express protection for this right; this includes the two most important global human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966. This begs the question: Does the right to academic freedom not—even so—have a “home” in either or both of the U.N. Human Rights Covenants? Can and should academic freedom be protected as part of the right to freedom of expression in Article 19 of the former Covenant? Or does Article 15 on “cultural rights” of

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the latter Covenant constitute the proper provision? Or is it, in fact, Article 13 on the right to education, also of the latter Covenant, that encompasses academic freedom? Yet another option would be for different aspects of the right to academic freedom to be considered addressed by different Covenant provisions, including but not limited to those cited. However, if the latter option applies, does – or should – not one of these provisions be seen to be the primary or overarching provision? This article will attempt to answer these questions, commenting on the adequacy or otherwise of the various approaches discernible. Shedding light on the matter may well facilitate the formulation of a General Comment on the right to academic freedom by the proper U.N. human rights treaty body – and in this way help dispelling some of the fundamental misconceptions regarding the true purport of this right.

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Introduction

Some ten years back, the well-known international non-governmental organization (NGO) Human Rights Watch, in one of its briefing papers under the heading “Academic Freedom under International Law,” commented that

[a]cademic freedom is more than just the freedom of professors to speak and write freely in their fields of specialty. It also recognizes the role that academics play as intellectual shapers of society. As such, academic freedom is a sensitive barometer of a government’s respect for human rights.¹

The importance of academic freedom thus having been recognized by a major human rights NGO—reflecting a sentiment generally held by the human rights community—one would wish to see it protected as a human right in legally binding international human rights instruments, notably the two most important global human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and/or the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of 1966. However, neither of the two U.N. Human Rights Covenants expressly mentions a right to academic freedom. All the same—and as notably reflected by comments of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, the two bodies supervising implementation of the ICCPR and ICESCR, respectively²—there seems to exist consensus that the Covenants should be considered to protect that right.

¹ HUMAN RIGHTS WATCH, MEMORANDUM TO THE TURKISH GOVERNMENT ON HUMAN RIGHTS WATCH’S CONCERNS WITH REGARD TO ACADEMIC FREEDOM IN HIGHER EDUCATION, AND ACCESS TO HIGHER EDUCATION FOR WOMEN WHO WEAR THE HEADSCARF 7 (June 29, 2004), *available at* http://www.hrw.org/legacy/background/eca/turkey/2004/headscarf_memo.pdf.

² See *infra* Subsections IV-B and IV-D, where some of these comments are cited and examined.

The discussion that follows will address the question whether either or both of the Covenants does or do actually offer protection to the right to academic freedom and, if so, which provision(s) should be relied on in this regard. The latter is not a mere theoretical question as, who may raise a claim and what the nature and scope of his or her entitlements are, may well depend on the specific provision invoked. So as to contextualize the discussion, reference will be made to the historical development of the idea of academic freedom, the content of the right to academic freedom, essentially in the light of UNESCO's Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997, and the rationale for the protection of academic freedom as a human right. Dealing with the stated aspects will prove helpful in finding a "home" for the right to academic freedom in the U.N. Human Rights Covenants.

This article argues that many provisions of both Covenants, including *inter alia* Article 19 of the ICCPR on the right to freedom of expression and Article 15 of the ICESCR, covering the right to freedom of scientific research, may and should be relied on when protecting (aspects of) the right to academic freedom. It also argues, however, that Article 13 of the ICESCR on the right to education—which on closer scrutiny really is an open-ended provision in the sphere of education—constitutes the provision which assembles all aspects of academic freedom under "a single roof" and whose normative context provides the proper framework for interpretation. This conclusion may be stated to have strengthened the motivation of the Scholars at Risk Network, a U.S.-based NGO attending to the plight of scholars worldwide whose academic freedom is threatened or violated, to doctrinally base its work not solely on the right to freedom of expression, but to introduce the right to education as the second pillar supporting its activities.³

Identifying the fundamental educational norm of Article 13 as

³ See Robert Quinn & Jesse Levine, *Intellectual-HRDs and Claims for Academic Freedom under Human Rights Law*, 18 INT'L J. HUM. RTS. 898, 902–12, specifically at 903–05, 914 (2014). Prof. Quinn is the Executive Director and Mr. Levine the Advocacy Officer of the Scholars at Risk Network. For more information on the Scholars at Risk Network, see its website: *Scholars at Risk Network*, <http://scholarsatrisk.nyu.edu> (last visited Aug. 28, 2016).

the “true seat” of the right to academic freedom is of some significance: It makes it clear that academic freedom entails much more than free speech rights as covered by the right to freedom of expression—a right, in fact, accruing to each and every person. Academic freedom also covers rights of “free action,” and the free speech rights covered are, in fact, *special* speech rights, conditioned by the dictates of learning, teaching, and research. An approach based on Article 13 also best accommodates the special responsibilities of institutions of higher education and their academic staff in discovering new knowledge and facilitating ethical individualism, adequately emphasizes the special vulnerability of teachers and researchers in higher education to undue pressures, and correctly recognizes that academic freedom must also serve as an organizational principle in structuring the activities of institutions of higher education. The “ordinary” right to freedom of scientific research, as protected in Article 15 of the ICESCR, accrues to each and every person doing research. Although it is highly relevant in this regard too, of course, it lacks a specific reference to the higher education context, where the claim to the protection of free inquiry is the most acute.

This article is written in the context of a larger project on the right to academic freedom conducted at the University of Lincoln, United Kingdom, examining the doctrinal basis of the right to academic freedom in terms of international human rights law and further assessing the level of protection of that right in various regional contexts, concentrating on the European⁴ and African⁵

⁴ See Klaus D. Beiter, Terence Karran & Kwadwo Appiagyei-Atua, “*Measuring*” the Erosion of Academic Freedom as an International Human Right: A Report on the Legal Protection of Academic Freedom in Europe, 49 *VAND. J. TRANSN’L L.* 597 (2016) [hereinafter Beiter et al., “*Measuring*” the Erosion of Academic Freedom]; Klaus D. Beiter, Terence Karran & Kwadwo Appiagyei-Atua, *Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*, 3 *EUR. J. COMP. L. & GOV.* 254 (2016); Klaus D. Beiter, Terence Karran & Kwadwo Appiagyei-Atua, *Retrogression in Europe in the Legal Protection of the Right to Academic Freedom*, 10 *N.Z. J. RES. EUR.* (forthcoming 2016).

⁵ See Kwadwo Appiagyei-Atua, Klaus D. Beiter & Terence Karran, *The Composite Theory: An African Contribution to the Academic Freedom Discourse*,

contexts for the moment. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 13 on the Right to Education of 1999, has made a laudable initial attempt at bringing the right to academic freedom within the parameters of the right to education in Article 13 of the ICESCR.⁶ Premised on the conclusions of this and other publications produced within the framework of the project, a proposal for a General Comment on the right to academic freedom by the Committee on Economic, Social and Cultural Rights, based on Article 13 of the ICESCR, will be made at a future point. Such a General Comment would greatly contribute towards dispelling some of the fundamental misconceptions regarding the true purport of this right.

I. *Historical Development of Academic Freedom*

It was only with the Reformation—when the idea that there was a sole religious truth began to be challenged—that also a genuine search for the truth emerged in the field of science.⁷ In the Age of the Enlightenment, this free pursuit of the truth found its expression in the idea of a *libertas philosophandi*.⁸ Whereas restrictions were accepted for the faculties of medicine, theology and law, Kant required that the faculty of philosophy be the place “where reason must be allowed publicly to speak; because without it (to the

31 S. AFR. J. HUM. RTS. 315 (2015); Kwadwo Appiagyei-Atua, Klaus D. Beiter & Terence Karran, *The Capture of Institutional Autonomy by the Political Elite and Its Impact on Academic Freedom in African Universities*, 47 HIGH. EDU. REV. 48 (2015).

⁶ U.N. Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, ¶¶ 38–40, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment No. 13*].

⁷ See Ute Mager, *VI. Wissenschaft und Kunst, § Freiheit von Forschung und Lehre*, in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, BAND VII – FREIHEITSRECHTE 1075, at 1076–77, ¶ 2 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2009).

⁸ See, e.g., Stewart M. Alexander, *Libertas Philosophandi: From Natural to Speculative Philosophy*, 40 AUSTL. J. POL. & HIST. 29 (1994) (discussing the idea of a *libertas philosophandi*).

detriment of the government itself) truth would not emerge, reason by its nature, however, being free and not accepting any instructions to hold something to be true.”⁹ These ideas inspired university reforms in Prussia, essentially associated with the name of Wilhelm von Humboldt (1767–1835). Von Humboldt, a philosopher, statesman and founder of the Humboldt University of Berlin, believed that universities should be founded on freedom of teaching (*Lehrfreiheit*), freedom of learning (*Lernfreiheit*), the unity of teaching and research (*Einheit von Lehre und Forschung*) (in terms of which both students and professors are involved in a joint endeavor of discovering the truth), the unity of science/scholarship (*Einheit der Wissenschaft*) (signifying that there is no distinction in principle between the natural sciences and the humanities), and the primacy of “pure” science (*Bildung durch Wissenschaft*) over specialized professional training (*Ausbildung, Spezialschulmodell*).¹⁰ Von Humboldt’s philosophy has been highly influential and remains significant today—even if primarily as the reference point for a fierce debate as to whether the “research university” should remain the primary model of a “proper” university or whether higher education (HE) should be massified with (most) universities focusing on teaching, restricting research to a handful of “elite” institutions.¹¹

⁹ IMMANUEL KANT, DER STREIT DER FACULTÄTEN 20 (1798), available at <http://korpora.zim.uni-duisburg-essen.de/kant/aa07/>. This translation is our own, from the original German text. It appears that the first clear articulation of the *libertas philosophandi* in English may be found in the work of David Hume. See Stewart M. Alexander, *Academic Freedom: Origins of an Idea*, 16 BULL. AUSTRAL. SOC’Y LEGAL PHIL. 1, 25–31 (1991–92) (explaining that the overriding message of Hume’s work *Enquiry concerning Human Understanding*, published in 1748, is that “scepticism is the only philosophy compatible with a true knowledge of the human mind,” *id.* at 26).

¹⁰ See Mitchell G. Ash, *Bachelor of What, Master of Whom? The Humboldt Myth and Historical Transformations of Higher Education in German-Speaking Europe and the US*, 41 EUR. J. EDUC. 245, 246 (2006).

¹¹ See, e.g., Ash, *supra* note 10 (critical of the continued relevance of von Humboldt’s ideas today); Paul Taylor, *Humboldt’s Rift: Managerialism in Education and Complicit Intellectuals*, 3 EUR. POLIT. SCI. 75 (2003) (arguing in favor of the continued relevance of von Humboldt’s ideas); Barbara Zehnpfennig, *Die Austreibung des Geistes aus der Universität*, 46 WISSENSCHAFTSRECHT 37 (2013) (likewise supporting the continued relevance of von Humboldt’s ideas).

The ideals of freedom of teaching, learning, and research eventually found a manifestation in a legal document, the German Paulskirchenverfassung of 1849 (which never entered into force, though), which stated, in its section on fundamental rights, that “[s]cience and its teaching shall be free” (Sect. VI, Art. VI, § 152). The notion of “freedom of science” (“*Wissenschaftsfreiheit*”), being a particularly German creation,¹² influenced developments in other continental European jurisdictions.¹³ It may be noted that of the 28 Member States of the European Union, 17 provide for the express protection of “freedom of science” in their constitution.¹⁴ The Constitution of Spain of 1978 is a special case, as it protects both “freedom of science” as part of the right to “scientific production” (Art. 20(1)(b)) and also “academic freedom,” i.e. “*la libertad de cátedra*,” literally meaning “the freedom of the academic chair” (Art. 20(1)(c)).¹⁵

Hence, the continental European legal systems—at least the express terms of their constitutions¹⁶—essentially protect a “freedom

¹² See Christian Starck, *Freedom of Scientific Research and Its Restrictions in German Constitutional Law*, 39 *ISR. L. REV.* 110, 110–11 (2006).

¹³ See ERIC BARENDT, *ACADEMIC FREEDOM AND THE LAW: A COMPARATIVE STUDY* 117–60 (2010), on the legal protection of “freedom of science” (“*Wissenschaftsfreiheit*”) in Germany. See *id.* at 317–18, for a select bibliography of relevant literature on “freedom of science” in Germany.

¹⁴ The states concerned are Austria, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain, and Sweden. See Beiter et al., “*Measuring the Erosion of Academic Freedom*,” *supra* note 4, at 636–37. See also THOMAS GROß, *DIE AUTONOMIE DER WISSENSCHAFT IM EUROPÄISCHEN RECHTSVERGLEICH* (1992), for a good, even if somewhat out-of-date, legal comparison of “freedom of science” in Europe.

¹⁵ Constitución Española, B.O.E. núm. 311, Dec. 29, 1978, Art. 20 (Spain).

¹⁶ In Belgium, France, and Portugal, for example, the highest courts have accepted “*la liberté académique*” (see Cour d’arbitrage [Ct. Arb.] decision No. 167/2005, Nov. 23, 2005, MONITEUR BELGE, Dec. 2, 2005, ¶ B.18.1. (Bel.)), “*l’indépendance des personnels*” (see Conseil Constitutionnel [CC] decision No. 83/165, Jan. 20, 1984, RECUEIL, 365, Jan. 21, 1984, ¶ 19 (Fr.)), and “*liberdade científica*” (“freedom of science”) and “*liberdade de cátedra*” (“academic freedom”) (see Tribunal Constitucional [Const. Ct.] decision No. 491/2008, Oct. 7, 2008, DIÁRIO DA REPÚBLICA, 219 (Series II), Oct. 11, 2008, ¶ 8.3. (Port.)), to be protected by the respective national constitution also in the absence of any express

of science” rather than “academic freedom.” “Academic freedom,” as will be shown further below, although related to the notion of “freedom of science,” is a separate concept. The rights entailed by “academic freedom” and “freedom of science,” respectively, reveal differences. The concept of “academic freedom” has its origins in the United Kingdom and the United States of America.¹⁷

The U.K.’s Education Reform Act of 1988, in Section 202(2)(a), stipulates that “academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions,” this giving expression to the right of individual academic freedom, though not mentioning “academic freedom” as such.¹⁸ The right conferred is that of academic staff in institutions of HE (essentially universities).¹⁹ Section 32(2) of the Higher Education Act of 2004 does mention “academic freedom,” stating that the Director of Fair Access to Higher Education—the independent regulator of fair access to HE in England and Wales—in the performance of his functions “has a duty to protect academic freedom including, in particular, the freedom of [HE] institutions (a) to determine the contents of particular courses and the manner in which they are taught, supervised or assessed, and (b) to determine the criteria for the admission of students and apply those criteria in particular cases.”²⁰ This provision emphasizes the autonomy of institutions of HE rather than the individual academic freedom of academic staff in these institutions. Apart from these references, U.K. law is essentially silent on “academic freedom.” In the U.K., “there is no *constitutional* guarantee of academic . . . freedom.”²¹ There is,

reference to “freedom of science” or “academic freedom.”

¹⁷ See BARENDT, *supra* note 13, at 38. See *id.* at 73–116 and 161–201, on the legal protection of “academic freedom” in the U.K. and the U.S., respectively. See *id.* at 316–17 and 318–20, for a select bibliography of relevant literature on “academic freedom” in the U.K. and the U.S., respectively.

¹⁸ Education Reform Act, 1988, ch. 40, § 202(2)(a).

¹⁹ See, however, the Further and Higher Education (Scotland) Act 2005 (asp 6), which, in Section 26, does refer to “academic freedom” as such, defining this similarly as the Education Reform Act of 1988.

²⁰ Higher Education Act, 2004, ch. 8, § 32(2).

²¹ BARENDT, *supra* note 13, at 74–75.

moreover, “hardly any case law on academic freedom.”²² To a large extent, the protection of academic freedom and institutional autonomy in the U.K. has been and remains a matter of convention and practice.²³

In the U.S., the German ideals of freedom of teaching, freedom of learning, and the unity of teaching and research exerted a strong influence on the emerging concept of “academic freedom.”²⁴ Today, there are essentially two definitions of academic freedom in the U.S. On the one hand, academic freedom is defined at the *professional* level in the 1940 Statement of Principles on Academic Freedom and Tenure, adopted by the American Association of University Professors (AAUP) and the Association of American Colleges (today the Association of American Colleges and Universities),²⁵ which states, in part (under the title “Academic Freedom”):

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching

²² *Id.* at 74.

²³ *See id.* at 73. This is in contrast to the rich case law on the topic developed in especially Germany and the U.S. *See id.* at 74.

²⁴ *See* RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 367–412 (1955), on the German influence in this respect (“More than nine thousand Americans studied at German universities in the nineteenth century. Through these students, through the scores of Americans who knew Germany from books and an occasional *Wanderjahr*, through German expatriates teaching in American colleges, the methods and ideals of the German university were transported into this country.” *See id.* at 367.).

²⁵ The 1940 Statement is based on the 1915 AAUP Declaration of Principles on Academic Freedom and Academic Tenure, which formulated the relevant principles for the first time.

controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.²⁶

On the other hand, academic freedom has been defined at the *constitutional* level by a series of decisions of the Supreme Court in the 1950's.²⁷ These rely on the First Amendment's protection of freedom of speech (there being no express mention of "academic freedom"). In the case of *Keyishian v. Board of Regents*, the Court thus refers to a "deep commitment" to "safeguarding academic freedom."²⁸ Whereas the professional definition emphasizes individual academic freedom, "it is unclear how far constitutional academic freedom protects individual scholars or whether, as the majority of court decisions indicates, it safeguards primarily—perhaps only—the institutional freedom of universities and colleges."²⁹ However, what may be noted regarding both the U.K. and the U.S. is that the normative or legal doctrine in the field under discussion is based on the concept of "academic freedom" rather than that of "freedom of science."

"Freedom of science" and "academic freedom" meanwhile are protected by the constitutions of many states in the world. In a survey focusing on "academic freedom," it has been found that "as of December 2012, 20 state constitutions include explicit protections, 99 direct protections and 77 indirect protections."³⁰ The survey

²⁶ American Association of University Professors & Association of American Colleges, *1940 Statement of Principles on Academic Freedom and Tenure*, Academic Freedom, ¶¶ 1–2 (1940), available at <https://www.aaup.org/file/1940%20Statement.pdf>.

²⁷ The principle of constitutional academic freedom has first been established in the separate, but concurring opinion of Frankfurter J. in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

²⁸ 385 U.S. 589, 603 (1967).

²⁹ BARENDT, *supra* note 13, at 161.

³⁰ Quinn & Levine, *supra* note 3, at 912. According to oral information provided by the authors of that article, the 20 state constitutions including "explicit protections" are those of South Sudan (2011), Ecuador (2008), Kosovo (2008),

considers references to “freedom of science” as well as those to entitlements such as “right to teach,” “right to publish,” or “freedom of education” as instances of “direct protections.”³¹ It appears that it is especially more recent constitutions that provide “explicit protection.”³² Explicit references “tend to be drafted in broad language, without significant limitations.”³³ It may further be noted that Article 13 of the Charter of Fundamental Rights of the European Union of 2007³⁴—which may perhaps be described as a supranational bill of human rights—under the heading “Freedom of the arts and sciences,” protects both “freedom of science” and “academic freedom.” It states: “The arts and scientific research shall be free of constraint. Academic freedom shall be respected.”³⁵

II. *Content of the Right to Academic Freedom in the Light of UNESCO’s Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997*

Thailand (2007), Sudan (2005), Albania (1998), Gambia (1997), South Africa (1996), Uganda (1995), Malawi (1994), Peru (1993), Ghana (1992), Sierra Leone (1991), Namibia (1990), Nicaragua (1987), Philippines (1987), Liberia (1986), El Salvador (1983), Spain (1978), and Japan (1946).

