

Academic freedom as a human right? Facing up to the illiberal challenge

Renata Uitz¹

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Introduction

Academic freedom has an odd place in the warehouse of human rights. When all is well, it tends to be taken for granted² (i.e. it is neglected),³ as often happens with cherished concepts and idea(l)s that underscore constitutional democracy. When the global demise of constitutional democracy started to shrink academic freedom⁴, the intimidation and silencing of scholars was decried as a symptom of greater systemic problems.

In 2014 in a joint concurring opinion Judges Sajó, Vucinic and Kuris of the European Court of Human Rights (ECtHR) reminded that the “meaning, rationale and scope of academic freedom are not obvious, as the legal concept of that freedom is not settled.”⁵ In a similar spirit, in 2020 David Kaye, the outgoing UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression devoted his last report to academic freedom, starting with the somber admission that “there is no single, exclusive international human rights framework for the subject.”⁶ The elusiveness of

¹ Professor of comparative constitutional law. Central European University, Vienna - Budapest; distinguished visiting professor, University College London (AY 2020-21). Earlier versions of this paper were presented at seminars at CEU in Budapest, FGV in Sao Paolo and Bard College, Berlin. Draft prepared for the Bonavero Center’s discussion group meeting on 9 February 2021. References to be completed.

² E.g. Eric Barendt, *Academic Freedom and the Law*, Hart Publishing, 2010 at 12. Liviu Matei, “Charting Academic Freedom in Europe,” 455, in *European Higher Education Area: Challenges for a New Decade*, eds. Adrian Curaj, Ligia Deca, Remus Pricopie, Springer 2020, at 457.

³ https://www.ucu.org.uk/media/8614/Academic-Freedom-in-the-UK-Legal-and-Normative-Protection-in-a-Comparative-Context-Report-for-UCU-Terence-Karran-and-Lucy-Mallinson-May-17/pdf/ucu_academicfreedomstudy_report_may17.pdf

⁴ See e.g. <https://unesco.se/the-shrinking-academic-freedom-in-europe-world-science-day-for-peace-and-development-symposium/>; <https://www.icnl.org/post/report/closing-academic-space>.

⁵ *Mustafa Erdogan v. Turkey*,

⁶ <https://www.undocs.org/A/75/261>, para. 5.

academic freedom was also recognised by scholars who were urging⁷, or attempting to develop a scale⁸ or a dedicated Academic Freedom Index (AFI)⁹. This lack of clarity is the product of numerous forces. For better or worse, academic freedom sits at the intersection of numerous disciplines that treat it as an aspiration, an ideal, a value, a principle or — to quote Joan W. Scott — a “complicated idea with limited application.”¹⁰

This paper investigates whether — and why — academic freedom merits protection as a human right. It starts from the premise also recognised by the UN Special Rapporteur, accepting that “[a]ttacks on academic freedom corrode the pillars of democratic life, of scientific progress and of human development.”¹¹ It argues that illiberal practices triggering the demise of constitutional democracy¹² also present an existential challenge to academic freedom as a human right.

Raising an alarm about illiberal practices and academic freedom may sound overly dramatic at first. Despite their anti-elitist rhetoric, illiberal leaders do not seek to close universities and research institutes. Instead, they implement comprehensive higher education reforms, using rationales that are well-familiar in political and academic circles, such as austerity and economic efficiency considerations, the pursuit of academic excellence and concern about fraudulent practices. Illiberal practices rely on the vocabulary of constitutional democracy, with a special twist. Strategic adjustments to legal rules exert just the right amount of chilling effect, keeping dissent and critique at bay (and largely out of the public sphere). Over time, illiberal practices turn the university from a site of critical inquiry into a font of legitimacy, and the site of illiberal *Zeitgeist* on a global scale.

Whether imperiled by autocratic regimes, overzealous bureaucrats, populist politicians or a financial crisis, universities are easy targets: higher education is subject to intense regulation and is dependent on public funding in every constitutional democracy.¹³ Academic freedom is vulnerable to illiberal chicanery, as it depends on ‘a general enabling environment’¹⁴: the haziness of the concept together with the vocabulary of positive obligations and institutional protection is easily misused to mask restrictions on the individual liberties. In the course of defending educational reforms, the practitioners of illiberal chicanery transform the potentially applicable human rights framework into a vehicle of dissipating liberty. Their techniques are hardly novel: they follow in the footsteps of the conservative legal movement that repurposed the Civil Rights movement’s techniques of community building, networking, advocacy and strategic lawyering to defend traditional values and the preferences of the majority.¹⁵

This paper aims to locate the conceptual core of academic freedom and mobilise it in defence of academic freedom as a human right. It is propped in part by the recent judgment of the Court of Justice of the European Union (CJEU) and the opinion of AG Kokott in a case (C-66/18, *Commission v. Hungary*) that found that amendments to Hungarian higher education rules violated, *inter alia*, academic freedom under Article 13 of the EU Charter of Fundamental Right.

After a review of definitions of academic freedom in documents often cited in human rights circles in Part I, Part II argues that at its core academic freedom is a shorthand for the freedom of

⁷ Philip G. Altbach, “Academic Freedom: International Realities and Challenges,” *Higher Education* 41: 205–219, 2001.

⁸ Klaus D. Beiter, Terrence Karran, Kwadwo Appiagyeyi-Atua, “Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right,” *3 European Journal of Comparative Law and Governance* 254- 345 (2016).

⁹ See Jannis Grimm, Ilyas Saliba, “Free Research in Fearful Times: Conceptualizing an Index to Monitor Academic Freedom,” *Interdisciplinary Political Studies* 3, 1: 41-75 (2017); also Katrin Kinzelbach (ed.) *Researching Academic Freedom: Guidelines and Sample Case Studies*, FAU University Press 2020.

¹⁰ Joan Wallace Scott, *Knowledge, Power, and Academic Freedom*, Columbia University Press (2019) at 39.

¹¹ <https://www.undocs.org/A/75/261>, para. 2.

¹² Fareed Zakaria, “The Rise of Illiberal Democracy,” *Foreign Affairs* 76(6): 22-43 (1997).

¹³ Judith Butler, “Academic Freedom and the Critical Task of the University,” *Globalizations* (2017)-

¹⁴ <https://www.undocs.org/A/75/261>, para. 9.

¹⁵ Steven M. Teles, *The Rise of the Conservative Legal Movement*, 2008; Virág Molnár, “Civil Society, Radicalism and the Rediscovery of Mythic Nationalism,” *Nations and Nationalism* 22(1): 165-185 (2016); Adam Hug, “The Rise of Illiberal Civil Society?,” July 18, 2018, <https://fpc.org.uk/introduction-the-rise-of-illiberal-civil-society/>,

Grzegorz Ekiert, “The Dark Side of Civil Society,” 24 June 2019, <http://conciliumcivitas.pl/the-dark-side-of-civil-society/>;

Grzegorz Pietrowski, “Civil Society in Illiberal Democracy: The Case of Poland”. *Politologický časopis - Czech Journal of Political Science* 2: 196-214 (2020).

professional critical inquiry, supported by an institutional environment and perfected through open debate that is essential for the daily operation of constitutional democracy. In short, in the best tradition of civil and political rights, academic freedom is a *rebel right*. Part III provides an overview of illiberal practices that seek to tame the rebellious features of academic freedom, turning it into a vehicle of acclamation. Part IV explores recent developments in European human rights jurisprudence, while Part V maps resources that can be mobilised in defense of academic freedom from illiberal practices, especially from institutional reforms and their chilling effect on individual liberty.

In doing so, it responds to the call of Martin Loughlin, warning that “the contemporary crisis [of constitutional democracy] cannot be found only by strengthening liberal institutions; to survive, constitutional democracy must also seek to reinvigorate its democratic aspirations.”¹⁶ It shows that if academic freedom is treated as a rebel right, its defenders can help rescue constitutional democracy from sliding into the banality¹⁷ of illiberal democracy. The creeping normalisation of illiberal practices gives an intellectual and practical urgency to this exercise.

I. In search of a definition: Between individual and institutional considerations

Despite the elusiveness of the concept, definitions of academic freedom are aplenty, and are often tailored to practical applications. The picture becomes murky when the definition has to account for both the individual and the institutional dimension of academic freedom, as especially for the detrimental impact of institutional factors on individual academic freedom. Definitions oscillate between defining academic freedom as an individual right of professionals and as a background principle of organising university life, with more recent signals from the UN pointing towards framing academic freedom as an individual right of members of the academic community in their intellectual pursuits.

This fluctuation may be explained in part by the particular formulation of the underlying instruments some of these recommendations bring to life: e.g. Article 15(3) ICESCR that formulates a duty of states to ‘respect the freedom indispensable for scientific research and creative activity’ — and not an individual right. At the same time, even a superficial reading of these definitions suggests that the differences are not explained fully by black letter considerations: there are numerous instances of protection of academic freedom as an individual right with reference to freedom of expression. The fact that some of these recommendations focus on university life or governance does not explain the differences in presenting academic freedom either.

In Europe the 1988 Magna Charta Universitatum posited academic freedom to be the “fundamental principle of university life” that governments should ensure to respect. In the same year — on the occasion of the 40th anniversary of the UDHR the World University Service formulated the Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education that defines academic freedom as

“the freedom of members of the academic community, individually or collectively, in the pursuit, development and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing and writing.”

Two formulations on the very same concept could not be farther apart: one positing a background principle, another an individual right.

The 1997 UNESCO recommendation concerning the Status of Higher-Education Teaching Personnel defines academic freedom as

“the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from

¹⁶ Martin Loughlin, “The Contemporary Crisis of Constitutional Democracy,” 39 OJLS 435.

¹⁷ Judith Butler, “Hannah Arendt’s Challenge to Adolf Eichmann,” The Guardian, August 29, 2011, <https://www.theguardian.com/commentisfree/2011/aug/29/hannah-arendt-adolf-eichmann-banality-of-evil>.

institutional censorship and freedom to participate in professional or representative academic bodies.”