³¹ Oral information provided by Quinn & Levine.

³² See Quinn & Levine, *supra* note 3, at 912.

³³ *Id.* at 912–13.

³⁴ 2012 O.J. (C 326) 391. The E.U. Charter of Fundamental Rights is legally binding under the Treaty of Lisbon of 2007.

³⁵ The official German version of Article 13 is as follows: The title reads: “Freiheit der Kunst und der Wissenschaft”, the provision itself: “Kunst und Forschung sind frei. Die akademische Freiheit wird geachtet.” The term “*akademische Freiheit*,” which is an exact rendering of “academic freedom,” historically referred to only freedom of learning (*Lernfreiheit*). See HOFSTADTER & METZGER, *supra* note 24, at 386 (note 63). These days, references to “*akademische Freiheit*” are intended to reflect the doctrinal equivalent of “academic freedom.” “*Akademische Freiheit*” as such does not have a separate basis in modern German constitutional law, which only protects “*Wissenschaftsfreiheit*” (freedom of science) (Art. 5(3) of the German Basic Law). In the context of the E.U. Charter of Fundamental Rights, however—forming part of a different legal system—the use of that term is legitimate, of course. See Debbie Sayers, *Article 13: Freedom of the Arts and Sciences*, in THE E.U. CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers et al. eds., 2014), for a discussion of Article 13 of the E.U. Charter of Fundamental Rights.

No legally binding global or regional international human rights instrument expressly protects the right to academic freedom. Various influential non-governmental documents on universities, academic freedom, and institutional autonomy have been adopted at the international and regional levels by NGOs, academic staff associations, expert groups, or rectors.³⁶ At the intergovernmental level, policy (or soft law) documents on the topic have been prepared at conferences sponsored by UNESCO³⁷ or by the Parliamentary Assembly and the Committee of Ministers of the Council of Europe.³⁸ The only international law document laying down standards with regard to academic freedom and institutional

³⁶ The most influential non-governmental document is the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, adopted by World University Service (WUS) in Lima, Peru in 1988. Others are the Magna Charta Universitatum, adopted by 388 rectors of universities worldwide in Bologna, Italy in 1988, the (national) Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics, adopted by six academic staff associations of HE institutions in Dar es Salaam, Tanzania in 1990, the (regional) Kampala Declaration on Intellectual Freedom and Social Responsibility, adopted by the participants in the Symposium on “Academic Freedom and Social Responsibility of Intellectuals” in Kampala, Uganda in 1990, and the Amman Declaration on Academic Freedom and the Independence of Institutions of Higher Education and Scientific Research, adopted by “an elite of thinkers, university presidents, professors, and researchers from the various Arab universities” in Amman, Jordan in 2004. The Lima Declaration, Magna Charta Universitatum, Dar es Salaam Declaration, and Kampala Declaration are reproduced in ULF JOHANSSON DAHRE & GÖRAN MELANDER, REPORT NO. 12: ACADEMIC FREEDOM 23–54 (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 1992), *available at* <http://books.rwi.lu.se/index.php/publications/catalog/view/14/14/142-1>.

³⁷ *See, e.g.*, the Sinaia Statement on Academic Freedom and University Autonomy, adopted by the Sinaia International Conference on Academic Freedom and University Autonomy in Sinaia, Romania in 1992.

³⁸ *See* Council of Europe, Eur. Parl. Ass., Recommendation 1762 (2006) on Academic Freedom and University Autonomy (June 30, 2006) [hereinafter Recommendation 1762]; *see also* Council of Europe, Comm. of Ministers, Recommendation CM/Rec(2012)7 on the Responsibility of Public Authorities for Academic Freedom and Institutional Autonomy (June 20, 2012). Whereas the former is directed at the Committee of Ministers, the latter is directed at the governments of Member States.

autonomy in a more structured and detailed manner is UNESCO's Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997.³⁹ The Recommendation "applies to all higher-education teaching personnel."⁴⁰ This means "all those persons in institutions or programmes of higher education who are engaged to teach and/or to undertake scholarship and/or to undertake research and/or to provide educational services to students or to the community at large."⁴¹ The Recommendation is more than a code regulating the profession of "higher-education teaching personnel." Apart from envisaging improvements in the professional, material, and social position of such personnel, it is also—as a result of improvements in status—aimed at enhancing the quality of the HE system.⁴² Although the Recommendation is not in the first instance "an international instrument on academic freedom," guaranteeing academic freedom in HE is a fundamental concern thereof. Various provisions of the Recommendation address aspects of academic freedom.

UNESCO's Recommendations are not legally binding. They constitute soft-law. Having been adopted by the General Conference

³⁹ General Conference (UNESCO), Recommendation concerning the Status of Higher-Education Teaching Personnel, UNESCO Doc. 29 C/Res. 11 (1997) [hereinafter UNESCO Recommendation].

⁴⁰ *Id.* ¶ 2.

⁴¹ *Id.* ¶ 1(f). Predating this Recommendation is UNESCO's Recommendation on the Status of Scientific Researchers of 1974. See General Conference (UNESCO), Recommendation on the Status of Scientific Researchers, UNESCO Doc. 18 C/Res. 40 (1974) [hereinafter Recommendation on the Status of Scientific Researchers]. This instrument applies to scientific researchers, thus covering a wider group of researchers than only those in HE. See *id.* ¶ 1. In various parts, the Recommendation alludes to scientific freedom. The Preamble thus refers to the "open communication of . . . results, hypotheses and opinions," Paragraph 8 to the "utmost respect for the autonomy and freedom of research," and Paragraph 14 to "the responsibility and the right" of scientific researchers "(a) to work in a spirit of intellectual freedom" and "(c) . . . in the last resort [to] withdraw from . . . projects if their conscience so dictates."

⁴² See KLAUS D. BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW: INCLUDING A SYSTEMATIC ANALYSIS OF ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 280 (2006).

of UNESCO, they must be considered to reflect an international consensus on the specific subject matter dealt with. Recommendations “have a normative character in their intent and effects and the States concerned regard them as political or moral commitments.”⁴³ Moreover, under UNESCO’s Constitution, UNESCO members are obliged to submit recommendations adopted to their competent national authorities so that these may take cognizance of their provisions, and further to report on the measures taken towards and the progress made in implementing recommendations.⁴⁴ As the Recommendation of 1997 concerns international labor *and* international education law, supervision of its implementation is entrusted to a Joint ILO/UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART). The Committee is composed of twelve independent experts—six appointed by UNESCO, six by the ILO. The Committee performs two tasks with regard to the 1997 Recommendation: examining relevant data, including the reports referred to, to adjudge application of the Recommendation, and examining allegations received from teachers’ organizations on the non-observance of provisions of the Recommendation in Member States.⁴⁵

The relevant provisions of the Recommendation shedding light on the content of the right to academic freedom may be divided into four groups: 1) individual rights and freedoms, 2) institutional autonomy, 3) academic self-governance, and 4) security of employment, including tenure.⁴⁶

⁴³ YVES DAUDET & KISHORE SINGH, *THE RIGHT TO EDUCATION: AN ANALYSIS OF UNESCO’S STANDARD-SETTING INSTRUMENTS 45* (2001), available at <http://unesdoc.unesco.org/images/0012/001238/123817e.pdf>.

⁴⁴ Constitution of the United Nations Educational, Scientific and Cultural Organization, *opened for signature* Nov. 16, 1945, 4 U.N.T.S. 275 (*entered into force* Nov. 4, 1946), Art. IV(4), (6), respectively.

⁴⁵ For more information on the supervision of the Recommendation, see BEITER, *supra* note 42, at 282–84 and CEART’s latest sessional reports, e.g., Rep., 9th Sess., Oct. 30–Nov. 3, 2006, ILO/UNESCO Doc. CEART/9/2006/10; Rep., 10th Sess., Sept. 28–Oct. 2, 2009, ILO/UNESCO Doc. CEART/10/2009; Rep., 11th Sess., Oct. 8–12, 2012, ILO/UNESCO Doc. CEART/11/2012/9.

⁴⁶ See Terence Karran, *Academic Freedom in Europe: Reviewing UNESCO’s*

Paragraphs 25 to 30 thus contain provisions on “Individual rights and freedoms: civil rights, academic freedom, publication rights, and the international exchange of information.” These include all “internationally recognized civil, political, social and cultural rights applicable to all citizens”⁴⁷ and further “the principle of academic freedom.”⁴⁸ The latter may be described as academic freedom *stricto sensu* (i.e. individual academic freedom, this including freedom to teach and undertake research),⁴⁹ academic freedom *lato senso* covering also institutional autonomy, academic self-governance, tenure, and all other human rights in as far as they are relevant to sustaining any aspect of academic freedom. Even if particularly the institutional autonomy of HE institutions has historically developed for different reasons,⁵⁰ all the above elements may today be considered to make up “the right to academic freedom.”

Paragraph 27 defines the principle of academic freedom as follows:

the right [of higher-education teaching personnel], without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express

Recommendation, 57 BRIT. J. EDUC. STUD. 191, 195–96 (2009) (identifying these four groups).

⁴⁷ UNESCO Recommendation, *supra* note 39, ¶ 26.

⁴⁸ *Id.* ¶ 27.

⁴⁹ For analyses of academic freedom as an individual right, *see, e.g.*, Terence Karran, *Academic Freedom in Europe: Time for a Magna Charta?*, 22 HIGH. EDUC. POL’Y 163, 170–75 (2009), André Prüm & Rusen Ergec, *La liberté académique*, No. 1 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L’ÉTRANGER [RDP] 1, 13–17 (2010), https://orbilu.uni.lu/bitstream/10993/11016/1/RDP_2010_AP_RE_liberte-academique.pdf; JOGCHUM VRIELINK ET AL., ACADEMIC FREEDOM AS A FUNDAMENTAL RIGHT 9–18, ¶¶ 27–59 (League of European Research Universities, Advice Paper No. 6, Dec. 2010), *available at* http://www.leru.org/files/publications/AP6_Academic_final_Jan_2011.pdf.

⁵⁰ *See* BARENDT, *supra* note 13, at 29.

freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. All higher-education teaching personnel should have the right to fulfill their functions without discrimination of any kind and without fear of repression by the state or any other source.⁵¹

Academic freedom is subject to “Duties and responsibilities of higher-education teaching personnel,” as described in Paragraphs 33 to 36. There is, for example, a duty of higher-education teaching personnel “to teach students effectively” as there is a duty “to base . . . research and scholarship on an honest search for knowledge.”⁵²

Paragraphs 17 to 21 of the Recommendation contain provisions on “Institutional autonomy.”⁵³ UNESCO Member States are obliged “to protect higher education institutions from threats to their autonomy coming from any source.”⁵⁴ Institutional autonomy is “that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights.”⁵⁵ The Recommendation states that “[t]he proper enjoyment

⁵¹ UNESCO Recommendation, *supra* note 39, ¶ 27.

⁵² *Id.* ¶ 34(a), (c), respectively.

⁵³ See, e.g., Prüm & Ergec, *supra* note 49, at 18–21, or VRIELINK ET AL., *supra* note 49, at 18–22, ¶¶ 60–75, on institutional autonomy as an aspect of the right to academic freedom.

⁵⁴ UNESCO Recommendation, *supra* note 39, ¶ 19.

⁵⁵ *Id.* ¶ 17. As it were, the Recommendation understands autonomy to be “the institutional form of academic freedom.” *Id.* ¶ 18. The Recommendation does not provide any detail as to what exactly institutional autonomy entails, only remarking that “the nature of institutional autonomy may differ according to the type of establishment involved.” *Id.* ¶ 17. The European University Association (EUA), an organization representing universities in Europe, dedicated *inter alia* to promoting university autonomy, usefully distinguishes between organizational,

of academic freedom . . . [requires] the autonomy of institutions of higher education.”⁵⁶ It is important to appreciate, however, that there is no automatic link between institutional autonomy and individual academic freedom.⁵⁷ It is for this reason that the Recommendation stresses that a proper interpretation of institutional autonomy needs to render that term as “institutional autonomy consistent with respect for academic freedom.”⁵⁸ Autonomy should further “not be used by higher education institutions as a pretext to limit the rights of higher-education teaching personnel provided for in [the] Recommendation.”⁵⁹

Autonomy must go hand in hand with “Institutional accountability,” as provided for in Paragraphs 22 to 24: “Member States and higher education institutions should ensure a proper balance between the level of autonomy enjoyed by higher education institutions and their systems of accountability.”⁶⁰ HE institutions are thus accountable for a commitment to quality and excellence in teaching and research, ensuring high quality education, the creation of codes of ethics to guide teaching and research, honest and open accounting, and an efficient use of resources.⁶¹ HE institutions are also accountable for “effective support of academic freedom and fundamental human rights.”⁶²

Paragraphs 31 and 32 of the Recommendation contain provisions on “Self-governance and collegiality.”⁶³ Self-governance means the right of higher-education teaching personnel “without

financial, staffing, and academic autonomy. See European University Association, *Lisbon Declaration: Europe’s Universities beyond 2010: Diversity with a Common Purpose*, ¶ 26 (Apr. 13, 2007), available at http://www.eua.be/Libraries/quality-assurance/lisbon_declaration.pdf?sfvrsn=0.

⁵⁶ UNESCO Recommendation, *supra* note 39, ¶ 17.

⁵⁷ See *infra* Section III.

⁵⁸ UNESCO Recommendation, *supra* note 39, ¶ 17.

⁵⁹ *Id.* ¶ 20.

⁶⁰ *Id.* ¶ 22, caput.

⁶¹ See *id.* ¶ 22(b), (d), (k), (i), (j), respectively.

⁶² *Id.* ¶ 22(c).

⁶³ See, e.g., Karran, *Time for a Magna Charta?*, *supra* note 49, at 175–76, Prüm & Ergec, *supra* note 49, at 21–25, or VRIELINK ET AL., *supra* note 49, at 19–20, ¶¶ 65–66, on self-governance as an aspect of the right to academic freedom.

discrimination of any kind, according to their abilities, to take part in the governing bodies and to criticize the functioning of higher education institutions, including their own, while respecting the right of other sections of the academic community to participate,” and the right further “to elect a majority of representatives to academic bodies within the higher education institution.”⁶⁴ The closely related 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.” It is pointed out that “[c]ollegial decision-making should encompass decisions regarding the administration and determination of policies of higher education, curricula, research, extension work, the allocation of resources and other related activities, in order to improve academic excellence and quality for the benefit of society at large.”⁶⁵ If it has been explained that institutional autonomy should be interpreted so as to be consistent with academic freedom, it should be added that “[s]elf-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education.”⁶⁶ Consequently, a HE institution that enjoys substantial autonomy, but in which higher-education teaching personnel cannot sufficiently participate in the taking of decisions having a bearing on science and scholarship fails to comply with the requirement of

⁶⁴ UNESCO Recommendation, *supra* note 39, ¶ 31. Therefore, academic staff should have more than 50% (ideally between 60 and 70%) representation on senates or faculty or departmental councils, or their respective equivalents. On boards involved in strategic decision-making (and often including external experts), they should ideally have up to 50% representation.

⁶⁵ UNESCO Recommendation, *supra* note 39, ¶ 32. It is submitted that “the right . . . to take part in the governing bodies” read with the principles of collegiality suggests the applicability of the *primus inter pares* model, in terms of which academic staff are to decide on “their leaders” (rectors, deans, heads of departments) themselves, choosing them from among themselves, for a certain period of time, after which they become ordinary members of staff again. Under this model, academic staff should also be able to express a lack of confidence in their leaders’ ability to lead, where appropriate. *See also* Terence Karran, *Academic Freedom in Europe: A Preliminary Comparative Analysis*, 20 HIGH. EDUC. POL’Y 289, 303–04 (2007).

⁶⁶ UNESCO Recommendation, *supra* note 39, ¶ 21.

institutional autonomy as understood by the Recommendation.

Paragraphs 45–46 of the Recommendation contain provisions on “Security of employment,” this including “tenure or its functional equivalent, where applicable.” In the Recommendation’s perception, tenure (or its equivalent) “constitutes one of the major procedural safeguards of academic freedom and against arbitrary decisions.”⁶⁷ In terms of Paragraph 46, tenure (or its equivalent) should be granted “after a reasonable period of probation”⁶⁸ and “following rigorous evaluation . . . to those who meet stated objective criteria in teaching . . . [and] research to the satisfaction of an academic body.”⁶⁹ Tenure (or its equivalent) entails “continuing employment” and potential dismissal “on professional grounds and in accordance with due process” only. The Recommendation allows release “for *bona fide* financial reasons, provided that all the financial accounts are open to public inspection, that the institution has taken all reasonable alternative steps to prevent termination of employment, and that there are legal safeguards against bias in any termination of employment procedure.”⁷⁰ Moreover, tenure (or its equivalent) “should be safeguarded as far as possible even when changes in the organization of or within a higher education institution or system are made.”⁷¹ In other words, dismissals on grounds of serious misconduct, a flagrant violation of scholarly duties, or two or more consecutive negative appraisals of work quality will usually be

⁶⁷ *Id.* ¶ 45. See, e.g., Karran, *Time for a Magna Charta?*, *supra* note 49, at 177–85, or Prüm & Ergec, *supra* note 49, at 26, on tenure as an aspect of the right to academic freedom.

⁶⁸ UNESCO Recommendation, *supra* note 39, ¶ 46. This would normally be the phase following the award of a doctoral degree. This phase typically (and legitimately) is between 5–7 years. See Karran, *Time for a Magna Charta?*, *supra* note 49, at 178.

⁶⁹ UNESCO Recommendation, *supra* note 39, ¶ 46. Additionally, paragraph 42 stipulates that the duration of probation should be known in advance and conditions for its satisfactory completion strictly related to professional competence. Reasons should be provided should a candidate fail to complete the probation satisfactorily. There should also be a right of appeal. *Id.* ¶ 42.

⁷⁰ *Id.* ¶ 46.

⁷¹ *Id.*

permissible, if due process rules are observed.⁷² Dismissals on operational grounds (restructuring, down-sizing, reorganization, or economic difficulties), however, should ideally not take place. They will only be justifiable exceptionally and provided all alternatives have been considered, appropriate priority criteria have been observed, a formalized procedure has been followed, and procedural safeguards have been respected.⁷³

III. Rationale for the Protection of Academic Freedom as a Human Right

It may well be asked why academic freedom should be recognized as a human right. For many, academic freedom may seem to entail special rights, privileges as it were, granted to those practicing a particular profession for which there do not exist justifiable reasons. Not only, they may argue, should academic freedom not be protected, it should also not be elevated to the status of a human right. There are good reasons, however, why academic freedom should be protected and, furthermore, why it deserves such protection as a human right.

Focusing first of all on *individual academic freedom*, it should be pointed out that such freedom facilitates the search for and discovery of the truth. "Truth" being a good in itself, discovering new knowledge is also important for human progress and political development.⁷⁴ Granting academic freedom ensures that nobody (not

⁷² See *id.* ¶47 (on "Appraisal," Subparagraph (e) stating that the results of appraisal may legitimately be taken into account when "considering the renewal of employment"); *id.* ¶¶48–51 (on "Discipline and dismissal," specifically Paragraph 50 on "dismissal as a disciplinary measure"). See also Karran, *Time for a Magna Charta?*, *supra* note 49, at 181–85 (figs. 7, 8), for a description of due process rules in this context.

⁷³ See Karran, *Time for a Magna Charta?*, *supra* note 49, at 179–81, 184–85 (figs. 5, 6, 8), for a description of due process rules in this context.