Along largely similar lines in 2006 the Parliamentary Assembly of the Council of Europe (PACE) proclaimed 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 without restriction.”¹⁸ These formulations of academic freedom points towards accepting it as an individual right, with elements that are familiar from the realm of freedom of expression

In contrast the UNESCO’s 1974 recommendation on science and scientific researchers was much more reserved about academic freedom of scientific researchers (i.e. a specific class of academics), emphasizing instead their public accountability, and the duty of states to show “utmost respect for the autonomy and freedom necessary to scientific progress” (point 8). The 2017 revision of the UNESCO recommendation puts this duty in even more stern terms, as “utmost respect for the autonomy and freedom of research indispensable to scientific progress” (point 10) without mentioning the academic freedom of scientific researchers. Instead, the recommendation urges states to “treat public funding of research and development as a form of public investment” (point 6) and urges them to “bear in mind that the scientific researchers’ sense of vocation can be powerfully reinforced if they are encouraged to think of their work in terms of service both to their fellow nationals and to their fellow human beings in general” (point 2015).

The 2012 recommendation of the Council of Europe’s Committee of Ministers (CoM) on the responsibility of public authorities for academic freedom and institutional autonomy provides that “[a]cademic freedom should guarantee the right of both institutions and individuals to be protected against undue outside interference, by public authorities or others. It is an essential condition for the search for truth, by both academic staff and students, and should be applied throughout Europe. University staff and/or students should be free to teach, learn and research without the fear of disciplinary action, dismissal or any other form of retribution.”¹⁹

In addition, academic freedom needs to be balanced against institutional autonomy “through deliberation and consultations involving public authorities, higher education institutions, the academic community of staff and students and all other stakeholders.”²⁰

On its face this approach is more comprehensive than the 1997 UNESCO and the 2006 PACE recommendations, as it includes institutions and students among the beneficiaries of academic freedom, and also extends to student learning. In doing so, it drops the emphasis on academic freedom as an individual right that is specific to a particular profession. Rather, it treats academic freedom as a principle animating academic life that should inform policy decisions, but does not have a priority over other considerations.

In 2020 the UN Special Rapporteur defined academic freedom as

“the freedom of individuals, as members of academic communities (e.g., faculty, students, staff, scholars, administrators and community participants) or in their own pursuits, to conduct activities involving the discovery and transmission of information and ideas, and to do so with the full protection of human rights law.” (para. 8).

Positing academic freedom as an individual — and not as an institutional — right that is distinct from freedom of expression, this definition includes all members of the academic community. Yet, it appears narrower than the CoM recommendation, as it does not mention student learning expressly, referring more broadly the ‘pursuits’ of members of the academic community. Mindful of the institutional dimension of academic freedom, the Special Rapporteur — drawing on a trove of examples from practice — highlighted the restrictions that institutional protection imposes on academic freedom.²¹

¹⁸ Recommendation 1762 (2006), Academic Freedom and University Autonomy, 4.1

¹⁹ Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy, para 5.

²⁰ Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy, para 4.

²¹ <https://www.undocs.org/A/75/261>, para. 11.

II. Conceptualising academic freedom as a human right: Meet the rebel

II.1. Delineations and tensions

Based on the above overview of definitions, it appears that attempts at a definition of academic freedom as a human right attempt to (1) identify its unique characteristics that (2) set it apart from other human rights (e.g. freedom of expression) and (3) reconcile its institutional and collective dimensions with its individual ones. These key dilemmas do not appear to depend on the exact wording of applicable black letter provisions. This is due in part to the often mentioned conceptual haze, and in part to the apparent interdependence of the individual and institutional dimensions of academic freedom.

This section, explores the dilemmas surrounding the more technical elements of definitional efforts, focusing on what sets academic freedom apart from other human rights, and how its individual and institutional dimensions relate to each other. The next section is devoted to exploring the core characteristics of academic freedom that are often taken for granted when legal definitions are crafted. The discussion takes Robert Post's advice to distinguish between the professional and the legal (constitutional) definitions of academic freedom from the outset, reminding that the professional notion evolved in light of the changing purpose of higher education in a given society.²²

It is clear from the outset even minimalistic definitions aim to move beyond protecting academic freedom solely as a subset or type of freedom of expression. One way to emphasize the unique characteristics of academic freedom is to restrict it to protecting the pursuits of academics (excluding student learning). In the US context Matthew Finkin and Robert Post identified four dimensions of academic freedom that set it apart from freedom of expression: freedom of research and publication, freedom in the classroom, freedom of intramural speech, freedom of extramural speech. This approach also keeps academic freedom distinct — for the purposes of identifying its normative basis — from the right to education²³, a right that belongs to students and prospective students seeking access to education.

The premises and consequences of the distinction between academic freedom and freedom of expression were emphasised by several authors over the years. Robert Post explained that “academic freedom exists to protect the ability of academics to pursue their professional tasks. Academic freedom does not concern human freedom generally, but rather *the autonomy of the scholarly profession*” (emphasis added).²⁴ Elsewhere he emphasised expressly that “academic freedom refers not only to the freedom of faculty, but also to the specific institution of the university.”²⁵ Such a definition, positing academic freedom as professional freedom is used by the UK Equality and Human Rights Commission that frames academic freedom as a freedom of professionals from undue interference: “Academic freedom relates to the intellectual independence of academics in respect of their work, including the freedom to undertake research activities, express their views, organise conferences and determine course content without interference.”²⁶

Eric Barendt stresses that this is a far cry from a privilege to say whatever one likes in the public discourse. This means that unlike in the ‘marketplace of ideas’ associated with the general public

²² Robert C. Post, “Academic Freedom and the Constitution,” in *Who's afraid of academic freedom?* / edited by Akeel Bilgrami and Jonathan R. Cole., Columbia UP, 2015, 123, at 124. Also: Matthew Finkin - Robert Post, *For the Common Good: Principles of American Academic Freedom*, Yale University Press, 2009, at 9.

²³ See the debate in Klaus D. Beiter, Terrence Karran, Kwadwo Appiagyei-Atua, “Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right,” *3 European Journal of Comparative Law and Governance* 254- 345 (2016).

²⁴ Robert Post, “Why Bother with Academic Freedom?,” *9(3) FIU Law Review* 9 (2013). Also Matthew Finkin - Robert Post, *For the Common Good*, 149: [academic freedom is] “freedom to pursue the scholarly profession according to the standards of that profession.”

²⁵ Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Yale University Press (2013) 135 (iBooks)

²⁶ Equality and Human Rights Commission: *Freedom of expression: a guide for higher education providers and students' unions in England and Wales*, February 2019, <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>, at 15

discourse, “academic freedom protects scholarly speech only when it complies with “professional norms”;²⁷ in other words, subject to professional rules of pursuing truth claims and to quality control for accuracy and coherence by professional standards.²⁸ When posited as such, academic freedom can be understood as a form of self-restraint (or unfreedom) that voluntarily submits “free inquiry” to the unique professional rules of the academy²⁹.

As the link between academic freedom and university autonomy appears intuitively evident (and is reinforced by dedicated recommendations on the subject), definitions of academic freedom as a human right tend to account for both³⁰. Acknowledging that the two dimensions are intertwined³¹, definitions often conceal how easily these two dimensions end up being be at odds with each other.

In practice, this relationship is complicated at best, and as in the course of complying with its positive obligations the modern state tends to get tenacious. Judith Butler explains how the relationship between the state, academic institutions and scholars should work: “[t]he state funds that which it cannot fully control—that is how democracies should work—and that freedom from censorship and control is a central meaning of academic freedom.”³² In practice, as the UN Special Rapporteur pointed out, although states are meant to create “a general enabling environment for academic freedom,”³³ state interference with institutional protection restricts academic freedom: it “undermine[s] the ability of the institution to protect the academic freedom of its community members and to serve its broader functions in society.”³⁴

In recommendations that explore academic freedom in the context of university life, there is a tendency to turn it into a principle or value, rather than an individual right. General Comment no. 25 adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in April 2020 departs from this approach and takes a strong stance on academic freedom as a freedom of individual researchers on account of outlining the duties of states to respect to ‘respect the freedom indispensable for scientific research and creative activity’ (Article 15(3) ICESCR)). It provides examples for doing so, such as

“protection of researchers from undue influence on their independent judgment; their possibility to set up autonomous research institutions and to define the aims and objectives of the research and the methods to be adopted; the freedom of researchers to freely and openly question the ethical value of certain projects and the right to withdraw from those projects if their conscience so dictates; the freedom of researchers to cooperate with other researchers, both nationally and internationally; the sharing of scientific data and analysis with policymakers, and with the public, wherever possible.” (para 13).

Although two such documents from the UN do not establish a trend in human rights, they definitely send a strong signal towards taking academic freedom as an individual right seriously.

II.2. Academic freedom as a rebel right: From dreams of a new university to dreams of a constitutional democracy

Foundational works on academic freedom — think Wilhelm von Humboldt, Cardinal Newman, John Dewey, Karl Jaspers or Paulo Freire — explored the concept with a view to creating a new university that meets the demands of modern times. Proposals for a ‘new’ university by definition challenge the *status quo*, and propose set ups that are designed to do the same on an institutional scale. To paraphrase Jonathan Cole, the pursuit of new knowledge means that most typical site of academic freedom, the research university is “*designed to be unsettling*.”³⁵ This feature is essential for

²⁷ Robert C. Post. *Democracy, Expertise, and Academic Freedom*.

²⁸ Barendt, *Academic Freedom and the Law*, 20.

²⁹ Adam Sitze, *Academic Unfreedom, Unacademic Freedom*, Part I *The Massachusetts Review* 58(4): 589 (2017), at 598.

³⁰ Barendt, *Academic Freedom and the Law*, 20-21.

³¹ <https://www.undocs.org/A/75/261>, para. 9.

³² Judith Butler, “Academic Freedom and the Critical Task of the University,” *Globalizations* 2017, at 2.

³³ <https://www.undocs.org/A/75/261>, para. 9.

³⁴ <https://www.undocs.org/A/75/261>, para. 11.

³⁵ Jonathan R. Cole, “Academic Freedom under Fire,” 40. *Who’s afraid of academic freedom?* / edited by Akeel Bilgrami

conceptualising academic freedom as a human right, as it speaks the nature of the human pursuit that the human rights framework would need to account for: it may be dressed up in flowing gowns and encased in centuries old walls, yet, at its core, academic freedom is one of the *rebel rights*.

For professional academics it is trivial that new knowledge is the product of critical inquiry. The university as the institutional environment of critical inquiry fosters the production of new knowledge through opportunities of developing and testing ideas, and perfecting them through open debate. Any serious discussion on critical inquiry and the university is bound to lead to Kant (especially to *The Conflict of the Faculties* (1798)), and to the problem of state intervention with critical inquiry. In the words of Joan Wallach Scott:

“[f]rom the late eighteenth century on, there has been a tension between two avowed purposes of the university: to educate the citizens of the nation- state and, equally importantly, to encourage the critical thinking that would correct abuses of power and furnish the nation with the creativity and change that were vital to national well- being. Unfettered rational inquiry was taken to be the best guarantee of a healthy national future.”³⁶

Going beyond Kant’s initial argument on the ordering of faculties in the university, Judith Butler unpacks the Kantian notion of critical inquiry to show that it is bound to become uncomfortable for the state, as it applies to “the legitimating grounds of various public and governmental agencies. Hence, ... what is critical in academic work relates more broadly to the problem of *political dissent*, where the latter is understood as a way of objecting to illegitimate claims of public and governmental authority.”³⁷ This is roughly what Robert Post calls democratic capacity.

Importantly, Butler highlights, that what Kant envisioned as the freedom of philosophy from politics depends on political preconditions that are “built into the structure of university ... and its public mandate.”³⁸ Recently Michael Ignatieff translated this dimension of academic freedom into terms that resonate with the structural underpinnings of constitutional democracy and the protection of human rights, emphasising that universities are counter-majoritarian institutions; as such they “belong with the courts, the media, professional associations and civil society organizations as critical defenders of a democracy robust enough to resist the drift to tyranny.”³⁹

Accounting for the features of the university as the site of critical inquiry and a potential source of political dissent, Butler makes a compelling argument for a *three- way covenant*:

“a compact among the academic researcher, the university, and the state, for the state must accept the academic freedom of institutions and agree to restrain itself from intervention into matters that only those appointed within the university are entitled to decide.”⁴⁰

This approach assists with conceiving of the institutional environment of academic freedom as a human right not only as the gesture of the state to meet its positive obligations, but also as a source of restrictions on individual academic freedom — in case the state fails to restrain itself, thus getting in the way of critical inquiry that is at the core of academic freedom as a human right.

Due to populist and illiberal claims that put the university at heart of political projects that aspire to rebuilding the nation to its past glory, it is only prudent to take Scott’s guidance⁴¹ and view the challenge that nation building poses to universities — and academic freedom — through the spectacles of Edward Said’s account on the fate of post-independence Arab state universities. At the time universities became “extensions of the newly established national security state.”⁴²

“Political conformity rather than intellectual excellence was often made to serve as a criterion for promotion and appointment, with the general result that timidity, a studious lack of imagination,

and Jonathan R. Cole, *Columbia UP* (2015) at 50.

³⁶ Joan Wallach Scott, *Knowledge, Power and Academic Freedom*, 2019, at 96.

³⁷ Judith Butler, “Critique, Dissent, Disciplinarity,” *Critical Inquiry* 35(4): 773-795 (2009) at 775.

In a similar vein: Judith Butler, “Academic Freedom and the Critical Task of the University,” *Globalizations* (2017), at 2.

³⁸ Judith Butler, “Critique, Dissent, Disciplinarity,” *Critical Inquiry* 35(4): 773-795 (2009) at 779-780.

³⁹ Michal Ignatieff, “Academic Freedom from Without and Within,” 1, in *Academic Freedom: The Global Challenge*, eds. Michael Ignatieff and Stefan Roch. CEU Press (2018) at 8.

⁴⁰ Judith Butler, “The Criminalization of Knowledge,” *The Chronicle of Higher Education*, May 27, 2018, <https://www.chronicle.com/article/the-criminalization-of-knowledge/>.

⁴¹ Joan Wallach Scott, *Knowledge, Power and Academic Freedom*, at 97 et seq.

⁴² Edward W. Said, *Identity, Authority, and Freedom: The Potentate and the Traveler*, boundary 2, Autumn, 1994, Vol. 21, No. 3 (Autumn, 1994), pp. 1-18, at 7

and careful conservatism came to rule intellectual practice. ...nationalism in the university has come to represent not freedom but accommodation, not brilliance and daring but caution and fear, not the advancement of knowledge but self-preservation. ... It became possible for one to be free in the university only if one completely avoided anything that might attract unwelcome attention or suspicion.”⁴³

What Said highlights here is the impact of the overall political context and institutional environment on free inquiry, i.e. the core of academic freedom. He draws attention to the deep transformative effect of the political and institutional changes that came to inhibit critical inquiry through the instilling caution and fear, forces that are best known in human rights parlance as chilling effect.

To summarise: at its core, academic freedom is one of the rebel rights - just like freedom of expression, freedom of assembly (also known as the right to protest) or religious liberty (as exercised by religious minorities). These are the freedoms that enable the public competition and contestation on which constitutional democracy thrives. Critical inquiry, including questioning the status quo and testing ideas in uninhibited, open debate are the essential features of academic freedom. Depending on the conventions of a profession, the probing of particular propositions (truth claims) takes different forms and is conducted under professional standards by members of the academic community in institutional settings that serve (and are dedicated to serve) such efforts. What makes academic freedom worthy of protection as a human right is the contribution such genuine intellectual pursuits make to the operation of a constitutional democracy on a daily basis: critical inquiry, questioning and dissent of this kind are essential for a robust public debate and — ultimately — for holding government accountable, as is essential for self-government in a constitutional democracy. Academic freedom as a human right can only be defended from illiberal practices if their chilling effect — transmitted through institutional reforms — is confronted without further trepidation.

III. The illiberal challenge to academic freedom

The political and legal practices associated with illiberal democracy rely on the vocabulary of constitutional democracy to gradually build a plebiscitary leadership regime (or delegative democracy).⁴⁴ Critical inquiry and open contestation do not suit the illiberal political agenda, as they result in constitutional accountability and pluralism associated with constitutional democracy. The illiberal arrogation and centralisation of executive powers is often matched by increased state control in the economy and also in education. Through meticulous, if excessive legalization -- illiberal lawfare⁴⁵ -- illiberal democracy becomes a banal everyday experience.

Despite their loud anti-intellectualism and anti-elitism, so far the record shows that illiberal rulers are not in the business of eliminating universities. Instead, over time they seek to transform academia into a tool of acclamation. They discourage robust dissent, expect the transformation of academia to boost the legitimacy of illiberal rule and — ultimately — to cultivate the illiberal *Zeitgeist*. Similar control and cooptation strategies have long been identified in authoritarian regimes that invest in higher education to increase their chances of survival⁴⁶ through cultivating the support (or at least acquiescence) of the intelligentsia.⁴⁷

In order to capture the genius of illiberal academic reforms, the discussion will provide examples of illiberal practices irrespective of regime type. This approach acknowledges that currently authoritarian regimes (like Russia or Turkey⁴⁸) implemented educational reforms in an iterative manner

⁴³ Edward W. Said, *Identity, Authority, and Freedom: The Potentate and the Traveler*, boundary 2, Autumn, 1994, Vol. 21, No. 3 (Autumn, 1994), pp. 1-18, at 7-8.

⁴⁴ Uitz in *Routledge Handbook of Illiberalism* (forthcoming), with a review of the literature.

⁴⁵ <https://globalchallenges.ch/issue/2/orbans-lawfare-liberal-democracy-hungary/>.

⁴⁶ Margaret Hason - Sarah Wilson Sokhey, “Higher Education as an Authoritarian Tool for Regime Survival: Evidence from Kazakhstan and around the World,” *Problems of Post-Communism* (14 April 2020), <https://www.tandfonline.com/doi/full/10.1080/10758216.2020.1734839>.

⁴⁷ Elizabeth J. Perry, “Educated Acquiescence: How Academia Sustains Authoritarianism in China,” *Theory and Society* 49, 1-22 (2020).

⁴⁸ Sinan Eremcü, Aysa Alemdaroglu, “Dialectics of Reform and Repression: Unpacking Turkey's Authoritarian “Turn”,” *Review of*

that is responsive to local developments. This approach also acknowledges that illiberal practices draw on the legal tools of constitutional democracies, exploiting the gaps and inconsistencies of familiar concepts. Often it is not a particular measure itself, but the change from one solution to the next that produces the requisite illiberal effect.