⁷⁴ See BARENDT, *supra* note 13, at 54. The potential of new knowledge to contribute to progress cannot, however, constitute the sole nor even most important reason for respecting academic freedom, as this may readily lead to acceptance of the notion that academic freedom must yield "useful" results. Discovery of the

the government, the Church, the media, the general public, and also not HE institutions themselves through their governing bodies and administration) can suppress certain research and the disclosure of its results through teaching or publication because these are considered to be disturbing.⁷⁵ Discovery of the truth simultaneously constitutes an argument against an unbridled freedom, i.e. academic freedom not constrained by the responsibility of actually pursuing the discovery of new knowledge.⁷⁶ Academic freedom would thus clearly not cover, for example, fabricating research results, plagiarism, or applying unscientific research methods. The “truth” argument is applicable not only to academic freedom, but also to freedom of science, the former, as will be explained further below, being a special case of the latter (broader) freedom.⁷⁷ To the extent, however, that academic staff are concerned—only they (and to an extent also students in HE) being entitled to claim academic freedom—the scope of what they may say or do may be wider; simultaneously, the responsibilities attached to the exercise of their right are likely to be more extensive. This is so because institutions of HE have a special role—in fact, this is their very function—to discover the truth and to

truth not accompanied by “usefulness” may likewise warrant protection. “Usefulness” is just an additional argument in favor of respecting academic freedom. See Thaddeus Metz, *A Dilemma Regarding Academic Freedom and Public Accountability in Higher Education*, 44 J. PHIL. EDUC. 529 (2010).

The basic duty to transform society here means a constitutional . . . or moral . . . obligation to promote a variety of things that can be sensibly placed under the broad heading of ‘social justice’. . . . I can see no plausible way to deny that academics have a basic duty to promote social justice in the above ways, and a weighty one at that. . . . What there is reason to doubt is that the proper role of an academic *qua* academic is *entirely* a function of a duty to transform society.

Id. at 534. Metz supports a version of academic freedom that allows the pursuit of knowledge for its own sake, but which is constrained—not so much by reasons of accountability for the use of public resources—but by reasons of political morality.

⁷⁵ Cf. BARENDT, *supra* note 13, at 55–58.

⁷⁶ Cf. *id.* at 58.

⁷⁷ See *infra* Subsections IV-B to IV-D.

advance knowledge. Although writers, the media, special research institutes not “close” to the educational environment, or business corporations may also contribute to discovering the truth, they have not been mandated to perform the same important function in this respect as institutions of HE.⁷⁸ “Truth” as a rationale thus provides justification for the right-holders of academic freedom to be entitled to specialized protection when compared to scientists not employed at institutions of HE and entitled to raise claims in terms of freedom of science, or when compared to writers or journalists entitled to raise claims in terms of the right to freedom of expression or freedom of the press.⁷⁹

Nevertheless, as Ronald Dworkin points out, “[e]ven if we were to . . . suppose that complete academic freedom will advance truth in the long run . . . that instrumental assumption does not seem strong enough, on its own, to justify the emotional power that many of us feel academic freedom has, and that it must have.”⁸⁰ Dworkin convincingly argues that the instrumental ground for academic freedom needs to be supplemented by an ethical ground.⁸¹ Every person has a duty to make up his own mind, as a matter of personal conviction, as to what a successful life would be to him.⁸² He refers to this as the ideal of ethical individualism. This requires a certain environment, one of political liberalism, one reflecting a culture of independence from the state, also in institutions of HE. Both freedom of speech and academic freedom constitute essential elements of this environment. Such an environment will enable teachers and students in institutions of HE to cultivate attitudes that promote ethical individualism. Promoting ethical individualism places a special—a

⁷⁸ See also BARENDT, *supra* note 13, at 55, 58–59, regarding this line of reasoning.

⁷⁹ Although the “truth” theory constitutes a strong argument, questions remain: Does freedom (open discussion and inquiry) actually lead to discovering the truth? Are certain truths not perhaps too dangerous to know? Does objective truth exist whatsoever? On these and related issues, see BARENDT, *supra* note 13, at 59–61.

⁸⁰ Ronald Dworkin, *We Need a New Interpretation of Academic Freedom*, in *THE FUTURE OF ACADEMIC FREEDOM* 181, 187 (Louis Menand ed., 1996).

⁸¹ See *id.* at 185–89.

⁸² See *id.* at 187–89.

“more general and uncompromising”—responsibility on teachers and students in universities, who have “a paradigmatic duty to discover and teach what they find important and true, and this duty is not . . . subject to any qualification about the best interests of those to whom they speak. It is an undiluted responsibility to the truth.”⁸³ Academic freedom should accordingly also be protected because it promotes the values of intellectual independence. The argument of ethical individualism, of course, likewise justifies freedom of science as a right of everyone.⁸⁴ However, “[a]cademic staff working in universities and colleges may well be entitled to claim special freedoms on this argument because of the particular responsibilities of these institutions for ethical individualism.”⁸⁵

The ultimate reason for protecting human rights, of course, is generally recognized to be human dignity.⁸⁶ Truth in itself, new knowledge contributing to progress in society, and ethical individualism all clearly relate to human dignity—the human dignity of others for whose “benefit” academics exercise their academic

⁸³ *Id.* at 189.

⁸⁴ See BARENDT, *supra* note 13, at 63. See also Lea Shaver, *The Right to Science: Ensuring that Everyone Benefits from Scientific and Technological Progress*, 2015 EUR. J. HUM. RTS. 411 (2015).

The value of science then, is not purely instrumental. Yes, science and technology also have significant utilitarian value. They can be deployed to solve social problems and improve our material situation. But there is also a value inherent in the process itself, as with the educational process. Engaging in cultural manifestations such as art, literature, music, and theatre helps us to realize and express parts of our shared humanity, which has value from the perspective of individual development and the shared life of the community. Engaging in scientific discovery and technological innovation does as well.

Id. at 416.

⁸⁵ BARENDT, *supra* note 13, at 63.

⁸⁶ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Preamble (1948).

freedom,⁸⁷ but also their own, as they themselves “benefit” from these endeavors too. Additionally, the engagement of academics in promoting these values requires their specific dignity as teachers and researchers in HE to be protected. It has been stated that academics bear a special responsibility in promoting these values. A still frequently quoted non-governmental national instrument, the Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics, adopted by six academic staff associations of HE institutions in Dar es Salaam, Tanzania in 1990, states, in Paragraph 28, that members of the academic community should enjoy working conditions commensurate with their social and academic responsibilities “so that they may discharge their roles with human dignity, integrity and independence.”⁸⁸ Perhaps this adequately reflects the notion of the human dignity of academics *qua* academics entitling them to academic freedom.

It may be asked on what basis *the institutional autonomy of HE institutions* deserves protection. One argument is that it promotes institutional pluralism in HE. In the same way that the separation of government powers or their devolution to provincial or local authorities prevents all powers from vesting in a single state authority, institutional autonomy ensures pluralism in the formulation of HE policy, as each institution of HE decides on such policy itself without undue government involvement.⁸⁹ Eric Barendt mentions three problems associated with this line of justification. Firstly, it may be asked why a democratically elected government, which provides most of the funding for HE, should not be entitled to do exactly that, formulate HE policy and decide on resource

⁸⁷ This feature of freedom of science (or academic freedom) as revealing notable elements of serving the “needs” of others are typical for this right. It is for this reason that freedom of science in German fundamental rights theory is described as a “drittnütziges Grundrecht”—a fundamental right in favor of third parties. See Bernhard Kempen, *Kapitel I, Grundfragen des institutionellen Hochschulrechts*, in *HOCHSCHULRECHT: EIN HANDBUCH FÜR DIE PRAXIS 1*, at 5–6, ¶ 15 (Michael Hartmer & Hubert Detmer eds., 2nd ed. 2011).

⁸⁸ Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics, ¶ 28 (Apr. 19, 1990), available at <http://www.codesria.org/spip.php?article351>.

⁸⁹ See BARENDT, *supra* note 13, at 63–65.

allocation itself. Ultimately, the public will expect governments to account for public expenditure. Secondly, the pluralism argument might justify a more generous institutional autonomy than would be compatible with respect for the interests, values and freedoms of the HE community. Thirdly, the case from pluralism might also legitimize institutions of HE taking decisions inimical to individual academic freedom.⁹⁰ Although the pluralism argument may provide some justification for granting HE institutions autonomy, the main reason why institutional autonomy deserves protection is because it may clearly promote individual academic freedom. It has already been mentioned that there is no automatic link between institutional autonomy and individual academic freedom.⁹¹ As Pavel Zgaga underlines, “a highly autonomous institution may offer its members only a limited degree of academic freedom. . . . [I]n today’s relationship between university autonomy and the state, university autonomy does not subsume academic freedom.”⁹² In fact, “[a] certain responsibilities move gradually from public authorities to higher education institutions, academic freedom could be endangered. Even if the rationale for institutional autonomy were specifically to ensure academic freedom, one does not produce the other.”⁹³ UNESCO’s Recommendation of 1997, however, states that “[t]he proper enjoyment of academic freedom . . . require[s] the autonomy of institutions of higher education.”⁹⁴ It is obvious that it is much more likely that individual academic freedom will be protected if governments are not permitted to closely control all aspects of an

⁹⁰ See *id.* at 65–66.

⁹¹ In fact, historically the institutional autonomy of HE institutions has had little to do with securing academic freedom. Its purpose was respect for the liberties of privately established institutions to be directed in accordance with the wishes of their founders and further a general preference for institutional pluralism and decentralized decision-making. See BARENDT, *supra* note 13, at 29.

⁹² Pavel Zgaga, *Reconsidering University Autonomy and Governance: From Academic Freedom to Institutional Autonomy*, in UNIVERSITY GOVERNANCE AND REFORM: POLICY, FADS, AND EXPERIENCE IN INTERNATIONAL PERSPECTIVE 11, 19 (Hans G. Schuetze et al. eds., 2012).

⁹³ *Id.* See also Malcolm Tight, *So What is Academic Freedom?* in ACADEMIC FREEDOM AND RESPONSIBILITY 114, 122–24 (Malcolm Tight ed., 1988).

⁹⁴ UNESCO Recommendation, *supra* note 39, ¶ 17.

institution's governance. Governments that are entitled to do that will also be inclined not to tolerate individual academic freedom.⁹⁵ However, if individual academic freedom constitutes the principal justification for institutional autonomy, it also indicates the limits of HE institutions' autonomy.⁹⁶

The right to institutional autonomy accrues to HE institutions. But, is this a human right? This concerns two separate issues: Firstly, regarding *public* institutions of HE, does it make sense to accord human rights to such institutions? Ultimately, human rights provide protection against state action, public institutions of HE themselves being state institutions bound rather than entitled by human rights. Secondly, should (non-human) institutions be entitled to *human* rights? Regarding the first question, one might argue that certain public institutions, notably public broadcasting corporations and public HE institutions, are in a human rights-typical situation of peril, comparable to the classical antagonism between state and individual.⁹⁷ On the other hand, however, also addressing the second question, “[c]ollectivities of all sorts have many and varied rights. But these are not—cannot be—human rights, unless we substantially recast the concept.”⁹⁸ Human rights are accorded in the light of human dignity, this being absent in HE institutions.⁹⁹ Perhaps the solution is to regard the right to institutional autonomy as a right ranking below human rights, yet of such compelling character as to confer on it a “special” status, making it possible for that right to offer robust protection against state infringements. The implication

⁹⁵ See BARENDT, *supra* note 13, at 67–68.

⁹⁶ See *id.* at 68–69.

⁹⁷ See Kempen, *supra* note 87, at 8–9, ¶¶ 22–24.

⁹⁸ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 27 (2nd ed. 2003).

⁹⁹ See also CESCR, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She is the Author* (Art. 15, para. 1(c) of the Covenant), ¶ 7, U.N. Doc. E/C.12/2005/5 (2005) (supporting this view in a different context, stating that although “[u]nder the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights . . . their entitlements, because of their different nature, are not protected at the level of human rights.”).

of this, however, also is that, in cases of conflict between institutional autonomy and individual academic freedom, the latter would have to be given greater weight.

What is the rationale for protecting *academic self-governance*? One could argue that academic self-governance is justified as it amounts to a right to professional self-regulation of academics akin to that granted to other comparable professionals, for example, lawyers or doctors. The concept of professional self-regulation reflects the belief that the traditions and dignity of a profession are best served if members of that profession look after their interests themselves. Members are more likely to respect decisions of professional bodies than those imposed by external authorities.¹⁰⁰ One may argue further that academic self-governance makes sense as academics, by reason of their competence in academic matters, are best placed to take decisions regarding academic matters.¹⁰¹ Finally, one may argue that academic self-governance safeguards individual academic freedom.¹⁰² In fact, the latter two arguments are closely related. It is instructive in this regard to refer to a judgment of the German Constitutional Court, providing a convincing argument in support of academic self-governance.¹⁰³ According to the Court, freedom of science (or academic freedom for that matter) requires, in order that that right may be meaningfully exercised, that the state create functioning institutions of HE.¹⁰⁴ The state is obliged to ensure that these be organized in such a way that freedom of science (academic freedom) becomes possible and is not threatened.¹⁰⁵ This requires that members of these institutions be allowed to participate in the governance of the institutions

¹⁰⁰ See BARENDT, *supra* note 13, at 67.

¹⁰¹ See *id.* at 67–68.

¹⁰² See *id.* at 68.

¹⁰³ See the Hamburgisches Hochschulgesetz Case, Judgment of July 20, 2010, BVerfG [Fed. Const. Ct., F.R.G.], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 127, 87, at 114–18, ¶¶ 88–95 (relying on important earlier case law, notably the Hochschul Case, Judgment of May 29, 1973, BVerfG [Fed. Const. Ct., F.R.G.], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 35, 79).

¹⁰⁴ See Hamburgisches Hochschulgesetz Case, at 114, ¶ 88.

¹⁰⁵ See *id.* at 114–15, ¶¶ 88–89.

concerned.¹⁰⁶ The Court explains that participation is necessary because only this will guarantee that decisions taken by persons/organs will be “in the best interest of science and scholarship” (“*wissenschaftsadäquat*”).¹⁰⁷ Underlying this consideration is the understanding that academics, by virtue of their training and competence, are best qualified to ensure that decisions taken are “in the best interest of science and scholarship.” Participation that prevents decisions from being taken that are not “in the best interest of science and scholarship,” thereby, according to the Court’s reasoning, secures freedom of science (academic freedom).¹⁰⁸ It is submitted that participation implying decisive control should be guaranteed, where decisions are concerned that have a clear bearing on science and scholarship. In other instances, meaningful representation will suffice. This implies, for example, that “[f]inancial and development decisions . . . are almost certainly best left to bodies in which laypeople form a majority, though it is important that academics are well represented on them.”¹⁰⁹ The German Constitutional Court generally requires the participation provided for to be such that it is “sufficient,” i.e. that it structurally prevents infringements of freedom of science (academic freedom), even if it cannot rule out occasional infringements in individual cases (in which case, the individual concerned would be able to rely on relevant measures of redress and protection, however).¹¹⁰ Academic self-governance as the right of academics to participate in the

¹⁰⁶ See *id.* at 115–16, ¶ 91.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ BARENDT, *supra* note 13, at 71. It should be noted, however, that “[c]ollegial decision-making should encompass decisions regarding . . . the allocation of resources.” See UNESCO Recommendation, *supra* note 39, ¶ 32. It is submitted that questions pertaining to resources for academic activities must remain fully within the scope of competence of academics.

¹¹⁰ See Hamburgisches Hochschulgesetz Case, *supra* note 103, at 116, ¶ 92. See generally Ralf Müller-Terpitz, *Neue Leistungsstrukturen als Gefährdung der Wissenschaftsfreiheit?* 44 WISSENSCHAFTSRECHT 236 (2011), for a discussion of when governance arrangements of HE institutions may be considered to be consistent with freedom of science (academic freedom). Although the article deals with the situation in Germany, most of its statements are equally applicable in a more general sense.

governance of institutions of HE is thus both an “independent” right (as a right to professional self-regulation) and a “derivative” right, deriving from individual academic freedom. In the latter capacity, it has a human rights quality. Like individual academic freedom, it is the right of each academic. Unlike individual academic freedom, however, it only operates in a group context, where various academics act together.

The principle of collegiality is closely related to academic self-governance. The principle of collegiality, as has been explained, entails “the participation of all” in decision-making relating to matters having a bearing, one way or another, on science and scholarship. The purpose of the principle is to prevent powers from being concentrated in a single or a few persons (for example, the rector (rectorate) or dean (dean’s office)), as this will increase the likelihood of decisions being taken that are not “in the best interest of science and scholarship” and which infringe individual academic freedom. Again, reference to the judgment of the German Constitutional Court proves instructive:

The legislator must . . . guarantee a sufficient level of participation of the human right-holders. . . . [This will not be the case] where the executive organ is assigned substantive personnel and material decision-making powers in matters of science and scholarship, but, in comparison thereto, barely any competences and also no significant participatory and control rights remain with the body composed of academic staff. The legislator is not prevented from granting extensive competences to the executive organ, also not in matters of science and scholarship. However, the more competences the legislator grants to the executive organ, the more robust, in return, must be its formulation of direct or indirect rights of participation, influence, information and control of the collegial organs to

avoid threats to freedom of teaching and research.¹¹¹

Finally, how should the right of academic staff to *tenure or its equivalent* be justified? As has been pointed out, academic staff should enjoy security of employment, including “tenure or its functional equivalent, where applicable.” Security of employment, of course, is a human right.¹¹² There is no reason why academic staff working in institutions of HE should not be entitled to job security in the same way as employees in any other occupation. The question, however, is on what basis tenure for academic staff—i.e. permanent employment contracts, not easily terminable on operational grounds (in any event, only if very strict procedural requirements have been complied with), thus, more extensive rights of employment security than those granted to other employees—may be justified. Tenure “may seem anomalous in the modern working environment, characterized by high employment mobility, regular retraining for new jobs, previous ones becoming obsolete, fixed-term contracts awarded in respect of projects rather than ‘life-time jobs,’ and contracts of service that may easily be terminated on operational grounds.”¹¹³ Nevertheless, tenure should not be seen as a privilege solely granted to a particular group of professionals, but not to others. Tenure may be held to “[constitute] one of the major procedural safeguards of academic freedom and against arbitrary decisions.”¹¹⁴ As academic staff have been assigned special

¹¹¹ Hamburgisches Hochschulgesetz Case, *supra* note 103, at 117–18, ¶¶ 94–95 (authors’ own translation from original German text) (internal citation omitted).

¹¹² Article 6 of the ICESCR obliges states parties to recognize the right to work, requiring them to “take appropriate steps to safeguard this right.” The right to work “implies the right not to be unfairly deprived of employment.” CESCR, *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, ¶ 6, U.N. Doc. E/C.12/2005/5 (2005). Valid grounds for dismissal need to be provided and legal and other redress must be available in the case of unjustified dismissal. *See id.* ¶ 11.

¹¹³ Beiter et al., “*Measuring*” the Erosion of Academic Freedom, *supra* note 4, at 616–17.

¹¹⁴ UNESCO Recommendation, *supra* note 39, ¶ 45. It has been held that tenure also protects institutional autonomy: “Tenure is important because it can defend not only the individual academic but also the institution from ideological

responsibilities of using their academic freedom to discover new knowledge and facilitate ethical individualism, they are also called upon to scrutinize and challenge orthodox ideas. This exposes them to opposition by those in positions of power and desirous of clinging to “outdated” ideas.¹¹⁵ If no special employment security were provided to academic staff, those powerful and resisting change—whether within or beyond an institution of HE—could chill academic content by “getting rid of” academics (notably for bogus reasons) by terminating their contracts of employment or by having this done, through the exertion of pressure, by those able to do so. Knowing that they might be so punished for exercising their academic freedom would deter academic staff from actually exercising that freedom, thus preventing them from fulfilling their special responsibilities. As has been explained, “[t]he point is not that academics may not be dismissed for their opinions: it is that they need freedom from fear that they might be so dismissed. Without it, they cannot be counted on to do their work well.”¹¹⁶ But, apart from ideological reasons, also mere managerial reasons of efficiency for terminating a contract of employment (termination “for business reasons”) are not permissible in the case of academic staff, as such reasons would usually be in other sectors of employment. Only a situation of exigency (for instance, *bona fide* financial reasons) warrants terminating the contract of employment of a member of the academic staff. Special employment security is justified in these cases because unnecessary disturbances of “the tranquillity” required for carrying out high quality academic work should be avoided at all costs¹¹⁷—again in the

and managerial pressures, by helping them to continue to teach unfashionable or unpopular subjects, to research inconvenient topics and to provide more centers of initiative than hierarchical management can.” Margherita Rendel, *Human Rights and Academic Freedom*, in *ACADEMIC FREEDOM AND RESPONSIBILITY* 74, 87 (Malcolm Tight ed., 1988).

¹¹⁵ Scholars have been described as “dangerous” minds. See Robert Quinn, *Defending “Dangerous” Minds: Reflections on the Work of the Scholars at Risk Network*, 5 *ITEMS & ISSUES* 1 (2004). It has also been stated that “because of the nature of their work, academics are more naturally led in to conflict with governments and other seats of authority.” Karran, *supra* note 46, at 191.

¹¹⁶ CONRAD RUSSELL, *ACADEMIC FREEDOM* 23 (1993).

¹¹⁷ It has been emphasized that excellence in science requires “time and tranquillity [Zeit und Ruhe].” Walter Berka, *Wissenschaftsfreiheit an staatlichen*

light of the understanding that academic staff should encounter an environment that facilitates exercising their academic freedom in the interest of discovering the truth and promoting intellectual independence. Making the punitive non-extension of fixed-term contracts impossible and avoiding unnecessary disturbances of “the tranquillity” required for carrying out academic work are also the reasons why academic staff should (at a foreseeable point) be granted permanent employment contracts.

IV. Doctrinal Basis of the Right to Academic Freedom under the U.N. Human Rights Covenants

A. Relevant Provisions of the U.N. Human Rights Covenants

The two U.N. Human Rights Covenants—the International Covenant on Civil and Political Rights (ICCPR)¹¹⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹¹⁹ both of 1966—do not protect “a right to academic freedom.” In fact, no binding instrument of international law at the global or regional level does provide express protection for this right. Commenting on the right to education, Manfred Nowak noted in 1995 that various provisions of the covenants, such as those on the rights to freedom of thought, expression, assembly, and association in Articles 18, 19, 21, and 22 of the ICCPR, apparently were considered to offer sufficient protection for the right to academic

Universitäten: Zur Freiheit und Verantwortung des Wissenschaftlers, in *VOM VERFASSUNGSSTAAT AM SCHEIDEWEG: FESTSCHRIFT FÜR PETER PERNTHALER* 67, 80 (Karl Weber et al. eds., 2005).

¹¹⁸ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. Supervision of implementation of the ICCPR is entrusted to the Human Rights Committee, a body of independent experts.

¹¹⁹ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]. Supervision of implementation of the ICESCR is entrusted to the Committee on Economic, Social and Cultural Rights, likewise a body of independent experts.

freedom, so that no specific reference to the right was included.¹²⁰ A closer look at the covenants reveals that the following provisions may be relied on to protect (aspects of) the right to academic freedom and to construct (some of) the rights and duties entailed by that right:¹²¹

Article 6 of the ICCPR protects the right to life. In the extreme, brutal regimes might seek to physically eliminate critical academics. The right to life obviously also accrues to teachers in HE. Moreover, also in states parties that have not ratified the Second Optional Protocol to the ICCPR, the death penalty, which the Protocol seeks to abolish, can never be imposed on an academic, no matter how harsh his/her criticism of a government is. Under Article 6(2), the death penalty may only be imposed “for the most serious crimes.”

Article 7 of the ICCPR prohibits torture or cruel, inhuman, or degrading treatment or punishment. This clearly provides protection where the acts concerned occur as a result of scholarly views expressed or scholarly action taken by an academic. However, the provision also serves to impose limits on research that academics may undertake involving humans. The second sentence of Article 7 emphasizes that “no one shall be subjected without his free consent to medical or scientific experimentation.”

Article 9 of the ICCPR protects the right to liberty and security of the person, prohibiting arbitrary arrest or detention. It would afford protection, for example, to the academic who is arbitrarily arrested and detained in retaliation for certain academic views or conduct. It should be noted that “‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly

¹²⁰ See Manfred Nowak, *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 189, 209–10 (Asbjørn Eide et al. eds., 1995).

¹²¹ See Quinn & Levine, *supra* note 3, at 904, for an overview of provisions relevant to protecting the right to academic freedom in the major global and regional human rights instruments, including the two U.N. Human Rights Covenants and also the non-binding Universal Declaration of Human Rights of 1948. See *id.* at 902–12, for an analysis of the covenant provisions referred to in the discussion that follows and their relevance to the right to academic freedom in the light of relevant international legal materials.

to include elements of inappropriateness, injustice and lack of predictability.”¹²²

Articles 12 and 13 of the ICCPR protect the right to liberty of movement and the right of aliens not to be arbitrarily expelled from a state, respectively. Article 12 specifically guarantees the ability of academics to travel abroad, to return home and to move freely within a state for the purposes of study, teaching, and research. It should be noted, however, that the ICCPR does not (at any rate not explicitly) protect the right to enter a foreign state.¹²³

Article 2(3) of the ICCPR guarantees the right to an effective remedy to everyone whose rights as protected in the Covenant have been violated. An “effective remedy” should preferably be a judicial one, but can also be an administrative appeal that does not have a solely political character as well as a complaint to an independent legislative committee or organ (for example, an ombudsman).¹²⁴

Article 14 of the ICCPR stipulates that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 14 applies to criminal as well as civil, and public as well as private law cases and guarantees determination of a case by a competent, independent, and impartial tribunal in a way as to ensure the principle of “equality of arms” (*audi alteram partem*).¹²⁵ Hence, where rights granted and duties accorded by law

¹²² U.N. Human Rights Committee, *Van Alphen v. The Netherlands*, Comm. No. 305/1988, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (July 23, 1990) (reflecting by now constant Human Rights Committee jurisprudence).

¹²³ See Klaus Beiter, *The Protection of the Right to Academic Mobility under International Human Rights Law*, in *ACADEMIC MOBILITY* 243 (Malcolm Tight & Nina Maadad eds., 2014), for a discussion of the right to freedom of movement of scholars. Article 12(3) permits the rights to travel abroad and to move freely within a state to be limited in certain circumstances.

¹²⁴ See MANFRED NOWAK, *Article 2: Domestic Implementation and Prohibition of Discrimination*, in *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 27, specifically at 63–64, ¶¶ 64–65 (2nd rev. ed. 2005).

¹²⁵ See generally MANFRED NOWAK, *Article 14: Procedural Guarantees in Civil and Criminal Trials*, in *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS:*

in the context of academic freedom are concerned, an academic is (ultimately) entitled to have a relevant case “fairly” resolved before a tribunal as described in this and the preceding paragraph.¹²⁶

Article 17 of the ICCPR guarantees that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.” In terms of Article 17, every withholding, censorship, inspection of, listening to, or publication of an academic’s private (in the sense of secret) communication would constitute an infringement of the privacy of correspondence.¹²⁷ Secret state surveillance measures would only be permissible if based on the specific decision of a state authority expressly empowered by law to take that decision, in order to promote a legitimate purpose (for example, preventing terrorism), and where the measure may be considered proportional in the circumstances.¹²⁸ Moreover, unlawful and intentional attacks on any person, including an academic, based on untrue allegations, compromising his or her honor (personal sense of dignity) or reputation (standing among others), likewise infringe Article 17.¹²⁹ However, academics would, under state legislation aimed at securing compliance with Article 17, ordinarily—for example in their research—have to observe certain requirements when processing personal data, i.e. data relating to individuals who may be identified from that data, to protect the

CCPR COMMENTARY 302, 314–23, ¶¶ 15–30 (2nd rev. ed. 2005). Also proceedings against the dismissal of a civil servant for other than disciplinary reasons (in many countries, academics are civil servants!) constitute a “suit at law.” See U.N. Human Rights Committee, *General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, ¶ 16, U.N. Doc. CCPR/C/GC/32 (2007) [hereinafter *General Comment No. 32*].

¹²⁶ It is not quite clear whether Article 14 would entitle academics, at least those working in public institutions of HE, in cases where they claim their academic freedom to have been infringed by their institution, to a fair hearing (also) before an independent *institutional* tribunal. *General Comment No. 32, supra* note 125, does not address this type of situation or, at any rate, remains vague thereon.

¹²⁷ See MANFRED NOWAK, *Article 17: Privacy*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 377, 401, ¶ 48 (2nd rev. ed. 2005).

¹²⁸ See *id.* at 402, ¶ 48.

¹²⁹ See *id.* at 403–04, ¶¶ 51–54.

privacy (intimacy) of those persons.¹³⁰

Article 18 of the ICCPR provides for the right to freedom of thought, conscience, and religion. The provision covers every person's right "to manifest his religion or belief in worship, observance, practice and teaching." In certain cases, the same course of conduct may be protected by both Article 18 and academic freedom, although for different reasons, Article 18 protecting religious and other beliefs, academic freedom notably the discovery of the truth. Regarding the "teaching" of religion, it is submitted that, in the HE context, this could at most protect teaching dispensed by theological faculties, to the extent that such teaching may be described as "scholarly," i.e. where it, even if proceeding from certain dogmatic religious axioms, still attempts to verify their truth in an open manner.¹³¹ Beyond this, there is little scope for the "teaching" of religion in HE and any resulting overlap. Ultimately, "the State . . . must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner."¹³² The "practice" of a religion covers preparing and disseminating relevant writings in these fields.¹³³ In this type of case, academic freedom could only be implicated if the research entailed and the resulting publications may be described as the "scholarly" work (as defined above) of an academic.¹³⁴ It may further well be

¹³⁰ See *id.* at 388, ¶ 23.

¹³¹ See Mager, *supra* note 7, at 1086–87, ¶ 19. Conversely, however, to the extent that the teaching of theology is concerned, certain limits may legitimately be imposed on the academic freedom of academics espousing views contrary to the accepted doctrine of a particular faith, which that faith has been accorded rights to teach at a HE institution. See *Lombardi Vallauri v. Italy*, Appl. No. 39128/05, Eur. Ct. H.R. (Oct. 20, 2009) (decided in the context of *inter alia* Article 10 of the European Convention on Human Rights on the right to freedom of expression).

¹³² *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Appl. Nos. 5095/71, 5920/72, 5926/72, Eur. Ct. H.R., Series A No. 23, ¶ 53 (Dec. 7, 1976). If this case laid down these requirements with regard to primary and secondary education, they must be applicable to HE as well.

¹³³ See MANFRED NOWAK, *Article 18: Freedom of Thought, Conscience, Religion and Belief*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 406, 420, ¶ 25 (2nd rev. ed. 2005).

¹³⁴ In a report of the Human Rights Committee commenting on the consideration of the initial report submitted by the former Czechoslovakia, it is

that Article 18 entitles academics, in certain cases, to object to teaching or carrying out research on the ground that doing so would be contrary to their conscience, religion, or belief.¹³⁵

Article 19 of the ICCPR, in its first paragraph, protects “the right to hold opinions without interference” and, in its second paragraph, “the right to freedom of expression,” this “includ[ing] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one’s] choice.” Paragraph 3 provides that the rights in Paragraph 2 may be subject to restrictions, but only those “provided by law and . . . necessary (a) [f]or respect of the rights or reputations of others; (b) [f]or the protection of national security or of public order (ordre public), or of public health or morals.”¹³⁶ The question whether Article 19 may be

stated, “With respect to article 18 of the Covenant, questions were asked about the extent of freedom and protection enjoyed by clergymen and holders of religious beliefs in the fields of education and employment as well as in religious activities, *and also concerning the freedom of research at university level*” (emphasis added). See Report of the U.N. Human Rights Committee, 33 U.N. GAOR Supp. (No. 40), ¶ 128, U.N. Doc. A/33/40 (1978). The Committee’s statement is interesting, though it is not clear what rights exactly in the sphere of “freedom of research at university level” the Committee has in mind.

¹³⁵ Conscientious objection (the refusal to fulfill certain legal duties for reasons of conscience, religion, or belief) could be seen as a specific form of manifesting a religion or belief in practice. It is not clear whether Article 18 covers a general right of conscientious objection, i.e. a right extending beyond the context of refusing military service. Some consider the practice of the Human Rights Committee to rather deny this. See NOWAK, *supra* note 133, at 412–13, ¶¶ 10–11, and at 421–25, ¶¶ 27–32. Others hold that one may perhaps read the summary records of the drafting process of the Human Rights Committee’s General Comment No. 22 of 1993 on the Right to Freedom of Thought, Conscience, and Religion as supporting the view that Article 18 includes a more general right to conscientious objection. See E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, OPINION NO. 4–2005: THE RIGHT TO CONSCIENTIOUS OBJECTION AND THE CONCLUSION BY E.U. MEMBER STATES OF CONCORDATS WITH THE HOLY SEE 15–16 (Dec. 14, 2005), *available at* http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopinion4_2005_en.pdf. Nevertheless, even should such a right be held to exist, its exercise may potentially be restricted under Article 18(3), this allowing freedom to manifest one’s religion or beliefs to be subject to limitations in certain circumstances.

¹³⁶ It should be noted that a person “engag[ing] in any activity or

seen to constitute a more comprehensive basis for the right to academic freedom in the U.N. Covenants is addressed more fully below.¹³⁷

Article 20 of the ICCPR provides that “propaganda for war” as well as “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” is to be “prohibited by law.” States parties are accordingly obliged to adopt legislation formulating sanctions for intentional acts propagating any war of aggression or advocating national, racial, or religious hatred that publicly incites discrimination, hostility, or violence.¹³⁸ Naturally, such sanctions may also be imposed on academics in appropriate cases. Article 20, as it were, constitutes a limitation of the right to freedom of expression in Article 19. In relevant cases, such as where a literature professor is criminally convicted for his denial of the Holocaust in a non-academic journal¹³⁹ or a school teacher is transferred to a non-teaching position

perform[ing] any act aimed at the destruction of any of the rights and freedoms recognized [in the Covenant] or at their limitation to a greater extent than is provided for in the . . . Covenant,” may forfeit the right to rely on the right he/she misuses. ICCPR, Art. 5(1). This provision is of some relevance with regard to Article 19. By way of example, a professor propagating fascist ideology, this being accompanied by actions (ultimately) intended to destruct or limit the rights and freedoms of Jews, may forfeit the right to claim that any criminal conviction for the views he/she has expressed violates his/her right to freedom of expression. See MANFRED NOWAK, *Article 5: Prohibition of Misuse and Savings Clause*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 111, 115–17, ¶¶ 7–10 (2nd rev. ed. 2005), on Article 5(1) and the prohibition of misuse by private parties.

¹³⁷ See *infra* Section IV-B. See MANFRED NOWAK, *Article 19: Freedom of Opinion, Expression and Information*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 437, 437–67 (2nd rev. ed. 2005); U.N. Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34 (2011) [hereinafter *General Comment No. 34*], for analyses of Article 19.

¹³⁸ See MANFRED NOWAK, *Article 20: Prohibition of Propaganda for War and Advocacy of Hatred*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 468, 471–76, ¶¶ 9–16 (2nd rev. ed. 2005).

¹³⁹ See U.N. Human Rights Committee, *Faurisson v. France*, Comm. No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (Nov. 8, 1996). The Human Rights Committee considered the conviction to have been justified under

for his anti-Jewish views published in a private capacity,¹⁴⁰ and the teachers concerned allege that there has been a violation of their right to freedom of expression, Article 20 constitutes an additional argument in deciding whether a restriction of the freedom of expression is justified in terms of the limitation clause in Article 19(3).¹⁴¹

Article 21 of the ICCPR guarantees the right of peaceful assembly. This provision protects intentional, temporary gatherings of several persons (in closed rooms or outside, on public or private property, with a limited number of “invited” persons or open to the public) so as to discuss or proclaim information or ideas not of a purely private nature.¹⁴² The gathering must be free from violence.¹⁴³ The right of peaceful assembly has also been described as the institutional form of freedom of expression.¹⁴⁴ Article 21 would thus cover not only, for example, an academic conference in which opinions critical of a government’s policies in one area or another are expressed, but, in fact, every lecture taking place in an institution of HE.¹⁴⁵

Article 22 of the ICCPR guarantees the right to freedom of association. Article 22 “only applies to private associations.”¹⁴⁶ It

Article 19(3), neglecting to refer to Article 20. Strictly, this case does not involve academic freedom, as the professor’s speech was “off-topic speech” (i.e. speech falling outside his actual field of expertise). See VRIELINK ET AL., *supra* note 49, ¶¶ 57–58 (on “off-topic speech”).

¹⁴⁰ See U.N. Human Rights Committee, *Ross v. Canada*, Comm. No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (Oct. 18, 2000). The Human Rights Committee likewise considered the transfer to have been justified under Article 19(3), adequately referring to Article 20. Strictly, also this case does not involve academic freedom as (non-tertiary) school teachers do not properly qualify as “academics.” See *infra* Subsections IV-C and IV-D.

¹⁴¹ See NOWAK, *supra* note 138, at 476–79, ¶¶ 17–21.

¹⁴² See MANFRED NOWAK, *Article 21: Freedom of Assembly*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 481, 484–86, ¶¶ 5–8 (2nd rev. ed. 2005).

¹⁴³ See *id.* at 486–87, ¶¶ 9–11.

¹⁴⁴ See *id.* at 484–85, ¶ 6.

¹⁴⁵ Article 21 allows the right of peaceful assembly to be limited in certain circumstances. ICCPR, Art. 21, second sentence.

¹⁴⁶ U.N. Human Rights Committee, *Wallmann v. Austria*, Comm.

therefore does not to apply to establishing and governing public universities, but it is applicable in the context of private universities. It certainly applies to trade unions, Article 22 expressly mentioning “the right to form and join trade unions.”¹⁴⁷ Academic staff could thus rely on Article 22 to protect their right to form and join trade unions attending to their interests, including those related to academic freedom.¹⁴⁸ It has thus been stated that “[f]reedom of association for educators is a central component of academic freedom” and that “[i]n many cases, educators’ trade unions play a crucial role in protecting the material conditions of teachers and educational staff in order to allow them to pursue their pedagogical duties.”¹⁴⁹

Article 25(c) protects *inter alia* the right of every citizen, “without any of the distinctions mentioned in article 2 and without unreasonable restrictions,” “[t]o have access, on general terms of equality, to public service in his country.” This implies the absence of discrimination on various grounds, including, for example, “political or other opinion,” in access to the public service. Concretely, this means that states parties need to provide procedural guarantees ensuring that selection occurs on objective grounds. Likewise, suspension or dismissal from public service must be free from discrimination to be guaranteed under relevant procedural guarantees.¹⁵⁰ As has been pointed out above, in the case of the dismissal of civil servants for other than disciplinary reasons there is further a right to a fair hearing before an independent tribunal to contest the dismissal. In the present context, Article 25(c) assumes significance in all those states parties in which the academic staff at

No. 1002/2001, ¶ 9.4, U.N. Doc. CCPR/C/80/D/1002/2001 (Apr. 1, 2004).

¹⁴⁷ This right is likewise protected by Article 8 of the ICESCR.

¹⁴⁸ Article 22(2) allows the right to freedom of association to be limited in certain circumstances.

¹⁴⁹ HUMAN RIGHTS WATCH, *ETHIOPIA: LESSONS IN REPRESSION: VIOLATIONS OF ACADEMIC FREEDOM IN ETHIOPIA* 46–47 (Jan. 2003), available at <http://www.hrw.org/sites/default/files/reports/ethiopia0103.pdf>.