In illiberal settings innovation in higher education is not driven by the academic profession, but is dictated by the government, according to its political needs and priorities. Illiberal education reforms take advantage of the conceptual haze surrounding academic freedom, and exploit the opportunities delivering on positive obligations (institutional protection) offer for restricting academic freedom through the mastery of the credible threats, translating into a chilling effect. When illiberalism is in the air, the spirit of times inspires private and state action, and it is meant to do so: in 2019 President Bolsonaro proposed stripping the Paulo Freire from this honorary title of Brasil's 'patron of education,' in an effort to tackle the scourge of leftist indoctrination, and replace it with 'neutrality' that reinforces traditional morals in public education.⁴⁹ Soon state governments copied federal measures restricting academic freedom without being required to do so.⁵⁰

The means used to achieve these aims are diverse, but — for the most part — are far less dramatic than the mass arrest and dismissal of Turkish professors after the 2016 coup would suggest.⁵¹ The prime examples include the prosecution or dismissal of eminent scholars for criticising the government or measures targeting particular institutions. The refusal of an eminent Russian university, the Higher School of Education, to renew the contracts of faculty members who criticised the constitutional reforms of 2020 is a classic of the genre.⁵² Cutting ties with former employees was made possible by previous reforms that shortened the length of faculty contracts in the name of improving the fiscal management and promoting academic excellence.⁵³

High-profile measures should be treated as part of a comprehensive agenda of illiberal social transformation. As Andrea Pető argued the Hungarian government's sudden decision of 2018 to remove gender studies from the list of disciplines that can be offered at the master level should be seen as a test balloon in a political climate where the war on gender ideology holds may political actors together⁵⁴ in defense of Christian-conservative values.⁵⁵ The Christian-conservative sentiment was scripted gradually into the Hungarian Fundamental Law, with an amendment in late 2020, making it the duty of the state to ensure the education of children according to their biological sex at birth, in line with the values of Hungarian constitutional identity and Christian values (Article XVI(1), as amended).⁵⁶ (That this new state obligation may directly collide with the right of parents 'to choose the upbringing to be given to their children' (Article XVI) did not stand in the way.)

The drama of high-profile cases is accompanied by everyday administrative harassment. Administrative hazing tends to have a veneer of reasonableness: it is hard to question the wisdom of enforcing fire regulations. The license of the European University in St Petersburg may have been revoked in 2017, but the fire safety, sanitary and epidemiological inspections started in 2008.⁵⁷ The first fire inspection -- resulting in the temporary closure of the campus -- was prompted by the participation of the University in an EU funded Project of Interregional Electoral Chains of Support, advising political parties on best election practices⁵⁸ that triggered an accusation that the University was "interfering in the internal affairs of the Russian Federation."⁵⁹

Middle East Studies 52(1): 16-28 (2018).

⁴⁹ <https://www.opendemocracy.net/en/democraciaabierta/why-is-the-brazilian-right-afraid-of-paulo-freire/>.

Also Conrado Hübner Mendes, "Academic Freedom in Brazil," 63 in Kinzelbach ed.

⁵⁰ Hübner Mendez, "Academic Freedom in Brazil,"

⁵¹ <https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>.

⁵² <https://en.newizv.ru/news/society/27-08-2020/lecturers-dismissed-from-hse-open-free-university>.

⁵³ <https://www.opendemocracy.net/en/odr/cuts-cuts-cuts-life-and-times-of-russia-s-university-teachers/>.

⁵⁴ <https://progressivepost.eu/spotlights/gender-as-a-symbolic-glue-makes-european-freedom-of-education-at-stake>. Also <https://www.insidehighered.com/quicktakes/2018/10/17/hungary-officially-ends-gender-studies-programs>.

⁵⁵ <https://www.theatlantic.com/international/archive/2019/06/europe-far-right-target-gender-studies/591208/>.

⁵⁶ An unofficial translation of the consolidated text of the Fundamental Law is available on the website of the Constitutional Court: https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf.

⁵⁷ Yevgenia Albats, "The Direction of Russian Politics and the Putin Factor," Atlantic Council, issue brief, 2018, 1-, at 2.

⁵⁸ <https://www.theguardian.com/world/2008/feb/11/russia.highereducation>.

⁵⁹ Dmitry Dubrovski, <https://www.opendemocracy.net/en/odr/closure-of-european-university-at-st-petersburg-dead-cert/>.

Illiberal interference with academic freedom often targets university self-government (university autonomy), through strategic appointments or institutional reforms. For his part, President Bolsonaro simply decided to reanimate the discretionary nature of the president's constitutional powers in appointing rectors, going against the long established convention of appointing the preferred candidate of the university, and then resorted to emergency measures to appoint acting (*pro tempore*) rectors without election or consultations with the affected institutions.⁶⁰ In 2018 the Polish government embarked on a higher education reform⁶¹ that expanded the powers of rectors (allegedly modelled on the powers of the vice-chancellor at the University of Cambridge) and added an external council, allegedly following Western models. Predictably, loyal appointments to these new positions followed in due course.⁶² Such interventions ensure that on the ground the transformation of academia is implemented not by government decree, but by universities themselves. This lends new meaning to university autonomy, and also deploys the chilling effect of institutional rules on a personal level.

Changes to university funding are labelled as rationalization, with a flair of increasing the efficiency of spending and boosting academic excellence. And illiberal architects of educational reforms are well aware of the reluctance of courts to challenge the redistribution of public resources.

The rationalisation of higher education spending may require the merger and even closure of universities, as well as the dismissal of staff.⁶³ In 2018 as a result of President Putin's currently running campaign to close 'dud' universities 46 universities were closed and more than 20 had their licenses suspended.⁶⁴ Spending cuts may call for closer governmental financial oversight. The Hungarian government created the position of chancellors to oversee university spending, thus undermining the financial autonomy of self-governing professional actors.⁶⁵ That the term chancellor sounds inoffensive in higher education parlance makes such reforms explain this move to an international audience.⁶⁶

In Brazil shortly after Bolsonaro's the attack on Freire's legacy, the minister of education proposed major funding cuts to federal universities (with reallocations of funding from 'leftist' disciplines of sociology and philosophy to useful disciplines as engineering and medicine).⁶⁷ To add some flavour to the measures, the minister encouraged students to record leftist indoctrination experienced in the classroom. Aspirations to boost academic excellence justified Russia's creation of dedicated federal research universities in 2009, shortly followed by an academic excellence program⁶⁸ to increase the visibility of top Russian universities internationally.⁶⁹ Comparative research suggests that Russia's reform measures -- complete with financial incentives, performance indicators and administrative intervention - - consolidated state-control over higher education.⁷⁰

The 2018 Polish higher education reform also included an excellence plan that designates top research universities for extra funding, based on the German model of boosting academic excellence.⁷¹ In practice -- just as feared -- the reforms open opportunities for considerable political interference with university affairs and the allocation of research funding. The minister of education is "known for personally intervening in academic funding decisions, such as those of the National Programme for the Development of the Humanities. Grants in the humanities and social sciences have become almost impossible to get for those working in gender or cultural studies."⁷² A comprehensive

⁶⁰ Hübner Mendez, "Academic Freedom in Brazil," 73.

⁶¹ https://eacea.ec.europa.eu/national-policies/eurydice/content/national-reforms-higher-education-50_en

⁶² <https://www.timeshighereducation.com/features/polands-higher-education-reforms-power-grab-or-necessary-adjustment>.

⁶³ <https://www.opendemocracy.net/en/odr/cuts-cuts-cuts-life-and-times-of-russia-s-university-teachers/>.

⁶⁴ <https://www.universityworldnews.com/post.php?story=20200211104538186>.

⁶⁵ Gergely Kováts, Balázs Heindrich, Nick Chandler, "The Pendulum Strikes Back? An Analysis of the Evolution of Hungarian Higher Education Governance and Organizational Structures since the 1980s," *European Educational Research Journal* 16(5): 568–587 (2016), at 578.

⁶⁶ On chancellor shared her insight on best practices in accounting during merging and de-merging public universities: - international knowledge exchange on merging and de-merging public universities more efficiently:

https://www.asz.hu/storage/files/files/public-finance-quarterly-articles/2016/pavlik_2016_2_a.pdf.

⁶⁷ <https://www.opendemocracy.net/en/democraciaabierta/why-is-the-brazilian-right-afraid-of-paulo-freire/>.

⁶⁸ <https://www.5top100.ru/en/about/more-about/>.

⁶⁹ <https://strategy.hse.ru/en/about5-100>.

⁷⁰ Lukas Bischof, "Effects of the Bologna Process on Quality Assurance Regimes in the Post-Soviet Space: Isomorphism and Path-dependencies in Moldova, Russia and Kazakhstan," in *European Higher Education Area: 2018*.

⁷¹ <https://www.insidehighered.com/news/2019/12/05/poland-give-extra-funds-top-research-universities>.

⁷² <https://www.timeshighereducation.com/opinion/polands-new-higher-education-laws-are-unholy-mess>.

institutional reform -- with spending cuts and an attempt to install ministerial control over the distribution of research funding -- recast the institutional architecture of the research institutes of the Hungarian Academy of Sciences in 2019.⁷³ This followed the physical relocation of several research institutes to a newly built venue, a move explained in terms of increasing research efficiency to attract European research funding.⁷⁴

Illiberal rationalisation does not necessarily result in an overall reduction of spending on higher education, but spending on institutions and projects that the regime prefers. After initial spending cuts⁷⁵ and forced mergers in the name of austerity, since 2014 the Orbán government's expenditure on higher education has increased steadily, reaching a +4.2% increase in expenditure in real terms, exceeding the 2008 level in 2019, despite a continuous decline of student numbers. Considerable investment was devoted to creating a new University of Public Service (complete with a newly built campus) and an astonishing new campus built for the Moholy-Nagy University of Art and Design.⁷⁶

Opening up avenues of private funding for public universities — a move that can be interpreted as an attempt to modernise or liberalise without further warning — can be exploited for illiberal ends. In Turkey between 2002 and 2007

“deregulation and privatization had opened up new spaces and points of entry to the field of education for Islamic communities (*cemaat*) ... For almost a decade, the AKP that lacked expertise in the field of education had allowed the Gülen community to entrench itself and dominate the field. This partly explains the ferocity and scope of the reprisals after the alliance broke up in stages from 2013 onwards, culminating in an all out purge after the failed military coup of 15 July 2016.”⁷⁷

In Hungary, in 2019 the government created a unique type of trust, called ‘public interest asset management foundation performing public duty.’⁷⁸ Initially introduced as a measure to encourage private investment in culture and education, in practice this vehicle has been used to transfer public assets to universities at parliament's discretion (and without any clear guidance on what makes institutions qualify for such generosity). In 2020 Mathias Corvinus Collegium, dedicated to elite education received an infusion of assets (including castles and a marina) that roughly equals Hungary's annual spending on higher education, according to journalists' assessment.⁷⁹ As an important collateral effect of this mechanism, the board of trustees of the foundation is superimposed on the elected Senate of the institutions. While some university senates welcomed this transformation, the students of the University of Theater and Film Arts staged a lasting protest.⁸⁰ In late 2020 the Fundamental Law was amended to constitutionalise the discretionary powers of parliament to create such ‘public interest asset management foundations’ (new Article 38(6)).

Aspirations for international recognition mirror influence operations of authoritarian regimes in the fields of education, medicine, culture and technology. While Human Rights Watch raised concerns about the impact of Confucius Institutes on academic freedom in Western academia,⁸¹ Poland's National Science Centre funds numerous research projects that are undertaken by researchers based at foreign universities.⁸² Due to strategic cooperation between the Hungarian and Chinese governments, in 2016 Chinese students are the third largest cohort among foreigners studying in Hungary.⁸³ Thus, despite these government's general aversion towards foreign influence and attempts

⁷³ <https://www.chemistryworld.com/news/hungarian-government-withholds-funding-from-academy-of-sciences-prompting-protests/3010161.article>.

⁷⁴ <https://mta.hu/english/our-future-lies-in-research-a-brand-new-research-building-several-launching-projects-and-ongoing-strategic-programmes-at-the-academy-107367>.

⁷⁵ <https://www.universityworldnews.com/post.php?story=20130220151416428>.

⁷⁶ <https://hypeandhyper.com/en/the-new-mome-campus/>.

⁷⁷ Deniz Kandiyoti & Zühre Emanet, “Education as Battleground: The Capture of Minds in Turkey,” *Globalizations*, 14:6, 869-876 (2017).

⁷⁸ Act no. XIII of 2019

⁷⁹ Act no. CVI of 2020. Also <https://telex.hu/belfold/2021/01/15/nagyon-szinvonalas-megis-kez-d-kinos-lenni-hogy-oda-tartoztam-a-kormanykozeli-elitkepzo-belulrol>.

⁸⁰ <https://www.reuters.com/article/uk-hungary-politics-education-theatre/hungary-arts-university-protesters-defy-order-to-end-blockade-idUKKBN2711QN?edition=redirect=uk>

⁸¹ <https://www.hrw.org/news/2019/03/21/china-government-threats-academic-freedom-abroad>.

⁸² <https://ncn.gov.pl/wspolpraca-zagraniczna/wspolpraca-wielostronna?language=en>.

⁸³ Li Xueyan, “Chinese Students Choosing Hungarian Tertiary Education: A Systematic Review,” *East Asia* 37: 317-330 (2020).

to strengthen national sovereignty, they covet international recognition to boost the legitimacy of illiberal leadership, as well as the networking (and influence) potential such cooperation fosters.

The meeting of minds is further hastened in illiberal democracies by the strategic smudging of boundaries between academia, government-funded think tanks and GONGOs. Building and supporting a lively network of knowledge-production (or at least echo chamber), assists with elite replacement,⁸⁴ enables easy career transitions across institutions as well as the amplification of messages across different media and constituencies as and when desired by the government. Thus, while illiberal governments are shrinking the civic and academic space of critical inquiry and dissent (features that make holding government accountable), they are also expanding the space of affirmation and acclamation (features that contribute to the resilience of illiberal rule).

Once it is understood that illiberal leaders are not simply reforming higher education, but are actively cultivating an illiberal *Zeitgeist*, the prosecution of dissenting academics makes better sense. At first, this appears to run counter to the description of illiberal lawfare as a calculated and strategic affair. When they target academics through the arbitrary deployment of formal legal rules, illiberal governments expect to be found in violation of the European Convention. They are also aware that such a finding will happen several years down the line, while the air of prosecution — and prosecutability — lingers on, slowly building up the atmosphere of illiberal democracy.

Individual coping strategies with illiberal practices differ: some resist, others choose exile, again others attempt creative compliance through magic synonyms, sarcasm, utopia or resorting to self-censorship. The chilling effect of illiberal institutional reforms in academia is not dead pan silence. Illiberal reforms succeed when academic knowledge production continues -- without criticising the government. Illiberal governments can and do rely on the intellectual output of their universities and research institutes for policy making and social engineering. What they do not tolerate is critical inquiry that seeks to hold them accountable.

Despite their detrimental impact on academic freedom, illiberal practices of the kind discussed here are surprisingly hard to challenge on human rights grounds. Taking advantage of the conceptual haze surrounding academic freedom as a human right, defenders of illiberal measures can easily emphasise those features of academic life that serve them well purposes, such as professionalised teaching that reinforces the (illiberal) status quo. Cutting edge research on canine cognition and learning ticks all these boxes,⁸⁵ without attempting to hold the government accountable. The chilling effect of such reforms is particularly hard to capture: victim status is conferred on applicants who suffered persecution (like prosecution or dismissal), not on those who decide to choose a different research topic under the weight of the illiberal *Zeitgeist*.

While defending illiberal practices in higher education, their architects actively work on fading those core elements of academic freedom that make it into a rebel right, worthy of protection as a human right. To illustrate how real this danger is, the next part reviews developments in European human rights jurisprudence.

IV. Academic freedom in European human rights jurisprudence

IV.1. The ECtHR: Under and beyond Article 10

In the jurisprudence of the ECtHR violations of academic freedom are constructed in terms of individual human rights, mostly on account of violations of freedom of expression (Article 10), encompassing freedom of teaching and research.⁸⁶ This is a rather limited protection, that applies to *individual academics* (not institutions), when they make a *contribution on matters of public interest*,

⁸⁴ Stanley Bill, "Counter-elite Populism and Civil Society in Poland: PiS's Strategies of Elite Replacement," *East European Politics and Societies: and Cultures* (2020), <https://journals.sagepub.com/doi/full/10.1177/0888325420950800>

⁸⁵ <https://familydogproject.elte.hu/>

⁸⁶ For an overview see Julia Laffranque, "A Look at the European Court of Human Rights Case Law on Moral Issues and Academic Freedom," *Juridica International* 26/2017, 34, <https://doi.org/10.12697/JI.2017.26.04>. Recently see e.g. *Mustafa Erdogan v. Turkey*, 27 May 2014; *Sorguc v. Turkey*, 23 June 2009; *Sapan v. Turkey*, 8 June 2010; *Lombardi Vallauri v. Italy*, 20 October 2009.

drawing on their own research or on a question of academic life that is of interest to the general public. This section shows that while Article 10 provides considerable protection for the public expression of dissent by academics, those aspects of academic freedom where scholars are at variance with the universities that employ them are easily left outside the Convention's blanket of protection.

As the ECtHR put it in *Mustafa Erdogan v. Turkey* in 2014, academic freedom “is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof.”⁸⁷ In the same case the joint concurring opinion of Judges Sajó, Vucinic and Kuris emphasised that

“[t]here is no Chinese wall between science and a democratic society. On the contrary, there can be no democratic society without free science and free scholars. This interrelationship is particularly strong in the context of social sciences and law, where scholarly discourse informs public discourse on public matters including those directly related to government and politics.”⁸⁸

The ECtHR has been rather cautious in developing this line of jurisprudence in small steps, without having to test the boundaries of Article 10. In *Sorguc v. Turkey*, the first case where it mentioned academic freedom as such, it found in favour of a professor —sued for defamation by another professor — for comments made in a talk at an academic conference about the weakness of academic promotion procedures in his field, without naming any names. Along the way it highlighted the “the importance of academic freedom, which comprises the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction,”⁸⁹ and noted that national courts should have taken into account the “general interest in promoting [academic] freedom where issues of public interest are concerned”⁹⁰ when deciding the defamation case. In its reasoning the Court relied on the 2006 PACE Recommendation for the protection of academic freedom of expression.

This was not the first time when the ECtHR defended the freedom of expression of professors who made contributions to the public discourse on controversial issues.⁹¹ Yet, it was the first time when — due to the university setting — it mentioned academic freedom expressly. It soon reiterated the protection of academic freedom under Article 10 in *Sapan v. Turkey*, a case involving the seizure of a book based on the applicants doctoral dissertation, accepting that the phenomenon of stardom in the Turkish musical scene could be the subject of genuine academic study, without sensationalist elements.⁹²

Initially the primary concern of the Court was to ensure that Article 10 was applicable in the university setting. In *Aksu v. Turkey*, a case challenging depictions of the Roma community in government-funded books, the Grand Chamber emphasised that it was “consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings.”⁹³ When a plagiarism debate reached the newspapers in *Hasan Yazidi v. Turkey* — and turned into a defamation suit — the ECtHR emphasised that the issue of plagiarism and the institutional safeguards Turkish academia had in place to respond it were matters in the public interest, falling under Article 10 scrutiny.⁹⁴

The expansion of the scope of Article 10 to cover access to information served the research dimension of academic freedom well. In *Kenedi v. Hungary* the Court recognised (without mentioning academic freedom as such) that “access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression.”⁹⁵ More recently, in a case concerning the revocation of the research permit of a journalist in the archives of the former Romanian secret police the ECtHR remarked that the applicant did not conduct academic research in the archives, instead, he used his access to divulge private and personal details of athletes to the general public in an indiscriminate manner.⁹⁶

⁸⁷ *Mustafa Erdogan v. Turkey*, 27 May 2014, § 40.

⁸⁸ *Mustafa Erdogan v. Turkey*, 27 May 2014, joint concurring opinion Judges Sajó, Vucinic and Kuris §§ 4, 6.