¹⁵⁰ See MANFRED NOWAK, *Article 25: Political Rights*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 563, 584–90, ¶¶ 38–44, specifically at 587–88, ¶ 42 (2nd rev. ed. 2005).

HE institutions are civil servants.¹⁵¹

Article 26 of the ICCPR provides that “[a]ll persons are equal before the law.”¹⁵² This prohibits arbitrary distinctions being drawn by administrative officials or courts. One may well argue that this duty also binds officials and tribunals in public institutions of HE—as state institutions—and perhaps even in private ones—in private institutions of HE as these, because of their important public function, may be considered “quasi-public” actors.¹⁵³ All persons are further entitled to “the equal protection of the law.”¹⁵⁴ This entails the negative obligation not to adopt laws that discriminate (“the law shall prohibit any discrimination”)¹⁵⁵ and the positive obligation to adopt special laws providing protection against discrimination by the state and in relevant circumstances also by private actors (“guarantee . . . equal and effective protection against discrimination”).¹⁵⁶ Article 26 mentions various grounds of prohibited discrimination, including “political or other opinion”—this probably encompassing

¹⁵¹ In a case concerning *inter alia* university teachers at a state-controlled university, charged with the offence of *lèse-majesté* for having been critical of Togolese politics, the Human Rights Committee, with regard to Article 25(c), pointed out that this “should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content.” The Committee found Articles 19 and 25(c) to have been violated. See U.N. Human Rights Committee, *Aduayom, Diasso and Dobou v. Togo*, Comm. Nos. 422/1990, 423/1990, 424/1990, ¶¶ 7.5, 8, U.N. Doc. CCPR/C/51/D/422/1990 (July 12, 1996). Note should also be taken of the *Vogt* case decided by the European Court of Human Rights, holding that the dismissal of a secondary school teacher (being a civil servant) from her post because she was an active member of the Communist party violated *inter alia* Article 10. See *Vogt v. Germany* [GC], Appl. No. 17851/91, Eur. Ct. H.R., Series A No. 323 (Sept. 26, 1995). See, however, the comments made as regards (non-tertiary) school teachers at note 140 *supra*.

¹⁵² ICCPR, Art. 26, first sentence, first part.

¹⁵³ The salient sources are silent as to whether this construction is legitimate. MANFRED NOWAK, *Article 26: Equality*, in U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 597, 605–06, ¶¶ 14–15 (2nd rev. ed. 2005), e.g., does not comment on the issue.

¹⁵⁴ ICCPR, Art. 26, first sentence, second part.

¹⁵⁵ *Id.* second sentence, first part.

¹⁵⁶ *Id.* second sentence, second part.

“academic” opinions. Hence, a measure seeking to punish an academic because of his or her “academic” opinion—whether meted out by the state directly, or by a public or private institution of HE—may constitute discrimination in violation of Article 26. Legislation may, moreover, not discriminate against academics and it should provide protection to academics against discrimination on account of their “academic” views.¹⁵⁷

Article 13 of the ICESCR protects the right to education. Article 13 is a lengthy provision, requiring education to be directed at certain aims, obliging states parties to make primary, secondary, and higher education available and accessible to varying degrees, guaranteeing the right of individuals and bodies to establish and direct private schools, etc. It also enjoins states parties to “continuously improve” “the material conditions of teaching staff.” The discussion below will examine the relevance of Article 13 in providing an all-encompassing basis for the right to academic freedom in the U.N. Covenants in more detail.¹⁵⁸

Article 15 of the ICESCR protects “cultural rights.” This provision assumes a similar significance as Article 13 when discussing the question of a more comprehensive basis for the right to academic freedom in the U.N. Covenants.¹⁵⁹ Where Article 15(1)(b) recognizes the right “[t]o enjoy the benefits of scientific progress and its applications,” this implies ensuring an

¹⁵⁷ Note should also be taken of Article 2(1) of the ICCPR, obliging states parties to protect the rights in the Covenant “without distinction of any kind,” such as, for example, “political or other opinion”—this again probably covering “academic” opinions. Whereas Article 26 *generally* prohibits discrimination, Article 2(1) is linked to discrimination with regard to any of the rights (such as that to freedom of expression, important in the present context) of the Covenant. *See* NOWAK, *supra* note 153, at 597–634 and NOWAK, *supra* note 124, at 27–57, ¶¶ 1–51, for analyses of Articles 26 and 2(1), respectively.

¹⁵⁸ *See infra* Section IV-D. As in the case of the ICCPR, the exercise of all the rights of the ICESCR needs to be guaranteed “without discrimination of any kind” on various grounds, again including “political or other opinion.” ICESCR, Art. 2(2). There is, moreover, a general limitation clause providing that rights may be subjected “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” *Id.* Art. 4.

¹⁵⁹ *See infra* Section IV-C.

environment of free inquiry in all settings where research takes place, making possible such progress in the first place. Article 15(1)(c) protects the right “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [one] is the author,” thus also protecting the right of researchers to claim “ownership” of and dispose over their scholarly writings (copyright) or inventions (patents).¹⁶⁰ Article 15(2) requires states parties to take those steps “necessary for the conservation, the development and the diffusion of science and culture,” implicitly obliging them to take active measures aimed at *inter alia* promoting freedom in teaching and carrying out research, as these may be considered necessary to advance and spread science. Article 15(3) then expressly calls upon states parties to “undertake to respect the freedom indispensable for scientific research and creative activity.” Article 15(4), finally, enjoins states parties to “recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.” Again, international contacts and co-operation in the field of science are meaningful in an atmosphere of scientific freedom only.

Articles 7, 8, 9, 11, and 12 of the ICESCR protect the right to just and favorable conditions of work, the right to form and join trade unions, the right to social security, the right to an adequate standard of living, and the right to the highest attainable standard of physical and mental health, respectively. Also these provisions are relevant in the context of the right to academic freedom. Ultimately, academic freedom can only be enjoyed if working conditions and salaries for academic staff are adequate, such staff enjoy good health, and they know that they will be entitled to pension benefits on retirement.¹⁶¹

¹⁶⁰ In practice, the question of whom exactly—academic, HE institution, state, or research funder—intellectual property rights accrue to, is more complex.

¹⁶¹ See UNESCO Recommendation, *supra* note 39, ¶ 40 (calling upon the employers of higher-education teaching personnel to establish terms and conditions of employment “as will be most conducive” for effective teaching and research). The Inter-American Commission of Human Rights has held that the removal of an academic from his position in a way that is not in accordance with the law and the guarantees of due process and effective judicial protection,

The above overview reveals that in particular three Covenant provisions might provide protection for the right to academic freedom in a more encompassing manner: Article 19 of the ICCPR on the right to freedom of expression, Article 15 of the ICESCR on cultural rights—covering the right to freedom of scientific research—and Article 13 of the ICESCR on the right to education. A look at the legal literature on the topic shows that different views as to the relative importance of these provisions (or the rights they reflect) for the right to academic freedom exist. Some commentators consider the right to freedom of expression *and* the right to education to constitute the two equally important pillars of the right to academic freedom.¹⁶² Regarding cuts in the funding of HE, it has been argued that, where these affect *Lehrfreiheit* and *Lernfreiheit*, they constitute “an infringement of the freedom of expression of academics and students and of the right to education of students.”¹⁶³ Others opine that the right to freedom of expression should be seen as the essential basis of the right to academic freedom.¹⁶⁴ It has, however, also been stated that, although the right to academic

depriving that person of his earnings, may constitute a violation of the right to property, as protected in Article 21 of the American Convention on Human Rights (1969). In this case, the Commission found this right not to have been violated as the position of the academic concerned, a professor at a public university, had been abolished for reasons of redundancy (a need to reorganize) and as his removal had had nothing to do with the opinions he had expressed. *See* *Zipper v. Chile*, Case 12.470, Inter-Am. Comm’n H.R., Report No. 110/09 (Nov. 10, 2009).

¹⁶² *See, e.g.*, Quinn & Levine, *supra* note 3, at 902–12, specifically at 903–05. *See also* Balakrishnan Rajagopal, *Academic Freedom as a Human Right: An Internationalist Perspective*, 89 *ACADEME* 25, 27–28 (2003). Similarly, the Belgian Court of Arbitration is of the opinion that the right to academic freedom represents an aspect of freedom of expression (Belgian Constitution, Art. 19) and a part of the freedom of education (Constitution, Art. 24, § 1). *See* Cour d’arbitrage decision No. 167/2005, Nov. 23, 2005, *MONITEUR BELGE*, Dec. 2, 2005, ¶ B.18.1 (Belg.). *See also* Michel Pâques, *Liberté académique et Cour d’Arbitrage, in LIBER AMICORUM PAUL MARTENS: L’HUMANISME DANS LA RÉOLUTION DES CONFLITS: UTOPIE OU RÉALITÉ?* 399 (2007), for a discussion of the decision.

¹⁶³ Rendel, *supra* note 114, at 86.

¹⁶⁴ *See, e.g.*, Kwadwo Appiagyei-Atua, *A Theoretical Review of the Origins of Academic Freedom*, UNIVERSITY VALUES, SCHOLARS AT RISK NETWORK (July 3, 2014), <https://www.scholarsatrisk.org/resources/a-theoretical-review-of-the-origins-of-academic-freedom>.

freedom has points of contact with the rights to freedom of expression and to education, it should clearly be distinguished from these, as it reflects a very distinctive structure, and that it has most in common with the right to freedom of science.¹⁶⁵ Elsewhere it has been stated that the right to freedom of expression may overlap, but cannot be equated with the right to academic freedom, the latter being a special form of the right to freedom of science (not mentioning the right to education).¹⁶⁶ Yet others maintain that, whereas all the various Covenant provisions cited above should play a role in protecting (relevant aspects of) the right to academic freedom, Article 13 of the ICESCR on the right to education constitutes a complete locus for the right to academic freedom, stating that: “Article 13 ICESCR . . . constitutes the provision which concurrently assembles all aspects of academic freedom under ‘a single roof’ and whose normative context provides the proper framework for interpretation.”¹⁶⁷ There are writers who agree that all these provisions should play a role, but who argue that “Article 13 ICESCR alone is too weak a basis to support academic freedom.”¹⁶⁸

¹⁶⁵ See PAULUS J. ZOONTJENS, *VRIJHEID VAN WETENSCHAP: JURIDISCHE BESCHOUWINGEN OVER WETENSCHAPSBELEID EN HOGER ONDERWIJS* 79–84, but also 84–88 (1993).

¹⁶⁶ See BARENDT, *supra* note 13, at 19, 21, 54–55.

¹⁶⁷ See, e.g., Klaus D. Beiter, *The Doctrinal Place of the Right to Academic Freedom under the U.N. Covenants on Human Rights*, UNIVERSITY VALUES, SCHOLARS AT RISK NETWORK (July 2011), <https://perma.cc/6APS-UG32> [hereinafter Beiter, *The Doctrinal Place of the Right to Academic Freedom under the U.N. Covenants on Human Rights*]; Klaus D. Beiter, *The Doctrinal Place of the Right to Academic Freedom under the U.N. Covenants on Human Rights: A Rejoinder to Antoon de Baets*, UNIVERSITY VALUES, SCHOLARS AT RISK NETWORK (Dec. 2013), <https://perma.cc/69V2-SRMJ> [hereinafter Beiter, *A Rejoinder to Antoon de Baets*].

¹⁶⁸ See, e.g., Antoon de Baets, *The Doctrinal Place of the Right to Academic Freedom under the U.N. Covenants on Human Rights: A Rejoinder*, UNIVERSITY VALUES, SCHOLARS AT RISK NETWORK (May 2012), <https://perma.cc/M2GF-JSP7>; Antoon de Baets, *Some Puzzles of Academic Freedom (Part 1)*, UNIVERSITY VALUES, SCHOLARS AT RISK NETWORK (July 3, 2014), <https://www.scholarsatrisk.org/resources/some-puzzles-of-academic-freedom-part-1>; Antoon de Baets, *Some Puzzles of Academic Freedom (Parts 2 and 3)*, UNIVERSITY VALUES, SCHOLARS AT RISK NETWORK (Jan. 9, 2015), <https://www.scholarsatrisk.org/resources/some-puzzles-of-academic-freedom->

B. The Right to Freedom of Expression in Article 19 of the International Covenant on Civil and Political Rights

The right to academic freedom is often treated in the context of the right to freedom of expression. A former U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has thus identified violations of that right to have occurred in the form of certain acts infringing on “academic freedom,” mentioning, for example, “suppression of research on such controversial topics as a national independence movement that was active in the past; a ban on campuses of any independent organizations that are considered political; [and] refusal of permission to hold a seminar on human rights.”¹⁶⁹ Likewise, the Human Rights Committee, in its supervision of state compliance under its state reporting procedure, has on a number of occasions commented on issues of academic freedom in the context of Article 19 of the ICCPR. With regard to Kuwait, the Committee observed that “the limits imposed on freedom of expression and opinion in Kuwait . . . are not permissible under article 19, paragraph 3, of the Covenant” and that it was “particularly concerned . . . about restrictions imposed on academic and press freedom.”¹⁷⁰ Recently, following its consideration of the report of Hong Kong, the Committee stated that it “is concerned about reports that Hong Kong, China, has seen deterioration in media and academic freedom, including arrests, assaults and harassment of journalists and academics (arts. 19 and 25).”¹⁷¹ Interestingly, however, the

parts-2-and-3.

¹⁶⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, Submitted in Accordance with Commission Resolution 1999/36*, ¶ 37 (under heading “5. Academic freedom and public demonstrations”), U.N. Doc. E/CN.4/2000/63 (Jan. 18, 2000).

¹⁷⁰ U.N. Human Rights Committee, Concluding Observations: Kuwait (initial report), 69th Sess., ¶ 20, U.N. Doc. CCPR/C/69/KWT, July 27, 2000.

¹⁷¹ U.N. Human Rights Committee, Concluding Observations: Hong Kong, China (3rd periodic report), 107th Sess., ¶ 13, U.N. Doc. CCPR/C/CHN-HKG/CO/3, Apr. 29, 2013.

Committee, in its authoritative—and assumedly comprehensive—General Comment No. 34 on Article 19: Freedoms of Opinion and Expression of 2011, does not mention academic freedom.¹⁷² The approach of treating the right to academic freedom in the context of the right to freedom of expression may also be observed at the level of the regional protection of human rights. A former Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, for example, commenting on freedom of expression in Venezuela, has thus stated that “the right to freedom of thought and expression . . . is the very basis of academic freedom.”¹⁷³

In the absence of any express provision on the right to academic freedom in the European Convention on Human Rights (ECHR), also the European Court of Human Rights, authoritatively interpreting the ECHR, has variously dealt with academic freedom in the context of Article 10 of the ECHR, which addresses the right to freedom of expression in that instrument. The ECHR does not contain a provision addressing science or research. It does contain a provision on the right to education in Article 2 of the First Protocol to the ECHR, but this is formulated minimalistically as the right “not to be denied” the right to education.¹⁷⁴ Hence, Article 10 seemed to offer the only vehicle for providing protection to academic freedom.

The Court has never boldly formulated “a right to academic freedom.” What it has done is to view academic freedom as a consideration (among others) in deciding whether infringements of the right to freedom of expression could be justified or not (essentially as part of adjudging whether an infringement could be considered as “necessary in a democratic society” in order to protect

¹⁷² See *General Comment No. 34*, *supra* note 137. Neither does the probably most frequently quoted commentary on the ICCPR by Manfred Nowak (U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (2nd rev. ed. 2005)) elaborate on the topic of academic freedom in the context of Article 19.

¹⁷³ O.A.S., Inter-Am. C.H.R., Annual Report of the Inter-American Commission on Human Rights 2010, *Report of the Office of the Special Rapporteur for Freedom of Expression, Dr. Catalina Botero, Special Rapporteur for Freedom of Expression*, ¶ 524, OEA/Ser.L/V/II., doc. 5 (Mar. 4, 2011).

¹⁷⁴ See, e.g., BEITER, *supra* note 42, at 158–72, for a discussion of the right to education in Article 2 of the First Protocol to the ECHR.

important public interests, such as national security, or the reputation or rights of others under Article 10(2)). In its earlier relevant case law, the Court thus stressed that “sufficient regard” should be had to “the freedom of academic expression.”¹⁷⁵ Later decisions, the first being *Sorguç v. Turkey*, “underline[d] the importance of academic freedom.”¹⁷⁶ A stricter version of the criterion is perhaps that requiring that “[a]ny restriction . . . on the freedom of academics” should be submitted to “the most careful scrutiny.”¹⁷⁷ The first time the term “academic freedom” was used in a judgment of the Court was in the *Sorguç* case of 2009.¹⁷⁸ The Court evidently considered it legitimate to now “officially” use that term as the Parliamentary Assembly of the Council of Europe in 2006 had adopted a Recommendation on Academic Freedom and University Autonomy,¹⁷⁹ emphasizing the importance of these values. The Court then also cites *inter alia* Paragraph 4.1. of the Recommendation to the effect that

academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth

¹⁷⁵ *Başkaya and Okçuoğlu v. Turkey* [GC], Appl. Nos. 23536/94, 24408/94, Eur. Ct. H.R., ¶ 65 (July 8, 1999) (relying on *Hertel v. Switzerland*, Eur. Ct. H.R., 1998–VI, ¶ 50 (Aug. 25, 1998), although the latter decision does not actually use that phrase).

¹⁷⁶ *Sorguç v. Turkey*, Appl. No. 17089/03, Eur. Ct. H.R., ¶ 35 (June 23, 2009). See the cases *Lombardi Vallauri v. Italy*, *supra* note 131, ¶ 43; *Sapan v. Turkey*, Appl. No. 44102/04, Eur. Ct. H.R., ¶ 34 (June 8, 2010); *Aksu v. Turkey* [GC], Appl. Nos. 4149/04, 41029/04, Eur. Ct. H.R., ¶ 71 (Mar. 15, 2012); *HasanYazıcı v. Turkey*, Appl. No. 40877/07, Eur. Ct. H.R., ¶ 55 (Apr. 15, 2014); *Mustafa Erdoğan v. Turkey*, Appl. Nos. 346/04, 39779/04, Eur. Ct. H.R., ¶ 40 (May 27, 2014).

¹⁷⁷ *Lunde v. Norway* (dec.), Appl. No. 38318/97, Eur. Ct. H.R., 7 (Feb. 13, 2001). See also *Aksu v. Turkey*, *supra* note 176, ¶ 71; *Mustafa Erdoğan v. Turkey*, *supra* note 176, ¶ 40.

¹⁷⁸ It does feature in two earlier admissibility decisions: *Lunde v. Norway*, *supra* note 177, and *Petersen v. Germany* (dec.), Appl. No. 39793/98, Eur. Ct. H.R. (Nov. 22, 2001).

¹⁷⁹ Recommendation 1762, *supra* note 38.

without restriction.¹⁸⁰

Interestingly, the Recommendation itself does not refer to any provision of the ECHR, mentioning only the Magna Charta Universitatum, a non-governmental document signed by the rectors of universities worldwide in 1988.¹⁸¹ The Recommendation is then also referred to in subsequent judgments on the topic.¹⁸²

On the whole, the case law of the Court reflects that the latter is struggling with the concept of academic freedom. One may, for instance, observe some inconsistency in the use of the term. In one case, the English version of a decision speaks of “academic freedom,” but the French of “la liberté de la science” (freedom of science).¹⁸³ In another, the Court, citing from a Spanish judgment referring to “la libertad científica,” likewise translates this as “academic freedom,” although the Spanish court specifically did not mean “la libertad de cátedra” (the Spanish term for “academic freedom”).¹⁸⁴ The Court has further used the term in a case that did not concern an academic.¹⁸⁵ In other cases that did concern academics and their freedom to teach or to do research, the Court merely referred to their right to freedom of expression, not addressing—at least not expressly—their “academic freedom.”¹⁸⁶ The Court’s emphasis of the notion that “academic freedom . . . should guarantee freedom of expression and *of action*,”¹⁸⁷ relying on

¹⁸⁰ *Sorguç v. Turkey*, *supra* note 176, ¶¶ 21, 35.