⁸⁹ *Sorguc v Turkey*, Application no. 17089/03, Judgment of 23 June 2009, § 35.

⁹⁰ *Sorguc v Turkey*, Application no. 17089/03, Judgment of 23 June 2009, § 36.

⁹¹ E.g. *Başkaya and Okçuoğlu v. Turkey* [GC], Applications no. 23536/94 24408/94, Judgement of 8 July 1999 (in addition to this criminal conviction Baskaya was dismissed from his academic position).

⁹² *Sapan v. Turkey*, Application no. 44102/04, Judgement of 8 June 2010, § 37.

⁹³ *Aksu v. Turkey* [GC], Applications no. 4149/04, 41029/04, Judgment of 15 March 2012, § 71.

⁹⁴ *Hasan Yazici v Turkey*, Application no. 40877/07, Judgment of 15 April 2014, § 58.

⁹⁵ *Kenedi v. Hungary*, Application no. 31475/05, Judgment of 26 May 2009, § 43.

⁹⁶ *Gafiuc v. Romania*, Application no. 59174/13, Judgment of 13 October 2020, § 86.

Academics' access to information was also at stake in a case where Turkey imposed a blanket ban on Youtube. In the case (without elaborating on academic freedom) the ECtHR found that law professors who used Youtube for teaching and also to disseminate their own research met the requirements for victim status to challenge the general ban under Article 10.⁹⁷ This finding was in line with an earlier judgment of the Court where it found a violation of freedom of expression when the personal google site of an academic got blocked as a collateral effect of a general ban on google sites, ordered as a preventive measure in an unrelated criminal case.⁹⁸

The ECtHR afforded protection (without dwelling on academic freedom) to several high-profile Turkish academics who faced criminal charges and lasting intimidation for public statements,⁹⁹ or were placed in preventive pre-trial detention in the immediate aftermath of the coup¹⁰⁰. But it is yet to decide on the applications of Turkish professor who were dismissed en masse after the 2016 coup: as the Court expects them to exhaust effective domestic remedies that were put in place after the coup (such as the State of Emergency Inquiry Commission).¹⁰¹ The case that has been communicated in 2018 concerns applicants whose passports were withdrawn — and are thus barred from international travel indefinitely —, as a violation of Article 8.¹⁰² In this respect it is worth noting that in *Cox v. Turkey* the ECtHR found (without making express reference to academic freedom) that a ban preventing the applicant, a lecturer at the Middle East Technical University, from re-entering Turkey due to opinions she expressed before to students and colleagues violated her freedom of expression under Article 10, adding that “the ban on the applicant’s re-entry into Turkey was designed to repress the exercise of her freedom of expression and stifle the spreading of ideas.”¹⁰³

That the ECtHR finds the institutional environment of academic freedom perplexing is not evident at first. In *Lombardi Vallauri v. Italy* it found a violation of the procedural safeguards inherent in Article 10 in the case of a professor whose employment contract was not renewed by the Catholic University of Milan — where he had taught for 20 years — due to his public statements that the university disapproved of.¹⁰⁴ In *Kula v. Turkey*, the applicant was reprimanded because he did not receive the permission of his supervisors to appear in a television program outside the city of his residence. The ECtHR found that the refusal interfered with the applicant’s “academic freedom of expression and action,”¹⁰⁵ and that the disciplinary sanction (although mild) “was liable to have an impact on the exercise of his freedom of expression and even to have a chilling effect in that regard.”¹⁰⁶ At the same time, in *Gillberg v. Sweden* the Grand Chamber did not offer protection to a professor to keep the sources of survey research confidential when his university compelled the disclosure of those sources in order to comply with a court order. The Grand Chamber said that “finding that the applicant had such a right under Article 10 of the Convention would run counter to the property rights of the University of Gothenburg.”¹⁰⁷

One consideration that made the justices uneasy in a seemingly straightforward case is the proposition that academic personnel as professionals owe a duty of loyalty, reserve, and discretion to their employer (just as civil servants).¹⁰⁸ In *Kharlamov v. Russia* — a case with a fact pattern rather similar to *Sorguc* — the applicant was sued for defamation by his own university after he made critical comments about the elections for the university senate at a university forum.¹⁰⁹ Ultimately, following its earlier approach in *Mustafa Erdogan*, the ECtHR found in favour of the applicant, protecting this

⁹⁷ *Cengiz and others v. Turkey*, Application no.s. 48226/10 and 14027/11, Judgment of 1 December 2015, §§ 49-53.

⁹⁸ *Ahmet Yildirim v. Turkey*, Application no. 3111/10, Judgment of 18 December 2012.

⁹⁹ *Altug Taner Akcam v. Turkey*, Application no. 27520/07, Judgment of 25 October 2011; *Kaboglu and Oran v. Turkey*, Applications no. 1759/08, 50766/10 and 50782/10, Judgment of 30 October 2018; *Kaboglu and Oran v. Turkey (no. 2)*, Application no. 36944/07, Judgment of 20 October 2020.

¹⁰⁰ *Mehmet Hasan Altan v. Turkey*, Application no. 13237/17, Judgment of 20 March 2018

¹⁰¹ *Köksal v. Turkey*, Application no. 70478/16, Decision of 6 June 2017 (inadmissible).

See Emre Turkut, “The Köksal Case before the Strasbourg Court: A Pattern of Violations or a Mere Aberration?,” August 2, 2017, <https://strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/#more-3868>.

Also *Zinhi v. Turkey*, Application no. 59061/16, Decision of 8 December 2016 (inadmissible) (secondary school teacher dismissed among 50,875 civil servants by legislative decree).

¹⁰² *Telek v. Turkey*, Application no. Application no. 66763/17, Communicated on 26 September 2018.

¹⁰³ *Cox v. Turkey*, Application no. 2933/03, Judgment of 20 May 2010, § 44.

¹⁰⁴ *Lombardi Vallauri v. Italy*, Application no. 39128/05, Judgment of 20 October 2009

¹⁰⁵ *Kula v. Turkey*, Application no. 20233/06, Judgment of 19 June 2018, § 38.

¹⁰⁶ *Kula v. Turkey*, Application no. 20233/06, Judgment of 19 June 2018, § 39.

¹⁰⁷ *Gilberg v. Sweden*, Application no. 41723/06, Judgment of 3 April 2012, § 93.

¹⁰⁸ *Kharlamov v. Russia*, Application no. 27447/07, Judgment of 8 October 2015, § 27.

¹⁰⁹ *Kharlamov v. Russia*, Application no. 27447/07, Judgment of 8 October 2015.

freedom of expression as raised a matter of general public interest. Judicial balancing between freedom of expression and professional loyalty tipped in favour of the applicant because the “principle of open discussion of issues of professional interest must thus be construed as an element of a broader concept of academic autonomy which encompasses the academics’ freedom to express their opinion about the institution or system in which they work.”¹¹⁰ The careful balancing exercise suggests, however, that too strong of an emphasis on academic freedom being a professional freedom is likely to impose serious limitations on it — due to professional duties which the Court may find inherent in the right.

The highly regulated nature of higher education makes the Court particularly careful, and deferential to national authorities. In early 2020 the Court found inadmissible an application by the first Turkish private university (Bilkent University) as it could not meet the qualities of being a non-governmental organisation for the purposes of admissibility (Article 34).¹¹¹ The ECtHR emphasised that as a private university, it was established by Parliament, its internal organization was determined by legislation, it performed a public service, and was left with limited academic and financial autonomy subject to government supervision.¹¹² In doing so, the Court confirmed its stance expressed in a 2004 admissibility decision concerning a Bulgarian private university that was also created by discretionary decision of Parliament.¹¹³

Without a comprehensive account of academic freedom as an individual right that also encompasses its institutional dimension, the protection afforded by the ECtHR runs out very quickly, when academics are at variance with the university that employs them. In 2018, in *Antović and Mirković v. Montenegro* university lecturers challenged the surveillance of lecture halls that was put in place by the dean in violation of the national higher education law, for the purpose of surveillance of teaching (and not to ensure the safety of people or property or the protection of confidential data). The majority of the Chamber was willing to accept the complaint under Article 8 as an invasion of private life,¹¹⁴ to find that the measure exceeded the purposes outlined under national data protection rules, and as such, was not prescribed by law.

The separate opinions filed in the case display a fundamental disagreement between the judges. Judges Vucinic and Lemmens accepted in their concurring opinion that the application of Article 8 is somewhat of a stretch, and they are willing to stretch Article 8 this far due to the very unique nature of the physical context of the case: the university setting: “It seems to us that at least in an academic environment, where both the teaching and the learning activities are covered by academic freedom, the said expectation of privacy can be considered a “reasonable” one. Surveillance as a measure of control by the dean is, in our opinion, not something a teacher should normally expect.” In contrast, the three dissenting judges led by the section president, Judge Spano, had no sympathy for the ‘expectation of privacy argument’ in a university setting, as the applicants “fully engaged in a professional activity in a quasi-public setting” (emphasis added, § 12). This debate speaks to academic freedom as much as to colliding judicial visions concerning the role of the court in expanding the provisions of the Convention beyond the black letter words.

IV.2. The CJEU to the rescue

In October 2020 the CJEU handed down a much-awaited judgment concerning amendments to the 2017 Hungarian higher education law¹¹⁵.

The amendment set additional conditions for the operation of foreign-accredited private universities in the country: it required foreign accredited universities to have a campus in their accrediting country and also required that the government of the foreign accrediting state and its Hungarian counterpart sign an international agreement regarding the operation of the foreign university in Hungary. From statements of senior Hungarian politicians the amendment was commonly understood from the outside that the amendment targeted Central European University (CEU), and it was widely criticised locally and internationally as an attack on academic freedom.¹¹⁶ Yet, it was clear

¹¹⁰ *Kharlamov v. Russia*, Application no. 27447/07, Judgment of 8 October 2015, § 27

¹¹¹ *İhsan Dođramacı Bilkent Üniversitesi v. Turkey*, Application no. 40355/14, Decision of 28 January 2020.