¹⁸¹ Recommendation 1762, *supra* note 38, ¶¶ 1, 2, 3, 4, 13.

¹⁸² See *Lombardi Vallauri v. Italy*, *supra* note 131, ¶ 43; *Mustafa Erdoğan v. Turkey*, *supra* note 176, ¶ 40.

¹⁸³ See *Petersen v. Germany*, *supra* note 178, at 10 (English), at 11 (French).

¹⁸⁴ See *Perinçek v. Switzerland*, Appl. No. 27510/08, Eur. Ct. H.R., ¶¶ 38, 121 (Dec. 17, 2013). The Spanish judgment (No. 235/2007, Nov. 7, 2007) is referred to at note 203.

¹⁸⁵ See *Lunde v. Norway*, *supra* note 177 (a researcher working for an NGO).

¹⁸⁶ See *Riolo v. Italy*, Appl. No. 42211/07, Eur. Ct. H.R. (July 17, 2008); *Cox v. Turkey*, Appl. No. 2933/03, Eur. Ct. H.R. (May 20, 2010); *Gollnisch v. France* (dec.), Appl. No. 48135/08, Eur. Ct. H.R. (June 7, 2011); *Altuğ Taner Akçam v. Turkey*, Appl. No. 27520/07, Eur. Ct. H.R. (Oct. 25, 2011).

¹⁸⁷ Emphasis added.

Paragraph 4.1. of the Parliament's Recommendation,¹⁸⁸ is, moreover, a somewhat unconvincing attempt at trying to cover aspects of academic freedom that have nothing to do with expression under the concept of freedom of expression. As will be pointed out below, many aspects of academic freedom are related to conduct rather than expression. It is also not clear why academics in certain instances should enjoy wider protection than ordinary members of society when expressing their ideas—as the Court evidently holds in, for example, *Erdoğan v. Turkey*—if recourse is had to what is usually considered to constitute the premise of the right to freedom of expression, namely considerations of upholding democracy. Why should an academic's ideas be more important to protecting democracy than those of anybody else? The reason why academic speech rights may be wider in their scope is related to a consideration not primarily linked to democracy, but rather the understanding that academics play a seminal role in discovering the truth and advancing knowledge. By way of contrast, the right to freedom of expression also includes “a right to tell lies.”¹⁸⁹ It is instructive in this context to refer to the separate opinion of Judges Sajó, Vučinić and Kūris in the Court's latest pronouncement on the topic, the *Erdoğan* case. The Judges explain that

it would make little sense to attempt to justify the specific instance of “extramural” academic speech by a general reference to “the needs of a democratic society,” the typical justification accepted for freedom of expression in the Court's case-law. This would be superficial. Convincing justification for

¹⁸⁸ The Court did so most recently in *Mustafa Erdoğan v. Turkey*, *supra* note 176, ¶ 40.

¹⁸⁹ *See, e.g.*, the recent decision of the U.S. Supreme Court in *Susan B. Anthony List v. Driehaus* 573 U.S. __ (2014), in which the Court held that an anti-abortion group had standing to sue over an Ohio law that prevented it from making false statements about a political candidate. The decision has been interpreted as implying that free speech, in the U.S., covers the right to lie. *See, e.g.*, Laura Bassett, *Supreme Court Moves toward Legalizing Lying in Campaigns*, HUFFINGTON POST (June 16, 2014), http://www.huffingtonpost.com/2014/06/16/scotus-sba-list_n_5499404.html (last visited Aug. 28, 2016).

impugned “extramural” academic speech can very often be arrived at only if one takes into consideration the need to communicate ideas, which is protected for the sake of the advancement of learning, knowledge and science.¹⁹⁰ . . . It is for this reason that social and legal scientists’ judgments, those of value no less than those of fact, where these academics freely express their views and opinions on matters belonging to the area of their research, professional expertise and competence, deserve the highest level of protection under Article 10. . . . [T]he presence or absence of an “academic element” in an impugned comment or utterance may be decisive in finding whether a particular “speech” which otherwise would constitute an unlawful infringement of personal rights is protected under Article 10.¹⁹¹

Although the Judges thus still attempt to argue within the parameters of Article 10 – probably also for want of a better suited provision in the ECHR to protect academic freedom—they point to notable differences in the concepts. Elsewhere they state that “freedom of expression as an ‘umbrella concept’” is too broad a category in this case and that one should argue it from “academic freedom.”¹⁹² They also state that “[a]s a broader concept, academic freedom transcends the scope of Article 10 in certain areas, but this dimension is irrelevant to the present case and will not be discussed further here.”¹⁹³

John Stuart Mill argued that freedom of speech is about discovering the truth and advancing knowledge.¹⁹⁴ Although, as Eric

¹⁹⁰ Mustafa Erdoğan v. Turkey, *supra* note 176, Sajó, Vučinić & Kūris, JJ., jointly concurring, ¶ 5.

¹⁹¹ *Id.* ¶ 6.

¹⁹² *Id.* ¶ 7.

¹⁹³ *Id.* ¶ 3 (parentheses omitted).

¹⁹⁴ See John S. Mill, *Of the Liberty of Thought and Discussion*, in ON LIBERTY AND OTHER ESSAYS (1991).

Barendt points out, there is an element of truth in this, this applies to intellectual debate rather than to public discourse, debate in the mass media, or political campaigning.¹⁹⁵ Whereas freedom of speech is essentially about upholding democracy, academic freedom (or freedom of science for that matter) is more pronouncedly about discovering the truth and advancing knowledge (even if this is also crucial in building a democratic society). This supports the argument in favor of a different form of protection for academic freedom compared to that for freedom of expression. Certainly, saying that academics enjoy the same freedom of expression as other persons is true, but not helpful, as this does not explain why their right should be termed “academic freedom” when exercised in an academic context.¹⁹⁶ Applying the concept of “academic freedom” is to indicate that academics hold “special” speech rights in the academic context. This does not mean that they hold unrestricted speech rights.¹⁹⁷ It is true, the scope of their right may be wider, but their speech is also subject to quality controls to a far greater extent than ordinary speech, such quality controls being exercised by academics personally (self-compliance with academic duty), by the academic profession through peer review or departmental/faculty (collegial) review, by students (student evaluations), and, residually, by the state.¹⁹⁸ Quality controls of the nature stated are necessary because academics’ right is subject to *immanent limitations* flowing from the very purpose of that right and also the fundamental rights of other academics and students, these resulting from a commitment to discovering the truth¹⁹⁹ and ensuring good quality teaching and

¹⁹⁵ See BARENDT, *supra* note 13, at 18–19, 54–55.

¹⁹⁶ See *id.* at 18.

¹⁹⁷ See *id.* at 17–20.

¹⁹⁸ See *id.* at 20–21, in as far as professional control is concerned. Barendt describes these controls as “quality controls on the basis of general professional standards of accuracy and coherence.”

¹⁹⁹ See KARL JASPERS, DIE IDEE DER UNIVERSITÄT 34 (Schriften der Universität Heidelberg, Heft 1, 1946) (“Science means objectivity, dedication to the subject matter, well-considered deliberation, exploring contrary options, self-criticism. Science does not allow, in pursuing immanent needs, to think about this or that, and to forget the other. Inherent in science is the sceptical and inquisitive, caution in making a final assertion, examining the boundaries and nature of the

research, these limitations not existing with regard to general political or public discourse.²⁰⁰ By way of contrast, *limitations imposed by law* to further certain legitimate goals (for example, national security in the wake of terrorism or a person's good name) may exist more readily with regard to the right to freedom of expression²⁰¹ than the right to academic freedom, notably as it is considered that discovery of the truth is such a crucial value that any such discovery should not easily be frustrated. It is interesting to note that Article 5 of the German Basic Law²⁰²—the German idea of freedom of science, as has been stated, having had considerable influence on legal developments in many other countries—in Paragraph 1, protects the right to freedom of expression and, in Paragraph 2, allows this to be subjected to limitations imposed by law to protect, for example, young persons, whereas, the right to freedom of research, in Paragraph 3, may not be subjected to such (external) limitations.²⁰³

However, it is not only difficult to equate the right to academic freedom with the right to freedom of expression because the former entails “special” speech rights. The right to academic freedom, apart from speech rights, entails entitlements that have nothing to do with speech. In many respects, academic freedom relates to *permissible conduct*, such as using the equipment or facilities of a university department or laboratory, conducting scientific experiments, undertaking a survey, organizing a conference

validity of our assertions.” (authors' own translation from original German text)).

²⁰⁰ See BARENDT, *supra* note 13, at 20–21, for the argument that similar quality controls do not exist with regard to general political or public discourse.

²⁰¹ Article 19(3) of the ICCPR states that the right to freedom of expression may be limited to protect “the rights or reputations of others” and “national security or . . . public order (ordre public), or . . . public health or morals.”

²⁰² Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl. I, at 1, Art. 5 (F.R.G.).

²⁰³ See also the case law of the Spanish Constitutional Court, in terms of which freedom of science under Article 20(1)(b) of the Spanish Constitution enjoys enhanced protection relative to freedom of expression. See Tribunal Constitucional [Const. Ct.] decisions No. 235/2007, S.T.C., Nov. 7, 2007, B.O.E. No. 295, Dec. 10, 2007, ¶ 8 (fundamentos jurídicos) (Spain); No. 43/2004, S.T.C., Mar. 23, 2004, B.O.E. No. 99, Apr. 23, 2004, ¶ 5 (fundamentos jurídicos) (Spain).

or research teams, applying for research funding, marking exam papers, etc. It is uncontested that such forms of conduct are covered by the right to academic freedom.²⁰⁴ It should further be noted that many aspects of the right to academic freedom—immanent limitations to that right (flowing from its very nature, from the fundamental rights of other academics/students, or from certain important policy considerations, such as compliance of research with certain ethical standards), the principle of collegiality, or rights of academic self-governance—are difficult to deduce from the right to freedom of expression. This is so, as the right to academic freedom operates in a very specific context, not encountered in the case of the right to freedom of expression. Paulus Zoontjens aptly describes this as follows:

Even so, academic freedom needs to be clearly distinguished from [notably freedom of expression]. . . . [A]cademic freedom [stands] for a complex of rights that, to the extent that it has led to a delimitation and institutionalization of relationships of authority within the university, is so distinctive in character, that any reference to existing fundamental rights reveals no more than general patterns of similarity. Academic freedom governs the internal relationships within the university. It offers protection against influences originating with organs of governance or with individual members of staff or students and exerted within the institution on the researcher, lecturer or student. Although academic freedom is directed at and derives its justification from protecting the rights of the individual in his/her professional capacity as lecturer, researcher or student at the university, one cannot only speak of immediate protection through the concrete award of a “claim to a judgment” in case of a factual infringement of the freedom of the

²⁰⁴ See BARENDT, *supra* note 13, at 21.

individual, but there is also and prominently an indirect protective effect in that academic freedom functions as the legal basis for a structure within which the position of the individual is embedded in the larger context of an academic organization. In this sense, academic freedom functions as a principle for allocating responsibilities and as an academic and university organizing principle.²⁰⁵

It has similarly been stated that academic freedom is more like a professional freedom than an individual right.²⁰⁶ This is correct if understood in the sense that academic freedom does entail individual claims, but that these are exercised as member of the academic profession, the latter—within certain legal parameters—formulating standards for the exercise of rights and organizing itself autonomously.

Consequently, the right to academic freedom bears resemblance to the right to freedom of expression only in so far as a small sector of the former is concerned, namely speech rights. But, even in this respect, the resemblance is to a certain extent deceptive, as the speech rights entailed by each right differ substantially from one another in terms of the respective identity of right-holders, scope of entitlements, and range of immanent limitations and those that may permissibly be imposed by law. To the extent that this is taken into consideration, the speech rights of academics may potentially also be dealt with under Article 19 of the ICCPR. It is preferable, however, to identify a more pertinent seat for academics' speech rights, but also all other aspects of the right to academic freedom, somewhere in the U.N. Covenants.

C. Cultural Rights, including the Right to Freedom of Scientific Research, in Article 15 of the International Covenant on Economic, Social and Cultural Rights

²⁰⁵ ZOONTJENS, *supra* note 165, at 81–82 (authors' own translation from original Dutch text) (internal citations omitted).

²⁰⁶ See BARENDT, *supra* note 13, at 21–22.

Article 15 of the ICESCR protects “cultural rights.” Thus, whereas Article 15(1)(b) obliges states parties to “recognize the right of everyone . . . [t]o enjoy the benefits of scientific progress and its applications,” Article 15(3) enjoins them to “undertake to respect the freedom indispensable for scientific research and creative activity.”²⁰⁷ Regarding Article 15(1)(b), it has recently been observed that “there has been very little consideration of the right to science in the work of the CESCR, and the right has also been largely neglected in the academic literature.”²⁰⁸ Following three expert meetings on the topic initiated by UNESCO in June 2007, November 2008, and July 2009, however, the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications²⁰⁹ has now been adopted by the experts, providing some indication of the entitlements that may be held covered by Article 15(1)(b).²¹⁰ It is thus appreciated that “freedom of inquiry is a vital element in the development of science in its broadest sense.”²¹¹ It is pointed out that the right in Article 15(1)(b) “is inextricably linked . . . to the freedom . . . indispensable for scientific research as enshrined in Article 15(3)

²⁰⁷ It should be appreciated, however, that Article 15 as a whole, i.e. inclusive of its further provisions, is relevant in this context. *See supra* Section IV-A.

²⁰⁸ BEN SAUL ET AL., *Article 15: Cultural Rights*, in *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 1175, 1213–14 (2014).

²⁰⁹ UNESCO, *VENICE STATEMENT ON THE RIGHT TO ENJOY THE BENEFITS OF SCIENTIFIC PROGRESS AND ITS APPLICATIONS* 13–20 (2009).

²¹⁰ For a discussion of the Venice Statement, *see* Amrei Müller, *Remarks on the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications (Article 15(1)(b) ICESCR)*, 10 *HUM. RTS. L. REV.* 765 (2004). For a general discussion of the right to enjoy the benefits of scientific progress and its applications, *see, e.g.*, Eibe Riedel, *Sleeping Beauty or Let Sleeping Dogs Lie? The Right of Everyone to Enjoy the Benefits of Scientific Progress and Its Applications (REBSPA)*, in *COEXISTENCE, COOPERATION AND SOLIDARITY, LIBER AMICORUM RÜDIGER WOLFRUM (VOL. I)* 503 (Holger P. Hestermeyer et al. eds., 2012); William A. Schabas, *Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and Its Applications*, in *HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES* 273 (Yvonne Donders & Vladimir Volodin eds., 2007). *See also infra* note 216.

²¹¹ Venice Statement, *supra* note 209, ¶ 8.

ICESCR.”²¹² According to the Venice Statement, “[t]he normative content [of the right] should [amongst others] be directed towards . . . [c]reation of an enabling and participatory environment for the conservation, development and diffusion of science and technology, [this] impl[ying] *inter alia* . . . scientific freedom.”²¹³ State obligations “to *respect*” the right to enjoy the benefits of scientific progress and its applications are stated to encompass, for example, the duty

(a) to respect the freedoms indispensable for scientific research . . . , such as freedom of thought, to hold opinions without interference, and to seek, receive, and impart information and ideas of all kinds;

(b) to respect the right of scientists to form and join professional societies and associations, as well as academic autonomy;²¹⁴

(c) to respect the freedom of the scientific community and its individual members to collaborate with others both within and across the country’s borders, including the free[] exchange of information, research ideas and results.²¹⁵

Hence, Article 15 of the ICESCR as a whole and in particular Paragraphs (1)(b) and (3) protect the right to freedom of scientific research. The purpose here cannot be to decipher the precise content

²¹² *Id.* ¶ 12(d). See also SAUL, *supra* note 208, at 1215 (“The Venice Statement thus indicates that there are three aspects to [the right in Article 15(1)(b)]: freedom of scientific research and communication; enjoyment of the benefits of scientific progress; and protection from adverse effects of science.”).

²¹³ Venice Statement, *supra* note 209, ¶ 13(a).

²¹⁴ It is not quite clear whether the term “academic autonomy” as used here refers to the academic autonomy of the individual or that of the institution (or both).

²¹⁵ Venice Statement, *supra* note 209, ¶ 14(a)–(c).

of this right in any further detail.²¹⁶ It may be noted, however, that

²¹⁶ For further detail, see, e.g., Audrey R. Chapman, *Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications*, 8 J. HUM. RTS. 1, 16–18 (2009) (addressing freedom for scientific research as protected in Article 15(3) of the ICESCR); Richard P. Claude, *Scientists' Rights and the Human Right to the Benefits of Science*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 247, 260–262 (Audrey R. Chapman & Sage Russell eds., 2002) (discussing the duty of states parties to the ICESCR under Article 15(3) “to respect the freedom indispensable for scientific research”); RICHARD P. CLAUDE, SCIENCE IN THE SERVICE OF HUMAN RIGHTS 63–64 (2002) [hereinafter CLAUDE, SCIENCE IN THE SERVICE OF HUMAN RIGHTS] (addressing the topic of preserving scientific freedom); Yvonne Donders, *The Right to Enjoy the Benefits of Scientific Progress: In Search of State Obligations in Relation to Health*, 14 MED., HEALTH CARE & PHIL. 371, 373, 376–77 (2011) (addressing various issues concerning “the rights of scientists to freely conduct science,” including in the context of positive and negative state obligations, obligations to respect, protect, and fulfill, and core obligations); Yvonne Donders, *Balancing Interests: Limitations to the Right to Enjoy the Benefits of Scientific Progress and Its Applications*, 2015 EUR. J. HUM. RTS. 486, 490–93 (2015) (discussing the limiting of scientific freedom to prevent abuse and harm); MATTHIAS RUFFERT, SEBASTIAN STEINECKE WITH JANA MÜLISCH, *Constitutional Basis: The Freedom of Science*, in THE GLOBAL ADMINISTRATIVE LAW OF SCIENCE 29, 29–53 (2011) (discussing the constitutional basis of the freedom of science in international law and national constitutions); William A. Schabas, *Looking Back: How the Founders Considered Science and Progress in their Relation to Human Rights*, 2015 EUR. J. HUM. RTS. 504, 515 (2015) (in the course of examining the drafting history of Article 27 of the Universal Declaration of Human Rights, the precursor of Article 15 of the ICESCR, mentioning that Eleanor Roosevelt had insisted that the U.S. delegation felt strongly that science should be free from government control); Lea Shaver, *The Right to Science: Ensuring that Everyone Benefits from Scientific and Technological Progress*, 2015 EUR. J. HUM. RTS. 411, 421–22 (2015) (stating that the “minimum core” of the right to science covers, but should not be confined to respect for scientific freedom and ethical safeguards on research); U.N.G.A., Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, The Right to Enjoy the Benefits of Scientific Progress and Its Applications*, ¶¶ 39–42, U.N. Doc. A/HRC/20/26 (May 14, 2012) (commenting on the “[F]reedom indispensable for scientific research and opportunities for all to contribute to the scientific enterprise”); MARGARET WEIGERS VITULLO & JESSICA WYNDHAM, DEFINING THE RIGHT TO ENJOY THE BENEFITS OF SCIENTIFIC PROGRESS AND ITS APPLICATIONS: AMERICAN SCIENTISTS’ PERSPECTIVES, AAAS SCIENCE AND HUMAN RIGHTS COALITION 17 (Oct. 2013) (mentioning as a key finding: “Scientific freedom is not absolute, but centers on the nexus of freedom and responsibility.”); Jessica M. Wyndham & Margaret Weigers Vitullo, *The Right*

the academic literature so far has focused on the right to freedom of scientific research as an aspect of the right to enjoy the benefits of scientific progress and its applications, generally putting the stress on the positive obligations of states to regulate the sphere of science, according rather stepmotherly attention to negative obligations of restraint. Important as securing a wider participation of society in the enjoyment of the benefits of science is, excessive state regulation (and choice of the wrong regulatory instruments), failing to appreciate that science, in principle, is not susceptible to “being managed,”²¹⁷ may well “suffocate” freedom of scientific research.