¹¹² *İhsan Dođramacı Bilkent Üniversitesi v. Turkey*, Application no. 40355/14, Decision of 28 January 2020, §§ 41-45.

¹¹³ *Slavic University in Bulgaria and Others v. Bulgaria* ((dec.), No.60781 / 00, Decision of 18 November 2004 (inadmissible).

¹¹⁴ *Antović and Mirković v. Montenegro*, Application no. 70838/13, Judgment of 28 November 2017, § 44.

¹¹⁵ C-66/18, *Commission v. Hungary*, Judgment of 6 October 2020.

¹¹⁶ https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_966

from the outset that as a technical legal matter it will be difficult to object against the amendment in defence of academic freedom.

The first set of legal opinions were published by the Venice Commission in 2017.¹¹⁷ Oscillating between references to freedom of education, freedom of expression and academic freedom, ultimately the Venice Commission warned about violations of the principle of the rule of law (such as lack of participation of relevant stakeholders in the lawmaking process (55) , proportionality and foreseeability issues), ultimately noting that the main problem is that the new requirements apply to universities that have lawfully long operated in the country for many years (63). At the same time the Venice Commission noted that if the same regulatory framework were applied to new institutions, it would not “contradict applicable international standards and norms ” (63). This strongly suggests that the current state of international and European human rights law offers limited protection against illiberal institutional reforms.

In October 2020 the CJEU — in an infringement action brought by the Commission — found that the amendment violates WTO law, imposes unacceptable restrictions on freedom of establishment (Article 49 TFEU) and the free movement of services (Article 16 of Directive 2006/123/EC) and as such violates rights under the EU’s Charter of Fundamental Rights, among them academic freedom (Article 13) and the freedom to found such institutions (Articles 14(3) and 16). In reaching its conclusion on the violation of Charter rights, the CJEU drew on the jurisprudence of the ECtHR, as well as the PACE and CoM recommendations, discussed earlier. The reasoning of the CJEU is remarkable in two respects: (i) the extent to which the Court tested the rationales offered by the government from introducing these new conditions and (ii) the analysis of the impact of these conditions on academic freedom and the freedom to establish institutions to higher education (including the risks these rules posed for subjects that were meant to comply with them). In both respects the CJEU followed the lead of Advocate General Kokott’s opinion. Due to the multiple grounds of legal inquiry, several key arguments were considered in detail before the CJEU had reached the Charter inquiry, and were only summarised under the Charter.

The Hungarian government justified the requirement of an international treaty and a campus in the accrediting country as necessary for the purposes of maintaining public order and preventing deceptive practices, and as a guarantee of the reliability of the university, to ensure that its likely to comply with legal rules (122, 144). Instead the CJEU found that all the requirement does is enable “Hungary arbitrarily to prevent an institution from entering its market or from carrying on its activities in that market, since the conclusion of such a treaty and, therefore, the fulfilment of that requirement ultimately depend solely on the political will of that Member State” (136, see also 120). The CJEU also found no evidence that having a foreign campus would prevent a university from engaging in deceptive practices (55).

The CJEU agreed with AG Kokott to construe academic freedom broadly (226), with a view to its inherent elements, including the institutional dimensions of university autonomy (227). It was in this spirit that the CJEU found:

228: the measures at issue are *capable of endangering* the academic activity of the foreign higher education institutions concerned within the territory of Hungary and, therefore, of depriving the universities concerned of the autonomous organisational structure that is necessary for conducting their academic research and for carrying out their educational activities. Consequently, those measures are such as to limit the academic freedom protected in Article 13 of the Charter. In particular, it found that “the measures at issue are, depending on the circumstances, such as to *render uncertain or to exclude the very possibility* of founding a higher education institution, or of continuing to operate an existing higher education institution, in Hungary” (233).

This concern for the deterrent or chilling effect of the regulations has been raised by AG Kokott, when she found that “[t]he legal rule regarding the conclusion of an international treaty ... *does not limit that freedom directly*. It is nevertheless *likely to deprive academics* working at the universities concerned of the infrastructure needed to exercise academic freedom” (144).

What is remarkable about the approach recommended by AG Kokott and followed by the CJEU is the tight connection between the institutional and the individual aspect of academic freedom. In particular, their analysis rejected conditions that the fulfilment of which depended on the open political

¹¹⁷ Preliminary opinion (August 11, 2017): [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2017)005-e).

Final opinion (October 9, 2017): [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)022-e)

discretion of the government and emphasised the impact of institutional rules on those legal subjects that actually try to respect these rules. The approach of the CJEU is based on Article 13 of the EU Charter of Fundamental Rights, but is not tied to its specific terms. The CJEU made it very clear when it drew on numerous external sources, including the case law of the ECtHR and recommendations by various CoE bodies.

The judgment of the CJEU does not mention that although the Hungarian government entered into negotiations with the state of New York, an agreement regarding CEU has never been concluded. The government, as it often says, did conclude similar agreements regarding other foreign private universities, to demonstrate that the condition is not impossible to meet. The CJEU also did not consider that by the time it handed down its judgment, CEU moved its teaching campus to Austria. When in the fall of 2018 Rector Ignatieff announced the university's intention to move, various voices of the inner circle of the government took to the press to say that the government has not done a thing to push CEU out, there are no investigation targeting the University, nor is the government intending to enforce the new legal rules against CEU. In practical human rights terms this means that CEU cannot challenge the Hungarian governments actions or inactions that ultimately made it move away from Hungary. This is the perfect deployment of chilling effect — the target left the jurisdiction without a trace.

V. Way towards protecting academic freedom as a human right

The recent judgment of the CJEU, together with General Comment no. 25 and the 2020 report of the UN special rapporteur signal promising ways to strengthen the protection of academic freedom as a human right. Delivering on this promise is all the more important in the light of the existential challenge posed to academic freedom by illiberal practices.

To start, human rights practice should take the time to spell out the core characteristics of academic freedom as one of the rebel rights and convert them into conceptual foundations, with practical consequences. Fundamental characteristics of this kind are routinely built into human rights jurisprudence. Consider the foundational judgment of the ECtHR on freedom of expression, *Handyside v. the United Kingdom*, saying that

“[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. ... [I]t is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.”¹¹⁸

This is not to suggest that the protection of freedom of expression takes care of academic freedom (it does not), but to emphasise the significance of defining the conceptual framework and normative underpinnings of any fundamental right has for its protection.

In particular, the protection of academic freedom as a human right has to acknowledge the contribution of critical inquiry in research, teaching and public expressions of ideas to the operation of constitutional democracy, especially for holding government accountable. The ECtHR has already included academic researchers among the ‘watchdogs’ that deserve a high level of protection under Article 10.¹¹⁹ Such watchdogs (as the press and civil society) contribute to the discussion of public affairs, and — equally importantly — scrutinise the state in public affairs:¹²⁰

“in a democratic society, public authorities and their representatives expose themselves in principle to the permanent scrutiny of citizens and that everyone must be able to draw public attention to situations that they consider unlawful provided that they do so in good faith.”¹²¹

¹¹⁸ *Handyside v. the United Kingdom*, § 49.

¹¹⁹ *Magyar Helsinki Bizottság v Hungary* [GC], § 168.

¹²⁰ *Magyar Helsinki Bizottság v Hungary* [GC], § 167.

¹²¹ *Kita v. Poland*, Application no. 57659/00, Judgment of 8 July 2008, § 43. *Before Vides Aizsardzības Klubs v. Latvia*, Application no. 57829/00, Judgment of 27 April 2007, § 46 and *Kwiecień v. Poland*, Application no. 51744/99, Judgment of 9 January 2007, § 54.

Thus, although the elements are in place, the protection of academic freedom as a form of critical inquiry that contributes to constitutional accountability in a democratic society, would still need to be made explicit in similarly lucid terms.

Being mindful of the features of illiberal practices in the academic sphere, human rights practitioners and courts should be sensitive to legal rules that interfere with, thwart or discourage critical inquiry as well as the capacity (willingness) of academics to contribute to those strains of the public discourse that seek to hold the government accountable. Academic freedom as a rebel right has more to it than writing policy papers and recommendations for state actors; critical inquiry as at the heart of academic freedom and that means being able to criticise the government of the day, without fear of retribution falling on the individual or the institution that employs her.

The first major practical application of this understanding of academic freedom is in retuning the positive obligations — thus, the institutional dimension — of academic freedom accordingly. The UN Special Rapporteur’s 2020 report reminded that states are meant to create ‘a general enabling environment for academic freedom.’¹²² The enabling features of positive obligations have to be elaborated with a careful inquiry into whether they assist academic freedom as critical inquiry. As each step such conceptual work has to keep in mind that — as the UN Special Rapporteur rushed to point out — state interference with institutional protection restricts academic freedom: it “undermine[s] the ability of the institution to protect the academic freedom of its community members and to serve its broader functions in society.”¹²³

The interconnection of the individual and institutional dimensions of academic freedom means that state interference on the institutional side impacts (and has the potential to impair) individual freedom. Although this connection appears obvious (considering how the individual and institutional dimensions of academic freedom are intertwined), in practice such an approach is not that trivial to operationalise: after all, the subject of institutional regulations is not the individual, but her employer, and the individual’s academic freedom is restricted as a consequence of the regulation applicable to her employer.

In its recent judgment the CJEU has demonstrated the significance of closely scrutinising the stated aims of particular regulatory choices and the actual means (mechanism) chosen to implement those aims. As a brief review of illiberal practices demonstrated in Part III, illiberal educational reforms are often justified in terms that sound familiar in constitutional democracies, especially in times of austerity. The same goes for administrative practices (e.g. fire-safety inspections). It falls on human rights practitioners to point out if particular measures aim to silence critical or undesired voices in academia. The use of open political discretion to grant or withdraw entitlements (legal status, privileges, funding) is a clear sign of the arbitrary exercise of powers that violates individual freedom.

The CJEU made this clear in its judgment on the Hungarian education law. The ECtHR followed a similar logic in its 2014 judgment on the Hungarian law that made access to church status subject to a discretionary decision of parliament. The supervisory role of the ECtHR “does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient.”¹²⁴ In the case the ECtHR found that as a result Parliament’s discretionary powers

“the granting or refusal of Church recognition may be related to political events or situations. Such a scheme inherently entails a disregard for neutrality and a risk of arbitrariness. A situation in

¹²² <https://www.undocs.org/A/75/261>, para. 9.

¹²³ <https://www.undocs.org/A/75/261>, para. 11.

¹²⁴ *Magyar Keresztény Mennonita Egyház and others v. Hungary*, Applications no. 70945/11 23611/12 26998/12, Judgment of 8 April 2014, § 80.

which religious communities are reduced to courting political parties for their votes is irreconcilable with the requirement of State neutrality in this field.”¹²⁵

Access to institutional preconditions enabling the exercise of academic freedom cannot depend on courting political favours either. Nor can academic freedom be restricted by the collateral effect of restrictions imposed on others, as this amounts to the arbitrary restriction of academic freedom (devoid of judicial scrutiny), as pointed out by the ECtHR in *Ahmet Yildirim v. Turkey*.¹²⁶

The ECtHR has already acknowledged in several cases that limitations on the broader technical environment impair the sharing of ideas in the public discourse.¹²⁷ In the field of academic freedom human rights analysis should be more closely tuned to the chilling effect of regulations affecting or altering the institutional environment of academic freedom. The ECtHR has an extensive and elaborate jurisprudence on the chilling effect of criminal sanctions and other measures in the context of freedom of expression.¹²⁸ Vaguely formulated legal rules that leave wide discretion to national authorities are regularly recognised to have a chilling effect on freedom of expression.¹²⁹ In cases involving sanctions on expressions by academics the ECtHR has also considered the impact of intimidation, acknowledging that one applicant decided to “modify his conduct by displaying self-restraint in his academic work in order not to risk prosecution.”¹³⁰ In another case the Court found that an intimidation campaign was launched against the applicants “geared to repressing their intellectual personality, inspiring in them feelings of fear, anguish and vulnerability capable of humiliating and debasing them and of breaking their will to defend their ideas,”¹³¹ seeking to push them into self-censorship.¹³² Persistent anti-elitist propaganda campaigns against liberal indoctrination can have a similar effect, even the messages of disapproval do not name or target a particular individual. Public demonization and stigmatization have been shown to shrink civic space. Academic freedom is not immune to similar villainisation and smear campaigns.

The case law clearly covers different genres of professional expression and the diverse ways in which the threat of negative consequences prompts individuals into altering their conduct to avoid sanctioning. The focus at the moment is on criminal sanctions, or the threat of prosecution, although there are indications that the ECtHR is willing to consider the disabling impact of the institutional context on the exercise of a human right, such as the chilling effect of even mild disciplinary sanctions¹³³ or the ban to re-enter the country where a lecturer is employed.¹³⁴ The recent judgement of the CJEU certainly expanded the realm of possibilities any judicial inquiry on the chilling effect of institutional regulations of academic freedom has to take into account. As a rule of thumb, it is helpful to consider -- along the lines of the reasoning of AG Kokott — whether a particular legal rule applicable to the institutional setting of academic freedom is “likely to deprive academics working at the universities concerned of the infrastructure needed to exercise academic freedom,” even when it does not impose a direct restriction (144).

One practical challenge that any court faces that is willing provide protection from the chilling effect of legal restrictions is the technical requirement of standing (victim status). This was not an issue before the CJEU as the case was brought by the Commission in an infringement action, and as such, it did not require a concrete victim. For other courts and fora, however, victim status is an important prerequisite of making a claim. In cases involving freedom of expression the ECtHR has “found that certain

¹²⁵ *Magyar Keresztény Mennonita Egyház and others v. Hungary*, Applications no. 70945/11 23611/12 26998/12, Judgment of 8 April 2014, § 102.

¹²⁶ *Ahmet Yildirim v. Turkey*, Application no. 3111/10, Judgment of 18 December 2012, §§ 64-68.

¹²⁷ *Ahmet Yildirim v. Turkey*, Application no. 3111/10, Judgment of 18 December 2012, § 54; *Cengiz and others v. Turkey*, Application no.s. 48226/10 and 14027/11, Judgment of 1 December 2015.

¹²⁸ *Dilipak v. Turkey*, Application no. 29680/05, Judgment of 15 September 2015, §§ 44-50.

¹²⁹ *Vajnai v. Hungary*, Application no. 33629/06, Judgment of 8 July 2008, § 54; *Altug Taner Akcam v. Turkey*, Application no. 27520/07, Judgment of 25 October 2011, §§ 70-75.

¹³⁰ *Altug Taner Akcam v. Turkey*, Application no. 27520/07, Judgment of 25 October 2011, § 75.

¹³¹ *Kaboglu and Oran v. Turkey*, Applications no. 1759/08, 50766/10 and 50782/10, Judgment of 30 October 2018, § 87.

¹³² *Kaboglu and Oran v. Turkey (no. 2)*, Application no. 36944/07, Judgment of 20 October 2020, § 109.

¹³³ *Kula v. Turkey*, Application no. 20233/06, Judgment of 19 June 2018, § 39.

¹³⁴ *Cox v. Turkey*, Application no. 2933/03, Judgment of 20 May 2010, § 44.

circumstances which have a chilling effect on freedom of expression do in fact confer on those concerned – persons who have not been finally convicted.”¹³⁵

Relaxing the criteria of victim status certain does not sound appealing at a time when supranational human rights courts are attacked for their alleged overreaches. At the same time, without the careful consideration of criteria of victim status human rights practice will miss the moment when an intervention could protect the meaningful enjoyment of academic freedom as individual liberal. Architects and practitioners of illiberal education reforms are well aware of this dilemma, and active contribute to fueling it. At the same time, consider here that although there is no human right to receive research funding through a particular research scheme, even multiple rejections of projects in gender studies will not expose the illiberal chicanery behind the biased distribution of research funding.

In short, the longer courts and human rights bodies shy away from engaging with the chilling effect of illiberal practices, the longer they allow the illiberal transformation of academic freedom and the transformation of universities from sites of critical inquiry into sites of acclamation roll forward under their watch.

Conclusion

In the second decade of the 21st century academic life in Europe is marked by austerity-inspired funding cuts that have been kept in place for a decade in several states.¹³⁶ These are then accompanied by regulations that make universities part of the machinery of immigration control¹³⁷ and anti-terrorism measures.¹³⁸ Recent European scholarship — reflecting on the experiences of the Bologna process and the impact of austerity measures following the 2008 financial crisis — predominantly centres of university autonomy, and the permissible role of the state as funder and regulator. In the US lively debates erupted in the aftermath of the 9/11 terror attacks,¹³⁹ followed by a conservative challenge questioning the privileges of the liberal intellectual elite and a progressive challenge contesting the status quo.¹⁴⁰ Before the rise of populism and illiberal practices made constitutional democracy backslide on a global scale, the challenge illiberal democracy presented to academic freedom was perceived as a marginal affair, mostly on account of well-respected universities opening satellite campuses in the Gulf Region or East Asia.¹⁴¹ By 2020 illiberal practices have come to present an existential challenge to academic freedom.

This paper reviewed the definitional challenges posed by academic freedom as a human right, and outlined its core as a rebel right, to assist with building a workable set of safeguards in its defense (Parts I and II). It also provided an overview of illiberal practices that restrict academic freedom and seek to transform it from a human right that protects critical inquiry into a tool of acclamation that furthers the illiberal *Zeitgeist* — the very antithesis of being a rebel right (Part III). A careful analysis of European human rights jurisprudence (Part IV) was used to map the existing and available resources to build robust safeguards for academic freedom as a human right (Part V) in the face of the illiberal challenge. In particular, the analysis focused on sharpening human rights critique on the institutional environment of academic freedom and advocated for recognising the chilling effect of institutional regulations on individual freedoms.

In doing so the analysis treated the illiberal challenge as a crisis, to quote Hannah Arendt, as it

¹³⁵ *Dilipak v. Turkey*, Application no. 29680/05, Judgment of 15 September 2015, quoted in the affirmative in *Kaboglu and Oran v. Turkey* no.2, § 105.

¹³⁶ <https://www.timeshighereducation.com/news/european-university-funding-stuck-austerity-mode>.

¹³⁷ <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/the-student-immigration-system-a-consultation.aspx>.
<https://www.theguardian.com/education/2018/jun/05/universities-immigration-risk-hostile-environments>

¹³⁸ Ian Cram - Helen Fenwick, “Protecting Free Speech and Academic Freedom in Universities,” MLR

825-873 (2018)

¹³⁹ For an eminent collection of essays see *Academic Freedom after September 11*, ed. Beshara Doumani (New York, 2006),

¹⁴⁰ Judith Butler, “Critique, Dissent, Disciplinarity,” *Critical Inquiry* 35: 773 (2009).

¹⁴¹ Natalie Koch, “We Entrepreneurial Academics: Governing Higher Education in ‘Illiberal’ States,” *Territory, Politics, Governance* 4: 438-452 (2015).

"forces us back to the questions themselves and requires from us either new or old answers, but in any case direct judgments. A crisis becomes a disaster only when we respond to it with preformed judgments, that is, with prejudices. Such an attitude not only sharpens the crisis but makes us forfeit the experience of reality and the opportunity for reflection it provides."¹⁴²

¹⁴² Hannah Arendt, *The Crisis in Education*, in *Between Past and Future*, Penguin ed. 2006