Article 15 of the ICESCR, specifically Paragraphs (1)(b) and (3), may be considered to protect (aspects of) *the right to intellectual or scientific freedom* and to closely resemble (aspects of) what has been termed the right to freedom of science (“*Wissenschaftsfreiheit*”) above, when discussing legal developments in Continental Europe (“aspects” because, only freedom of research, but not freedom of teaching and freedom of learning are, at least expressly, referred to, the latter two freedoms, as has been explained, being a part of the right to freedom of science (“*Wissenschaftsfreiheit*”) according to the Continental European tradition).²¹⁸ The right to intellectual or scientific freedom accrues to every person involved in scientific endeavor. It may thus be claimed by private researchers, researchers working for NGOs, researchers employed by state corporations or specific governmental research institutes pursuing a set research agenda, researchers in private companies, publishers, but also academics carrying out research in universities, polytechnics, or research institutions “linked to” the HE milieu.²¹⁹ The term

to Science – Whose Right? To What?, 2015 EUR. J. HUM. RTS. 431, 455–59 (2015) (discussing scientific freedom, scientific responsibility, and the abuse of science).

²¹⁷ See, e.g., the landmark *Hochschul Case* of the German Constitutional Court of 1973, stressing the “*Eigengesetzlichkeit der Wissenschaft*” (“the autonomous character of science”), Judgment of May 29, 1973, BVerfG [Fed. Const. Ct., F.R.G.], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 35, 79, at 111–12, ¶ 128.

²¹⁸ See *supra* Section I.

²¹⁹ By way of example, prior to Croatia joining the European Union, an average of 44.9% of researchers in the EU worked in the “business enterprise sector,” 12.5% in the “government sector,” 41.6% in the “higher education sector,”

“academic” also covers students in HE, for example, to the extent that these are involved in carrying out research.²²⁰ The scope of the right to intellectual or scientific freedom naturally will depend on the specific context, i.e. on who exercises it in which type of situation. In this sense, the right of students will, for instance, be reduced in scope where they perform research under the instructions of a professor. Teachers and students at non-tertiary levels of education enjoy the right only if they perform research, which, though not totally improbable, appears rather unlikely.²²¹

Article 15 does not define “research.” Guidance on the meaning of that term may be sought in UNESCO’s Recommendation on the Status of Scientific Researchers, a non-binding instrument adopted by that organization in 1974 (and currently undergoing a process of revision).²²² A reading of Paragraph 1 reveals that “research” signifies “those processes of study, experiment, conceptualisation and theory-testing involved in the generation of scientific knowledge.” “Scientific knowledge” in turn results from “the objective study of observed phenomena, to discover and master the chain of causalities,” “systematic reflection and conceptualisation,” and “understanding . . . the processes and phenomena occurring in nature and society.” Moreover, the “theoretical element” from which research proceeds “is normally

and 1.1% in the “private non-profit sector.” See IDEA CONSULT ET AL., SUPPORT FOR CONTINUED DATA COLLECTION AND ANALYSIS CONCERNING MOBILITY PATTERNS AND CAREER PATHS OF RESEARCHERS 70 (Final Report MORE2, Prepared for European Commission, Aug. 2013), available at http://ec.europa.eu/euraxess/pdf/research_policies/more2/Final%20report.pdf.

²²⁰ See Kempen, *supra* note 87, at 7, ¶ 19.

²²¹ See Tight, *supra* note 93, at 120 (arguing that academic freedom does not apply in the secondary school sector).

²²² UNESCO states on its website that “[t]he General Conference of UNESCO, at its 37th session held in Paris in November 2013, has decided to begin a process that may result in revision of the original text, in order to give account to changes in the last forty years. The intention is to enrich the still-valid existing text, so that it reflects better today’s concerns about science in relation to society.” See UNESCO, *Call for Advice: Revision of the UNESCO Recommendation on the Status of Scientific Researchers*, <http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/call-for-advice-revision-of-unesco-recommendation-on-the-status-of-scientific-researchers> (last visited Aug. 28, 2016).

capable of being validated.”²²³

The right to academic freedom may be stated to be a special form of the right to intellectual or scientific freedom, solely applicable in the higher education context.²²⁴ Article 15, it should be noted, does not mention the higher education context. As the designation “academic” in “academic freedom” indicates, this right accrues to academics (only). Confusion exists in a few countries in which languages are spoken that use words seemingly the equivalent of the English “academic,” but which, in fact, have a different meaning. Regarding Dutch, it has thus been explained that “the noun *academic* . . . has a Dutch false friend: *academicus*. In English, an *academic* is a university or college teacher. The Dutch *academicus* is a more general term, referring to a person with a university or college degree. Its equivalent is *graduate*.”²²⁵ The same is true for the German “Akademiker” or the Danish “akademiker.” There is a danger, therefore, of confusing academic freedom with the more general intellectual or scientific freedom implicated in Article 15 and of considering all types of researchers (all of whom are usually “graduates”) in principle to be entitled to claim academic freedom.²²⁶ Whereas all academics may claim the right in Article 15, not all researchers entitled under Article 15 may claim academic freedom. As the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education of 1988—hitherto the most influential non-governmental instrument dealing with academic

²²³ Recommendation on the Status of Scientific Researchers, *supra* note 41, ¶ 1(a)(i), (ii), (d)(i). UNESCO’s Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997 also contains a definition of “research,” but this focuses on research solely “within the context of higher education.” See *id.* ¶ 1(b).

²²⁴ See BARENDT, *supra* note 13, at 54–55.

²²⁵ JOY BURROUGH-BOENISCH, RIGHTING ENGLISH THAT’S GONE DUTCH, *Ch. 15, Title-Tattle: An Academic Question* 97, 97 (2004).

²²⁶ The two rights should be clearly distinguished. It may thus be observed that Article 13 of the Charter of Fundamental Rights of the European Union of 2007 protects both “scientific freedom” and “academic freedom,” stating that: “The arts and scientific research shall be free of constraint. Academic freedom shall be respected.” Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

freedom—makes it clear: “‘Academic freedom’ means the freedom of members of the academic community,”²²⁷ and “[a]cademic community’ covers all those persons teaching, studying, researching and working at an institution of higher education.”²²⁸ Similarly, UNESCO’s Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997 provides that protecting the interests of HE requires that “the principle of academic freedom should be scrupulously observed.”²²⁹ The Recommendation “applies to all higher education teaching personnel.”²³⁰ In contrast, UNESCO’s Recommendation on the Status of Scientific Researchers of 1974 protects the right of scientific researchers “to work in a spirit of intellectual freedom.”²³¹ This Recommendation applies to “all scientific researchers,”

irrespective of:

- (a) the legal status of their employer, or the type of organisation or establishment in which they work;
- (b) their scientific or technological fields of specialisation;
- (c) the motivation underlying the scientific research and experimental development in which they engage;
- (d) the kind of application to which that scientific research and experimental development relates most immediately.²³²

²²⁷ Lima Declaration, *supra* note 36, ¶ 1(a).

²²⁸ *Id.* ¶ 1(b).

²²⁹ UNESCO Recommendation, *supra* note 39, ¶ 27.

²³⁰ *Id.* ¶ 2. “Higher-education teaching personnel” means “all those persons in institutions or programmes of higher education who are engaged to teach and/or to undertake scholarship and/or to undertake research and/or to provide educational services to students or to the community at large.” *Id.* ¶ 1(f).

²³¹ Recommendation on the Status of Scientific Researchers, *supra* note 41, ¶ 14(a). Granted, there is a reference to “academic freedom” in the Preamble to the Recommendation, but this does not recur anywhere else throughout the Recommendation.

²³² *Id.* ¶ 2.

If the above reveals clearly that academic freedom thus applies to teachers and researchers in HE, it should be held also to cover students in HE. The Collins English Dictionary defines an “academic” as “a member of a college or university.”²³³ By way of example, the German Hochschulrahmengesetz (Framework Act on Higher Education), in Section 36(1), states that “[t]he members of an institution of higher education shall comprise the staff . . . employed by the institution . . . and the enrolled students.”²³⁴ Obviously, students are the main beneficiaries of the freedom of learning. Moreover, to the extent that they engage in research, they hold the freedom of research as well.²³⁵ Accordingly, “in principle, [students in HE] should be entitled to claim academic freedom, at least to discuss controversial ideas in seminars, and research students should be free, in consultation with their supervisors, to determine the topics for their research and how they conduct it.”²³⁶

It is of significance to regard the right to academic freedom as a special form of (and as such not identical to) the right to intellectual or scientific freedom as implicated in Article 15. Compared to the latter right, the right to academic freedom entails a different, a wider scope of protection—and this for good reasons. As has been noted,

there can surely be nothing wrong in the authorities at a specialist institute, whether that of government or of a pharmaceutical or other industrial company, determining what it wants to research and directing its employees how to set about it. Insofar as the arguments for academic freedom are based on the special role of universities as places for the free

²³³ *Academic Definition*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/academic> (last visited Aug. 28, 2016).

²³⁴ Hochschulrahmengesetz in the version of Jan. 19, 1999, BGBl. I, at 18, last amended by Art. 2 of Law, Apr. 12, 2007, BGBl. I, at 506, § 36(1) (F.R.G.).

²³⁵ See Kempen, *supra* note 87, at 7, ¶ 19.

²³⁶ BARENDT, *supra* note 13, at 37–38.

exchange of ideas, they do not apply with the same force to [those] working in research institutes.²³⁷

Academic freedom has been compared to the privileges accorded to members of parliament, enabling them to properly perform their functions without fear of sanction. Whereas parliamentarians are required to conduct political debate, academics have a special responsibility to engage in critical inquiry and publish their conclusions. For this reason, they “enjoy a freedom that is not shared by other employees—whether in public or private service.”²³⁸

But there is also this perspective: Already in 1983, C.G. Weeramantry, in a book dealing with the implications of technological progress for human rights, argued that there had been power shifts in the field of technological advancement and that power had become concentrated in transnational corporations, these (often successfully) seeking to influence governments in their formulation of policies on research and technology.²³⁹ The Venice Statement, referred to above, similarly acknowledges that “[t]he relationship between human rights and science is . . . complicated by the fact that private and non-State actors are increasingly the principal producers of scientific progress and technological advances.”²⁴⁰ In terms of the Venice Statement, there is accordingly an obligation on states “to take measures . . . to prevent and preclude the utilization by third parties of science and technologies to the detriment of human rights.”²⁴¹ Such measures would, as appropriate, include those properly regulating the right to scientific freedom of those working in the private/non-state sector.²⁴² The rationale for any

²³⁷ *Id.* at 37 (internal citation omitted). This means, by way of implication, that scholars working in research institutions “close to” the HE milieu should also be held to be entitled to claim academic freedom.

²³⁸ *Id.* at 36.

²³⁹ CHRISTOPHER G. WEERAMANTRY, *THE SLUMBERING SENTINELS: LAW AND HUMAN RIGHTS IN THE WAKE OF TECHNOLOGY*, Chapter 10 (1983).

²⁴⁰ Venice Statement, *supra* note 209, ¶ 5.

²⁴¹ *Id.* ¶ 15(a).

²⁴² See also Müller, *supra* note 210, at 776 (adding this perspective: “Given the fact that the resources and capabilities of private actors to conduct scientific

similar regulation does not exist (at any rate not at the same level of compulsion) in universities and related institutions, which, by definition, are required to further the public interest.²⁴³

It is submitted that by treating academic freedom as a special right essentially exercised by academics in institutions of HE or research institutions “close to” the HE milieu—public or private, but first and foremost serving the general public interest—that right is accorded an “elevated” status when compared to that on which primarily researchers in corporations driven by mercantile interests would rely. Academics require enhanced protection. They are far more likely to experience political pressures as their work would usually not (merely) have a commercial objective, but address issues of public concern. Furthermore, obliged to promote the public interest, academics also need firm protection against attempts of private industry at influencing the objectivity of their work. Finally, it has already been emphasized that “academic freedom functions as a principle for allocating responsibilities [in universities] and as an academic and university organizing principle.”²⁴⁴ Considerations of self-governance and collegiality, but also those of institutional autonomy, play an important role in, but are specific to the academic

research are much higher than that of many states, the difficulty is to not only ensuring that non-state actors do not inhibit states’ efforts to implement the [right to enjoy the benefits of scientific progress and its applications] and other [economic, social and cultural] rights, but to also make sure that they contribute to the realisation of such rights through their activities.”).

²⁴³ Admittedly, there is a clear trend of commercializing HE, threatening the existence of institutions of HE as institutions of the public interest. *See, e.g.,* THOMAS DOCHERTY, *UNIVERSITIES AT WAR* ix (2015) (“Money has systematically replaced thought as the key driver and *raison d’être* of the [HE] institution’s official existence.”). It should be pointed out, however, that this is clearly in conflict with international human rights law, which envisages general taxation as the principal model for financing education (study, teaching, and research) and all other rights under the ICESCR. A former U.N. Special Rapporteur on the right to education, Katarina Tomaševski, has thus underlined that “[i]nternational human rights law assumes that states are both willing and able to generate resources needed for education through general taxation.” KATARINA TOMAŠEVSKI, *FREE AND COMPULSORY EDUCATION FOR ALL CHILDREN: THE GAP BETWEEN PROMISE AND PERFORMANCE* 21 (2001).

²⁴⁴ ZOONTJENS, *supra* note 165, at 81–82 (authors’ own translation from original Dutch text).

freedom context. They do not play a role in scientific endeavor beyond the sphere of HE. Hence, academic freedom as a special right needs to address these considerations, while the right to scientific freedom as applicable beyond HE does not.

The right to intellectual or scientific freedom implicated in Article 15 is an important right. As Richard Claude observed,

[t]he scientific freedom embedded in Article 15 of the ESC Covenant is like a ship's anchor on which scientists daily depend, a mainstay for freedom of information, association, and inquiry. Sometimes taken for granted, when captains of state 'haul anchor,' setting scientific freedom adrift, its impact is quickly felt in democratic countries as well as those under authoritarian regimes.²⁴⁵

The crucial question, however, is whether *full* protection for academic freedom—i.e. protection exceeding the common level of protection available to academic and non-academic researchers under Article 15—would, in practice, be recognized to be available under this provision. As is the case in Germany, one can, of course, construct a theory of scientific freedom *in higher education* (academic freedom) on the basis of this right. By way of example: It has been pointed out that Article 15 merely refers to freedom of research, but not to freedom of teaching and freedom of learning. A purposive interpretation—one that appreciates that research, teaching, and learning are closely intertwined processes²⁴⁶—might well have to conclude that teaching and learning in institutions engaging not solely in research, but considering teaching and learning a part of their mission, should also be considered protected under Article 15. Audrey Chapman states that “[a]cademic freedom is one critical component of the freedom indispensable for scientific

²⁴⁵ CLAUDE, *SCIENCE IN THE SERVICE OF HUMAN RIGHTS*, *supra* note 216, at 63.

²⁴⁶ See also *infra* Section IV-D, on this point.

research [in Article 15(3)].”²⁴⁷ Similarly, the U.N. Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, primarily with Article 15(1)(b) in mind, holds that “scientific freedom . . . encompass[es] academic freedoms.”²⁴⁸ And, under the Venice Statement on Article 15(1)(b), “[c]reation of an enabling and participatory environment for the conservation, development and diffusion of science and technology . . . implies *inter alia* academic and scientific freedom.”²⁴⁹ Yet, in the absence of a specific reference in Article 15 to the very context in which academic freedom operates—the sphere of higher education—it may be meaningful, however, to find an additional basis, a more natural “home,” for the right to academic freedom in the U.N. Human Rights Covenants.

D. The Right to Education in Article 13 of the International Covenant on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights, the body of independent experts established to supervise implementation of the ICESCR, has stated in its General Comment No. 13 on the Right to Education of 1999 that

[i]n the light of its examination of numerous States parties’ reports, [it] has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13 [of the ICESCR], it is appropriate and necessary for the Committee to

²⁴⁷ CESCR, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, Discussion Paper Submitted by Dr. Audrey R. Chapman, American Association for the Advancement of Science (AAAS), Washington, U.S.A. (Day of General Discussion, Article 15(1)(c) of the ICESCR), ¶ 36, U.N. Doc. E/C.12/2000/12 (Oct. 3, 2000).

²⁴⁸ Report of the U.N. Special Rapporteur in the Field of Cultural Rights, *supra* note 216, ¶ 74(f).

²⁴⁹ Venice Statement, *supra* note 209, ¶ 13(a).

make some observations about academic freedom.²⁵⁰

In the literature, it has been commented that “[i]t may be due to the textual scarcity that the . . . Committee on Economic, Social and Cultural Rights . . . treated freedom of scientific research as a special category of the right to education This, however, appears imprecise as the concept of science transcends the educative sphere.”²⁵¹ With all due respect, this observation confounds the issues. It makes exactly the mistake alluded to earlier on: confusing

²⁵⁰ *General Comment No. 13, supra* note 6, ¶ 38. In its Concluding Observations, the Committee has sometimes treated academic freedom in the context of Article 13, at other times in the context of Article 15. *See* CESCR, Concluding Observations: Kenya (without report), 8th Sess., ¶ 85, U.N. Doc. E/1994/23 (in context of Article 15, Committee expresses its deep concern about the fact that “academic freedom in Kenya is still seriously curtailed”); CESCR, Concluding Observations: Iraq (second periodic report), 10th Sess., ¶ 135, U.N. Doc. E/1995/22 (Committee seriously concerned—it appears in context of Article 13—about reports of “infringements of academic freedom within the State party”); CESCR, Concluding Observations: Nigeria (initial report), 18th Sess., ¶¶ 127, 130, U.N. Doc. E/1999/22 (Committee appears to admonish state party in context of Article 13 that “[r]espect for . . . academic freedom should . . . be restored urgently”); CESCR, Concluding Observations: Tunisia (second periodic report), 20th Sess., ¶ 170, U.N. Doc. E/2000/22 (Committee seriously concerned that “the police presence on university campuses may infringe on the freedoms necessary for academic and cultural expression, which the State party is obliged to respect under article 15 of the Covenant”); CESCR, Concluding Observations: Yugoslavia (preliminary), 24th Sess., ¶ 509, U.N. Doc. E/2001/22 (in context of Article 13, state party referred to General Comment No. 13 on the Right to Education, paragraphs 38 to 40, and “urged to introduce legislation and other measures which ensure the academic freedom of all staff and students throughout the educational sector”); CESCR, Concluding Observations: People’s Republic of China (including Hong Kong and Macao) (initial report), 34th Sess., ¶¶ 39, 68, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005) (Committee notes with deep concern—it appears in context of Article 15—“the restrictions placed on access to information with regard to academic research”); CESCR, Concluding Observations: Republic of Korea (third periodic report), 43rd Sess., ¶ 35, U.N. Doc. E/C.12/KOR/CO/3 (Dec. 17, 2009) (Committee concerned—it appears in context of Article 13—about “the absence of self-regulation and diversity in university education”).

²⁵¹ RUFFERT, STEINECKE WITH MÜLISCH, *supra* note 216, at 32.

academic freedom with the more general intellectual or scientific freedom. The Committee did not generally address “freedom of scientific research,” it addressed solely “academic freedom.” The right to academic freedom as a special form of the right to intellectual or scientific freedom only accrues to academics in HE institutions and centers of research “associated with” the HE sector. As such, it *is* appropriately dealt with under Article 13 of the ICESCR on the right to education. Article 13 may, in fact, be viewed as the natural seat of the right to academic freedom in the U.N. Human Rights Covenants. Appreciating why this is the case, requires a clear understanding of Article 13. This warrants citing the provision in full:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.²⁵²

At first sight, Article 13 may appear to protect the following: a right to receive instruction (“the right of everyone to education” in Paragraph 1, first sentence), and certain non-binding educational

²⁵² ICESCR, *supra* note 119, Art. 13.

ideals in what appears to be a Preamble to Paragraphs 2 to 4 (Paragraph 1, second and third sentences). Paragraph 2 then recognizes that education should be available and accessible at the various levels of education to varying degrees. There should also be sufficient well-paid teachers (Paragraph 2(e)). Paragraphs 3 and 4 then recognize freedom in education, including the right to establish and maintain private schools. A closer look, however, reveals that Article 13 is of a broader scope. The first sentence of Article 13(1), in terms of which “states parties recognize the right to education,” should be understood as “an open-ended fundamental norm in the sphere of education.”²⁵³ It provides the normative basis for a full-fledged, rights-based education system, including in the sphere of HE, also covering the rights of teaching/research staff. “Education system,” in this sense, covers study, teaching, and research, and the governance or administration of these. Such a wide reading of the first sentence of Article 13(1) is not only purposive, securing a firm protection of human rights, but also reflects the approach of the Committee on Economic, Social and Cultural Rights—the most important organ interpreting the ICESCR—with regard to this provision.²⁵⁴ The Committee has thus held Article 13 to cover pre-primary education,²⁵⁵ discipline in schools,²⁵⁶ or the quality of education,²⁵⁷ although these issues are not mentioned in Article 13. In other words, the normative potential of the first sentence of

²⁵³ See, e.g., BEITER, *supra* note 42, at 460–62, in support of such a wide reading of Article 13 (citing in support of his view *inter alia* PIUS GEBERT, DAS RECHT AUF BILDUNG NACH ART. 13 DES UNO-PAKTES ÜBER WIRTSCHAFTLICHE, SOZIALE UND KULTURELLE RECHTE UND SEINE AUSWIRKUNGEN AUF DAS SCHWEIZERISCHE BILDUNGSWESEN 286–88 (1996)). See also BEITER, *supra* note 42, at xi–xlii, for a list of U.N./UNESCO documents, a bibliography, and a table of cases, citing various materials useful to understanding the nature of the right to education in Article 13, but also generally under international law. See especially *General Comment No. 13*, *supra* note 6, for an analysis of Article 13.

²⁵⁴ See BEITER, *supra* note 42, at 461–62.

²⁵⁵ See CESCR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland (second periodic reports), 11th Session, ¶¶ 276, 278, U.N. Doc. E/1995/22.

²⁵⁶ See *General Comment No. 13*, *supra* note 6, ¶ 41.

²⁵⁷ See, e.g., CESCR, Concluding Observations: Republic of Korea (second periodic report), 25th Session, ¶¶ 237, 238, 252, U.N. Doc. E/2002/22.

Article 13(1) extends beyond the individual guarantees in Paragraphs 1 to 4, which that sentence introduces. In particular the aims of education, as laid down in the second and third sentences of Article 13(1) (full development of the human personality, respect for human rights, effective participation in a free society, tolerance among various groups, maintenance of peace), may indicate which topics may, or should be read into Article 13 via the first sentence of Article 13(1). The aims of education in Paragraph 1 are not part of what appears at first sight to be a “mere” Preamble. They form part of a material provision of the Covenant and constitute binding law.²⁵⁸

If one now considers letters (a) to (e) of Article 13(2): Although these seem only to address issues of *availability* (infrastructure) and *accessibility* (availability and accessibility, as it were, being external aspects of education, reflecting a right *to* education), it is now accepted that these provisions also address issues of *acceptability* and *adaptability* (internal aspects of education; rights *in* education).²⁵⁹ Ultimately, if education is to promote the stated aims, it does not suffice for it to be available and accessible, but it must also convey content of a certain quality, based on human rights values—i.e. it needs to be acceptable and adaptable. Rights *in* education may be justified as an interpretation of Article 13(2) in the light of the open-ended fundamental norm in the sphere of education in Article 13(1), first sentence, facilitated by the aims of education, in Article 13(1), second and third sentences.

However, if Article 13 also addresses rights *in* education, i.e.

²⁵⁸ See BEITER, *supra* note 42, at 469–70; GEBERT, *supra* note 253, at 324–26; *General Comment No. 13*, *supra* note 6, ¶ 49.

²⁵⁹ The 4-A scheme (availability, accessibility, acceptability, and adaptability) for studying the obligations under Article 13(2) has been developed by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education. See BEITER, *supra* note 42, at 476, note 56, for a citation of relevant literature by Tomaševski in this regard. The scheme has subsequently been endorsed by the Committee on Economic, Social and Cultural Rights. See *General Comment No. 13*, *supra* note 6, ¶ 6 (stating that “education in all its forms and at all levels shall exhibit the following interrelated and essential features: (a) Availability . . . ; (b) Accessibility . . . ; (c) Acceptability . . . ; (d) Adaptability”). See BEITER, *supra* note 42, at 476–510, for an analysis of Article 13(2) in terms of the 4-A scheme.

aspects of the quality or content of education, then, by necessary implication, it also addresses the quality of teaching and research, and, therefore, the rights and duties of academic staff in this context. A former U.N. Special Rapporteur on the Right to Education has accordingly held that academic freedom forms a part of the acceptability²⁶⁰ (alternatively, the availability)²⁶¹ criterion of the right to education. Elsewhere has it been stated that

[h]igher education relies on active engagement in critical enquiry and research, both of which inform the teaching and learning mission of our institutions. The quality of higher education and the experience of students both suffer when critical enquiry and research cannot flourish. The creation of academic positions that do not involve a range of academic activities in the pursuit of knowledge and its dissemination and application, undermines the mission of a higher education institution, which must remain inextricably committed to critical enquiry, learning and service to the community.²⁶²

Learning, teaching, and research in HE are so closely intertwined that one cannot exist without the other. The quality of one depends on the quality of the other. Moreover, the quality of all three presupposes that freedom of learning, teaching, and research be safeguarded. This is an argument reminiscent of Humboldt's ideal of

²⁶⁰ See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Annual Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted Pursuant to Commission on Human Rights Resolution 2001/29*, 13, U.N. Doc. E/CN.4/2002/60 (Jan. 7, 2002).

²⁶¹ See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Progress Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, Submitted in Accordance with Commission on Human Rights Resolution 1999/25*, ¶¶ 42–44, U.N. Doc. E/CN.4/2000/6 (Feb. 1, 2000).

²⁶² Education International, Statement to the UNESCO World Conference on Higher Education, Educators Committed to Quality Higher Education in the Coming Decade, Paris, July 5–8, 2009, ¶ 11.

a unity of the processes at stake here: University teachers need to do research so as to be able to teach effectively, so as to speak with the necessary academic authority. In turn, through teaching, teachers are able to test their own wisdom. Student feedback and insights gained in the classroom allow them, where necessary, to revise their research approach. Students, on the other hand, rely on their teachers' research experience, which empowers them to develop their own research competences. Opportunities to engage in free inquiry are crucial to the full development of students' personality and students becoming critical members of society, and, potentially, capable future researchers. At the same time, both teachers and students, exercising their academic freedom, satisfy not only "personal needs," but also contribute towards achieving the "greater" overarching goals of science.

It should further be noted that, where Article 13(2)(e) requires that "the material conditions of teaching staff shall be continuously improved," the reference to "material conditions" need not solely be understood in the sense of salaries, social security benefits, and labor/trade union rights. Article 13(1), first sentence, as an open-ended fundamental norm in the sphere of education, certainly countenances "material conditions" to be construed as including "soft core benefits" such as academic freedom. This appears also to be the opinion of the Committee on Economic, Social and Cultural Rights. Commenting on the phrase it notes that "the *general* working conditions of teachers have deteriorated." Quite clearly, "*general* working conditions" would include the enjoyment of academic freedom. The Committee underlines that a failure to guarantee adequate material conditions not only is "a major obstacle to the full realisation of students' right to education," but also "inconsistent with [the right of academic staff in] article 13(2)(e)."²⁶³

Moreover, it should be appreciated that the ICESCR, in Articles 18 to 23, envisages close co-operation between the U.N. specialized agencies and the U.N. Economic and Social Council (ECOSOC)—in practice, the Committee on Economic, Social and Cultural Rights—in promoting the implementation of the

²⁶³ *General Comment No. 13, supra* note 6, ¶ 27 (emphasis added).

Covenant.²⁶⁴ Article 23 thus states that “[t]he States Parties to the . . . Covenant agree that international action for the achievement of the rights recognized in the . . . Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance [etc.]” Read with Article 22, in terms of which the Committee is to provide information related to the implementation of economic, social and cultural rights to the U.N. specialized agencies, enabling the latter to decide on “the advisability of international measures,” it becomes clear that it is essentially the U.N. specialized agencies that have been identified as the sponsors of such “international action” (conventions, recommendations, technical assistance, etc.). The U.N. specialized agency with prime responsibility in the field of education is UNESCO, the United Nations Educational, Scientific and Cultural Organization. UNESCO has variously adopted conventions and recommendations on topics relevant to the right to education. These conventions and recommendations should thus, as it were, be seen to “give content” to the right to education as protected in Article 13. In this sense, then, UNESCO’s Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997—including its provisions on academic freedom—should be seen as elaborating on the content of Article 13. That this approach is correct, is confirmed by reading the Recommendation’s Preamble, which states that the Recommendation has been adopted in view of notably the following considerations:

in particular the responsibility of the states for the provision of higher education in fulfillment of Article 13, paragraph 2(c), of the International Covenant on Economic, Social and Cultural Rights (1966),

.....

the decisive role of higher education teaching personnel in the advancement of higher education,

²⁶⁴ See BEITER, *supra* note 42, at 229–32; GEBERT, *supra* note 253, at 64–69.

....

that the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education and that the 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, [and]

to ensure that higher-education teaching personnel enjoy the status commensurate with this role.²⁶⁵

The Recommendation's provisions protecting the academic freedom of higher education teaching personnel may therefore be stated to have a basis (also) in Article 13(2)(c).²⁶⁶ In the same way that this Recommendation "gives content" to the right to education in Article 13, UNESCO's Recommendation on the Status of Scientific Researchers of 1974 "gives content" to the more general right to intellectual or scientific freedom in Article 15. This Recommendation's Preamble refers to Article 27 of the Universal Declaration of Human Rights of 1948, which is "the predecessor provision" of what subsequently became Article 15 of the ICESCR.

Who is entitled to claim "academic freedom" under Article 13 of the ICESCR? As has been explained under the previous heading, academic freedom may be claimed by the academic (not the administrative) staff (professors, lecturers, researchers, assistants, etc.) and students in institutions of HE (universities, polytechnics, colleges) and centers of research "close to" the HE milieu. The scope of the right will, however, depend on the specific context (type of institution, academic rank of right-holder, etc.). Academic freedom is reserved to teachers/researchers/students in those public and private institutions dedicated to the trias of learning, teaching, and research,

²⁶⁵ UNESCO Recommendation, *supra* note 39, Preamble.

²⁶⁶ See *General Comment No. 13*, *supra* note 6, note 16 (positioned behind the heading "Academic freedom and institutional autonomy," introducing ¶¶ 38–40 on the topic), which refers to this Recommendation.

and to discovering the truth and advancing knowledge in the general public interest, i.e. not primarily for commercial reasons.²⁶⁷ In view of these considerations—and also because academic freedom substantially concerns allocating academic responsibilities and organizing HE institutions in circumstances in which the state’s supervisory role is markedly reduced (as compared to its role relating to institutions of non-tertiary education) to facilitate achieving the mentioned goals—academic freedom does not apply to primary or secondary schools. For this reason, the Committee’s statement that, even though “staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom[,] . . . staff and students throughout the education sector are entitled to academic freedom,”²⁶⁸ is not quite correct. Such staff and students are entitled to the right to freedom of expression and many other rights *in* education—not, however, to “academic freedom” in the technical meaning of that term.²⁶⁹

In Paragraphs 39 and 40 of General Comment No. 13, the Committee then—referring to UNESCO’s Recommendation of 1997—provides a definition of academic freedom, covering many of the elements elaborated on in that Recommendation: freedom to study, teach, and undertake research, the liberty to express freely opinions about the institution or system in which one works, the liberty to participate in professional or representative academic bodies, individual academic duties, institutional autonomy, and institutional accountability.²⁷⁰ As it were, the Committee allows the

²⁶⁷ Hence, academic freedom does not apply to HE institutions established purely to make a profit. It also does not apply to think tanks, policy institutes, or related NGOs. Naturally, it does not apply to public or private business corporations. In all these instances, the right to intellectual or scientific freedom in Article 15 of the ICESCR is applicable.

²⁶⁸ *General Comment No. 13, supra* note 6, ¶ 38.

²⁶⁹ See BEITER, *supra* note 42, at 503–506 (“The learner as the bearer of rights”) for an indication of the human rights-based rights of learners.

²⁷⁰ See *General Comment No. 13, supra* note 6, ¶¶ 39, 40, respectively.

39. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study,

Recommendation's provisions to inform the normative content of Article 13. It may thus be observed that the Committee has taken initial steps directed at developing the normative potential of Article 13 in the endeavor of providing effective protection for academic freedom. It should pursue these efforts further. To mention just three examples of conceivable areas in which norm clarification would be useful: The Committee might focus on describing "robust" academic speech rights under Article 13, distinguishing, for instance, between academics' intra-mural, extra-mural, and off-topic speech.²⁷¹ It might similarly describe "more robust" rights of freedom of assembly justified in the academic context than may be

discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfill their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

40. The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.

²⁷¹ See VRIELINK ET AL., *supra* note 49, at 14–18, ¶¶ 48–58, on the distinction between intra-mural, extra-mural, and off-topic speech by academics.

available under Article 21 of the ICCPR, or “more robust” rights of freedom of association than may be available under Article 22 of the ICCPR.

Eric Barendt explains that individual academic freedom classically protects academics against laws or administrative acts attempting to control what they can teach or research. He points out that in most countries, claims asserting positive academic freedom rights, such as that the government or a funding body should not withdraw resources from or that it should adequately support a research program, will not be successful.²⁷² He also refers to the fact that academics’ rights of self-governance are essentially positive rights, requiring a normative framework to be created, providing, for example, for the right of academics to be adequately represented on certain HE institution bodies or their right to be heard before certain academic decisions can be taken. In various jurisdictions, such as the U.S., positive participation rights under academic freedom are not granted constitutional protection.²⁷³ It should be noted that by recognizing the right to academic freedom primarily as part of the right to freedom of expression, positive dimensions of this right would enjoy rather weak protection. Although it is now recognized that also civil and political rights entail positive duties,²⁷⁴ positive obligations are easier to accommodate under the category of economic, social and cultural rights, as notably protected in the ICESCR. In terms of Article 2(1) of the latter Covenant, states parties are obliged “to take steps” “to the maximum of their available resources” “to progressively realize rights” (also those in Articles 13 and 15) “by all appropriate means, including particularly the adoption of legislative measures.” Apart from being “a sword” to ward off interferences (negative duties as entailed by all human rights of all categories), protection under the ICESCR ensures that the positive dimension of the right to academic freedom will enjoy

²⁷² BARENDT, *supra* note 13, at 25.

²⁷³ *Id.* at 33–34.

²⁷⁴ See, e.g., the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)*, an expert document, published in 20 HUM. RTS. Q. 691, ¶ 6 (1998) (emphasizing that civil, political, economic, social, and cultural rights impose obligations to respect, protect and *fulfill* on states).

sufficient recognition.

It may finally be noted that, apart from the U.N. Committee on Economic, Social and Cultural Rights, another international human rights body has decided to deal with academic freedom as part of the right to education. Article 17(1) of the African (Banjul) Charter on Human and Peoples' Rights of 1981 thus concisely recognizes that "[e]very individual shall have the right to education." In its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights of 2010, the African Commission on Human and Peoples' Rights, responsible for supervising implementation of the Banjul Charter, emphasizes that this imposes an obligation "[t]o ensure academic freedom and institutional autonomy in all institutions of higher learning."²⁷⁵ Correspondingly, the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights—the so-called Tunis Reporting Guidelines—also of 2010, call upon states parties, when reporting on developing and implementing national plans, policies, and systems aimed at ensuring access to education, to state what steps have been taken to ensure "[a]cademic freedom and institutional autonomy in all institutions of higher learning."²⁷⁶

²⁷⁵ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, ¶ 71(j). The African Commission on Human and Peoples' Rights adopted the Principles and Guidelines at the 47th Ordinary Session held in Banjul, the Gambia, from May 12–26, 2010.

²⁷⁶ State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, ¶ (vi)(c), under D. Right to Education. The African Commission on Human and Peoples' Rights adopted the Reporting Guidelines at the 48th Ordinary Session held in Banjul, the Gambia from Nov. 10–24, 2010.

Conclusion

The above analysis has shown that various provisions of the two U.N. Human Rights Covenants—the ICCPR and the ICESCR—are relevant to protecting (aspects of) the right to academic freedom. All of these constitute potential tools in supporting a claim alleging that academic freedom has been infringed. Article 19 of the ICCPR on the right to freedom of expression, Article 15 of the ICESCR on cultural rights—covering the right to freedom of scientific research—and Article 13 of the ICESCR on the right to education appear particularly relevant. Article 19 of the ICCPR, however, is far less helpful than seems to be the case at first sight. Not only does academic freedom entail much more than free speech rights—it also includes rights of “free action”—but the free speech rights entailed are, moreover, *special* speech rights, circumscribed by the requirements of learning, teaching, and research. Article 15 of the ICESCR, at a minimum, provides a certain common level of protection available to academic and non-academic researchers. The right to academic freedom—as a special form of the right to intellectual or scientific freedom, solely applicable in the higher education context—apart from also being an organizational principle in the sphere of HE, needs to offer a more robust protection to academics (in relation to non-academics) than some might perhaps hold to be available under Article 15. Ultimately, Article 15 lacks a specific reference to the HE context, where the claim to the protection of free inquiry is the most acute.

This article has argued that Article 13 of the ICESCR on the right to education constitutes the proper “home” for the right to academic freedom under the U.N. Covenants. As one of the authors of this article has observed elsewhere:

One of the most fundamental precepts of human rights law is the idea that all human rights are interdependent and indivisible. This means that one human rights entitlement may simultaneously be protected under different human rights provisions. This does not mean, however, that the entitlement

concerned may not quintessentially “be rooted” in a particular provision, whose specific context inspires the overall interpretation of that norm. It is in this sense that the various provisions referred to above should all be relied upon to protect relevant elements of academic freedom. Article 13 ICESCR, however, constitutes the provision which concurrently assembles all aspects of academic freedom under “a single roof” and whose normative context provides the proper framework for interpretation.²⁷⁷

It is submitted that interpreting Article 13 of the ICESCR as providing comprehensive protection to the right to academic freedom

provides a sound basis for developing a coherent set of norms, all elements of which are thoroughly imbued with the normative values of the right to education [as that right has been described here], thus affording prominence to academic freedom as a full-fledged institution, as it were, of international human rights law, whose rules require scrupulous observation.²⁷⁸

It is on this premise that a General Comment on the right to academic freedom should be drafted by the Committee on Economic, Social and Cultural, providing guidance to states parties to the ICESCR in their implementation of that right—and dispelling fundamental misconceptions as to the true purport of this right.

²⁷⁷ Beiter, *A Rejoinder to Antoon de Baets*, *supra* note 167.

²⁷⁸ Beiter, *The Doctrinal Place of the Right to Academic Freedom under the U.N. Covenants on Human Rights*, *supra* note 167.